1977 *Present:* **Pathirana, J., Malcolm Perera, J. and Wanasundera, J.**

MEDDEGAMA DHAMMANANDA THERO, 1st Defendant-Appellant and Another

and

DEKATANA SADDANANDA THERO, Plaintiff-Respondent

S.C. 136/70 (F)—D.C. Gampola, 11011/L

Buddhist Eccelesiatical Law—Action for declaration that plaintiff Viharadhipathi of Buddhist Temple—Nature of such action—Death of defendant—Does action abate—Scope and applicability of maxim "actio personalis moritur cum persona"—Civil Procedure Code, sections 392, 404—Buddhist Temporalities Ordinance (Cap. 318) section 20.

Plea of res judicata by defendant—Validity thereof—Decision of Maha Sangha Sabha—Irregularities in proceedings at inquiry—Violation of rules of natural justice—Can such decision be acted upon—Abandonment of right to be Viharadhipathi—Evidence given thereof by such priest—Plea of prescription—Imposter cannot acquire title to incumbency by prescription.

The plaintiff filed this action against the original 1st defendant (since deceased), the 2nd (also since deceased) and the 3rd defendants claiming to be the lawful Viharadhipathi of the Mahaloluwa Purana Vihare. He asked for a declaration that he was the rightful Viharadhipathi, for an order ejecting the defendants from the said Temple and for damages. The mode of succession applicable was the *sisyanu sisya paramparawa*. The 2nd defendant died during the trial in the District Court but it was agreed by Counsel appearing for the parties that no substitution was necessary as he had been sued as an agent of the 1st defendant and the action against him had abated on his death. The trial proceeded against the 1st and 3rd defendants only. After trial, judgment was entered in favour of the plaintiff as prayed for but without an order for damages. The 1st and 3rd defendants appealed.

During the pendency of the appeal the 1st defendant-appellant died and the record was returned to the District Court for substitution. Thereafter, the 3rd defendant filed petition and affidavit objecting to any substitution on the ground that the action by the plaintiff being a personal action to establish the right to an office abated on the death of the 1st defendant. Reliance was placed on section 392 of the Civil Procedure Code. At the inquiry into these objections no order for substitution was made and the record was returned to the Appellate Court at the request of both Counsel. It was submitted there by Counsel for the 3rd defendant-appellant relying on the Divisional Bench judgment of Dheerananda Thera v. Ratnasara Thera that the suit had abated on the death of the 1st defendant, inasmuch as the cause of action was purely personal.

It was submitted on behalf of the plaintiff-respondent that although the plaintiff had sued for a declaration to the office of Viharadhipathi the plaint showed that it was in substance an action both for the office of Viharadhipathi and the temple and its temporalities. The action could therefore continue after the death of the 1st defendant in view of the provisions of section 404 of the Civil Procedure Code as on the assumption that the 1st defendant was the Chief Incumbent of the temple, by operation of law there was a creation or devolution in favour of his successor in title. It was submitted further that there was a distinction between section 392 which referred to the necessity for identity of causes of action for an action to survive and section 404 which referred to the identity of interests which enable the causes of action to continue. Finally it was submitted that by reason of the refusal to substitute the successor of the deceased 1st defendant on whom the interests devolved, the appeal of the 1st defendant had abated.

Held: (1) That in an action for declaration of title to the office of Viharadhipathi of a temple, on the death of the plaintiff or the defendant (if he too claimed to be the Viharadipathi) the action can be continued by or against the successor-in-title under section 404. The maxim *actio personalis moritur cum persona* will not apply in such a case to abate the action. The action though in form an action for a status or an office is in substance an action for a temple and the temporalities which by operation of law belong to the Viharadipathi of the temple.

(2) That inasmuch as no substitution had been made in place of the deceased 1st defendant-appellant this appeal stood abated.

Per Pathirana J. : " I have next to consider the applicability of the maxim in relation our law particularly Chapter XXV of the Civil Procedure Code which relates to continuation of action after alteration of a party's status and examine to what extent the maxim is modified by statute. In considering this question I have also to keep in mind two other relevant maxims of equal importance in relation to litigation. The first is the maxim " interest reipublicae ut sit finis litium," viz. the general interests of the community in the termination of disputes and in the finality and conclusiveness of judicial decisions, and secondly, the maxim "Nemo debet bis vexari pro una et eadem causa ", viz. the right of an individual to protected from vexatious multiplication of suit.

In fact the aim and purpose of the Civil Procedure Laws of this country are primarily directed to the speedy and final determination of all actions and the avoidance of multiplication of action except in exceptional circumstances. It is not in dispute in this case that the Civil Procedure Code applies.

Chapter XXV which refers to continuation of actions and the sections in the Code relating to res judicata are the principle media by which this aim and purpose is sought to be achieved. Wherever possible every reasonable construction must be placed which would help the Court to continue the action rather than see the action abated or force a party on whom a deceased party's interests devolved to resort to fresh litigation with the attendant expense and delay such a process necessarily involves."

Dheerananda Thero v. Ratnasara Thero, 60 N.L.R. 7, distinguished.

Inasmuch as the 3rd defendant in this action had in his answer denied the plaintiff's title to the said temple the Appellate Court took the view that it was incumbent on the plaintiff to establish his title not only against the 1st defendant but also against the 3rd defendant. Submissions on behalf of the 3rd defendant-appellant were also therefore heard.

The 1st defendant-appellant had at the trial urged that the finding in an earlier action 3102/L operated as *res judicata* against the plaintiff in regard to his right to the incumbency of the temple. This was on the basis that one Vajiragnana Thero, the tutor of the plaintiff who the plaintiff claimed was the eldest pupil of Dhammarakkita Thero was a party to that action. It was common ground that Dhammarakkita Thero had been Viharadipathi of this temple until his death in 1933.

Held : (3) That the said decree did not operate as *res judicata* as Vajiragnana Thero was not a party to that action.

The question was also raised as to whether the 1st defendant-appellant or the said Vajiragnana Thero was the senior pupil of Dhammarakkita Thero. The learned District Judge had held that it was Vajiragnana Thero and that the 1st defendant was in fact the pupil of one Seelaratana Thero.

Held : (4) That on an examination of the evidence in this case the learned trial Judge was right in holding that the 1st defendant-appellant was not the pupil of Dhammarakkita Thero but was a pupil of Seelaratana Thero.

On the question of whether Vajiragnana Thero was the senior pupil of Dhammarakkita Thero as claimed by the plaintiff, the 1st defendant-appellant's position had been that Dhammarakkita Thero during his life time had dismissed Vajiragnana Thero from his pupilage. He also relied on a decision of the Maha Sangha Sabha made on 2.11.47 to the effect that Vajiragnana Thero though ordained by Dhammarakkita Thero was not robed by him. The 1st defendant-appellant had also claimed title to the Viharadhipathiship by prescription.

Held : (5) That on the evidence Vajiragnana Thero was and remained the pupil of Dhammarakkita Thero. The decision of the Maha Sangha Sabha relied on by the 1st defendant-appellant could not be acted upon inasmuch as there were such substantial irregularities in the procedure at the inquiry and also a violation of the principles of natural justice, that little reliance could be placed on this decision, even assuming that the Tribunal had jurisdiction to consider the the matter. This decision did not in any event act as an estoppel or *res judicata* against the plaintiff's claim that Vajiragnana Thero was the pupil of Dhammarakkita Thero.

(6) That the plaintiff's claim that he was the successor-in-title of Vajiragnana Thero to the incumbency should be upheld. Gnanawasa Thero who was the senior pupil and who gave evidence on this point for the plaintiff had clearly abandoned his rights to the Viharadipathiship.

Held further : That the 1st defendant's claim to be entitled to the Viharadipathiship by prescription must also fail as he could not by mere occupation of the temple acquire prescriptive title to the Viharadhipathiship. An imposter cannot acquire title to an incumbency by prescription and to uphold the contention that the 1st defendant was entitled to the incumbency until his death would be tantamount to so holding. On the death of Vajiragnana Thero in 1962 a fresh cause of action accrued to the plaintiff his pupil, which cause of action was not barred by lapse of time even on the assumption that the prescriptive period was 3 years.

Cases referred to :

Deerananda Thero v. Ratnasara Thero, 60 N.L.R. 7
Pannananda Thera v. Sumangala Thera, 68 N.L.R. 367.
Finlay v. Chirney, (1888) 20 Q.B. 494.
Cassim & Sons v. Sara Bibi, (1936) A.I.R. Rangoon 17.
Admiralty Commissioner v. S. S. Amerika, (1917) A.C. 38; (1916-17) All E.R. Rep. 177; 116 L.T. 34; 33 T.L.R. 135.
Charlis Appu Kapurala v. Manis Appu, 71 N.L.R. 350.
Yarmouth v. France (1887) 19 Q.B.D. 647; 57 L.J.Q.B. 7; 4 T.L.R. 1.
Lissenden v. Bosch Ltd., (1940) A.C. 412.
Podiya v. Sumangala Thero, 58 N.L.R. 29.
Sham Chand Giri v. Bhayaram Panday, (1894) 22 Cal. 92.
Ramsarup Das v. Rameshwar Das, (1950) A.I.R. (Patna) 184.
Vajiragnana Thero v. Anomadassi Thera, 73 N.L.R. 529.
Saranankara Thero v. Dhammananda Thero, 55 N.L.R. 313.
Dhammarama v. Wimalaratne, (1913) 5 Bal. Notes of Cases 57.
Attadassa Unnanse v. Revata Unnanse, 29 N.L.R. 361.
Terunnanse v. Terunnanse, 6 Times of Ceylon L.R. 22.

APPEAL from a judgment of the District Court, Gampaha.

H. A. Koattegoda with *N. R. M. Daluwatte* and *Daya Pelpola*, for the 3rd defendant-appellant.

Eric S. Amerasinghe, with *D. R. P. Goonetilleke* and *C. D. S. Siriwardene*, for the plaintiff-respondent.

Cur. adv. vult.

December 7, 1977. PATHIRANA, J.

The plaintiff-respondent instituted this action against the original 1st defendant Dhammananda Thero (since deceased), Jinananda Thero, the 2nd defendant (since deceased) and Saranapala Thero, the 3rd defendant, claiming to be the lawful Viharadipathi of Mahaloluwa Purana Vihara, a Buddhist temple. He alleged that the 1st defendant who had no title to the said temple had denied the title of the plaintiff and had placed the 2nd and 3rd defendants in possession of the said temple and that the 2nd and 3rd defendants were in wrongful possession thereof to his loss and damage which he estimated at Rs. 750 per annum. He asked for a declaration that he is the rightful Viharadipathi of the said temple, for an order ejecting the defendants from the said temple and for damages.

It is common ground that one time Anugammana Dhammarakkitha Thera was the Viharadhipathi of the said temple till his death in 1933. The plaintiff claimed as the successor-in-title of the eldest pupil of Anugammana Dhammarakkhitha Thera, namely Panagoda Vajiragnana Thera. The defendants in their

answer denied the plaintiff's title and claimed that it was the 1st defendant who was the senior pupil of Anugammana Dhammarakkhitha Thera and was the lawful Viharadipathi of the said temple. The 1st defendant pleaded that by deed No. 3665 of 16.2.46 he had appointed the 2nd and 3rd defendants as joint managers of the said temple.

During the course of the trial in the District Court, the 2nd defendant Jinananda Thera died on 1.8.69. As the action against the 2nd defendant has been brought as an agent of the 1st defendant it was agreed by Counsel appearing for the parties that no substitution was necessary in respect of the 2nd defendant as the action against the 2nd defendant had abated as a result of his death. The trial thereafter proceeded against the 1st and 3rd defendants only. The learned District Judge entered judgment in favour of the plaintiff as prayed for but without an order for damages.

The 1st and 3rd defendants on 30.5.70 appealed against the judgment and decree.

During the pendency of the appeal, on 6.7.72 the 1st defendant-appellant died and the record was sent from the Supreme Court to the District Court for an order for substitution. On 28.11.72 the 3rd defendant-appellant filed petition and affidavit objecting to any substitution as the action by the plaintiff being a personal action to establish the right to an office the action therefore abated on the death of the 1st defendant under the maxim *actio personalis moritur cum persona* relying on section 392 of the Civil Procedure Code. In the meantime the proctor for the plaintiff filed a motion dated 7.2.73 and moved for notice on Sandangama Attadassi Thera alleging that by deed No. 1385 of 20.7.72 the deceased 1st defendant Dhammananda Thera had appointed the said Attadassi Thera, his senior pupil, as his successor. An inquiry was held into the objections of the 3rd defendant on 15.2.73.

At the inquiry learned Counsel appearing for the plaintiff-respondent and the 3rd defendant-appellant, however, made no motion or application for substitution. Counsel for the 3rd defendant submitted that on the death of the 1st defendant the action stood abated and there was no provision in law for substitution of any other person in his place. He relied on the Divisional Bench decision of *Deerananda Thero v. Ratnasara Thero,* 60 N.L.R. 7, and referred to section 392 of the Civil Procedure Code. Attadassi Thera appeared on notice and although the District Judge explained to him of the matters arising out of the death of the 1st defendant, Attadassi Thera stated that he was not

taking any steps to have himself substituted. As no one had taken any steps for substitution in place of the deceased 1st defendant on the request of both Counsel the record was returned to this Court.

Before us at the forefront of his submissions Mr. Koattegoda, learned Counsel for the 3rd defendant-appellant relied strongly on the Divisional Bench judgment of *Deerananda Thero v. Ratnasara Thera* (*supra*). In this case as the plaintiff sued the defendants primarily to establish his personal right to an office as Viharadipathi and the cause of action was purely personal, it was held that the suit abated on the death of the defendant during the pendency of the suit by virtue of section 392 of the Civil Procedure Code in accordance with the maxim *actio personalis moritur cum persona.*

Mr. Eric Amerasinghe, learned Counsel for the plaintiff-respondent, however, submitted that although the plaintiff sued for a declaration to the office of Viharadipathi a perusal of the plaint would reveal that although the action in form was one for the office of Viharadhipathi but in substance it was an action both for the office of Viharadipathi and the temple and its temporalities. In spite of the death of the 1st defendant the action could continue in view of section 404 of the Civil Procedure Code as on the assumption that the deceased 1st defendant-appellant was the Chief incumbent of the temple by operation of law there was a creation or devolution in favour of the successor in title of the deceased 1st defendant-appellant of the interest in the temple and by virtue of section 404 the action can be continued against the person to whom such interest has come in substitution from the person from whom it has passed. He relied on the case of *Pannnanda Thero v. Sumangala Thero,* 68 N.L.R. 367, which held that where a plaintiff sues for a declaration that he is the lawful Viharadipathi of a Vihara and was entitled to possess the temporalities thereof, dies during the pendency of the action, a person who can establish that under the Buddhist Ecclesiastical Law he would be the successor to the title of incumbency upon the assumption that the deceased person himself had been the incumbent is entitled to substitution under section 404 of the Civil Procedure Code.

Mr. Amerasinghe in support of his submission drew our attention to certain averments in the amended plaint of the plaintiff which stated that the defendants were in possession of the temple causing loss and damage to the plaintiff. The cause of action was,

(*a*) for a declaration that the plaintiff was the Viharadipathi of the temple and,

(b) for an order ejecting the 1st, 2nd and 3rd defendants from the said temple.

Schedule 1 appended to the plaint refers to the land on which the temple is situated and schedules 2 to 9 refer to the temporalities belonging to the temple. In the body of the plaint is the averment that Mahaloluwa Purana Viharaya is an ancient temple and the premises and appurtenances thereof are more-fully described in the schedule hereto. Annexed to the plaint was an abstract of title relating to the nine lands. Mr. Amerasinghe relied strongly on section 404 which in his submission would apply to the facts of this case and was an enabling section for the continuation of the action. He drew a distinction between section 392 whcih according to him refers to the necessity for identity of causes of action for an action to survive and section 404 which refers to the identity of interest which enabled a cause of action to be continued. Mr. Amerasinghe therefore submitted that the 3rd defendant-appellant and Attadassi Thera having contumaciously refused to substitute the successor of the deceased 1st defendant on whom the interests devolved in place of the deceased 1st defendant in order to continue the action when section 404 enabled such a course of action, the appeal of the first defendant-appellant abated.

Before I deal with the other submissions made on behalf of the appellant I shall first deal with the question whether on the death of the 1st defendant-appellant the plaintiff's action abated under section 392 of the Civil Procedure Code.

It is not disputed in this case that the mode of succession to this temple is regulated by *sisyanu sisya paramparawa* and that the temple is exempted from the operation of section 4(1) of the Buddhist Temporalities Ordinance.

It would be necessary to trace the origin and examine the nature and scope of the maxim *actio personalis mortiur cum persona*. The principle expressed in this maxim means that a personal right of action dies with the parties to the cause of action. A personal action is an action where a cause of action or complaint or injury is one affecting solely a person. It is a cause of action purely personal on both sides, personal both to the person on whom and by whom the injury is inflicted. According to Bowen, L. J. in *Finlay v. Chirney*, (1888) 20 Q.B.L.R. 494, the maxim is of some antiquity but its origin is obscure and post classical. They were still in the dark as to the maxim's exact meaning or source. Pollock in his Treatise on The Law of Torts, 13th Edition, commenting on the maxim before the Law Reform (Miscellaneous Provisions) Act of 1934 speaks of a very similar

rule which existed in Roman Law with the modification that the inheritance of a man who had increased his estate by *dolus* was bound to restore the profits so gained and that in some cases heirs might sue but could not be sued. He goes on to say "Whether derived from a hasty following of the Roman rule or otherwise, the common law knew no such variations ; the maxim was absolute. Indeed, the survival of a cause of action was the exception in the earliest English Law." Bowen, L.J. in *Finlay v. Chirney* (*supra*) has stated :—

> "The truth is, that in the earliest times of English law survival of causes of action was the rare exception, non-survival was the rule."

Its origin, may be traced to the forms of actions under the early common law of England. When the common law of England was in the early stage of its development it was a principle of the common law that if an injury was done either to the person or to property of another for which damages only could be recovered in satisfaction, the action died with the person to whom or by whom the wrong was done. The reason was that the only writ available to a plaintiff in such cases was a writ of trespass which was quasi-penal in its effect a verdict for the plaintiff resulting not only in an award of compensation to the injured party but also in the infliction of a fine or imprisonment upon the defendant. In such circumstances, it was regarded as unjust that personal actions survive against the executor or administrator of the tort feasor because there could be no reason why he should be subjected to the fine or imprisonment which might follow a verdict of guilty in an action for trespass. Vide the judgment of Page, C. J. in *Cassis & Son. v. Sara Bibi*, (1956) A.I.R. Rangoon 17.

Bowen, L. J. in *Finlay v. Chirney* (*supra*) expressed the same view :

> "Actions of trespass were formerly actions of a quasi-penal character and based upon the supposition of personal wrong. It was not unnatural that such actions should die upon the death of the trespasser. "All private criminal injuries or wrongs as well as all public crimes are buried," says Lord Mansfield in *Hambly v. Trott* (2), "with the offender." But survival was also denied to other actions which did not fall within this category."

Many inroads have been made upon this maxim even in England throughout the ages and in this way the ambit of an application has been limited and curtailed by the Law Reform (Miscellaneous Provisions) Act of 1934. On the death of a person

after the commencement of the Act all causes of action subsisting against or vested in him shall survive against or for the benefit of his estate except actions for defamation, seduction or inducing one's spouse to live or remain apart from the other or damages on the ground of adultery.

The maxim has been subject to consistent severe criticism. In the case of *Admiralty Commissioner v. S.S. Amerika,* (1917) A.C. L.R. 38 at page 60, Lord Sumner made the following remarks :—

> " The maxim itself has many critics ; it has been coldly disparaged as post-classical, meaning thereby that it is bad Latin : *Finlay v. Chirney* (1) ; it has been suggested to be a mistake for actio poenalis (Poste's Gaius, 2nd Edition, p. 493), whence it is sometimes insinuated that it is bad law ; and it has been peevishly described as " a wretched saw " and as " a purely identical proposition " : Austin's Jurisprudence, 3rd ed., Vol. 2, p. 1013. "

Pollock in his treatise on the Law of Torts, 13th Edition, states that it is one of the least rational parts of our law and that when once the notion of vengeance has been put aside and that of compensation substituted, the rule *actio personalis moritur cum persona* seems to be without plausible ground.

Page, C.J. in *Cassim & Sons v. Sara Bibi* (*supra*) said :

> " Now I have never heard it suggested that the rule *actio personalis moritur cum persona,* is based upon justice or common sense or that it can be supported upon any principle of law. "

The maxim, therefore, according to its early English common law origin appears to be associated with injuries solely affecting the person and the quasi-penal nature of the verdict against the wrongdoer.

The maxim *actio personalis* and the controversial views arising out of it surfaced in this country after the judgment of the Divisional Bench of three Judges in the case of *Deerananda Thero v. Ratnasara Thera,* 60 N.L.R. 7, and the cases of *Pannanda Thera v. Sumangala Thera,* 68 N.L.R. 367, and *Charlis Appu Kapurala v. Manis Appu,* 71 N.L.R. 350.

I have next to consider the applicability of the maxim in relation to our law particularly Chapter XXV of the Civil Procedure Code which relates to continuation of actions after alteration of a party's status and examine to what extent the maxim is modified by statute. In considering this question I have also to keep

in mind two other relevant maxims of equal importance in relation to litigation. The first is the maxim "*Interest reipublicae ut sit finis litium.*" viz., the general interests of the community in the termination of disputes and in the finality and conclusiveness of judicial decisions, and secondly, the maxim "*Nemo debet bis vexari pro una et eadem causa*", viz., the right of an individual to be protected from vexatious multiplication of suit.

In fact the aim and purpose of the Civil Procedure laws of this country are primarily directed to the speedy and final determination of all actions and the avoidance of multiplication of actions except in exceptional circumstances. It is not in dispute in this case that the Civil Procedure Code applies.

Chapter XV which refers to continuation of actions and the sections in the Code relating to *res judicata* are the principal media by which this aim and purpose is sought to be achieved. Wherever possible every reasonable construction must be placed which would help the Court to continue the action rather than see the action abated or force a party on whom a deceased party's interests devolved to resort to fresh litigation with the attendant expense and delay such a process necessarily involved.

The next question is how far this maxim which had its origin in the early English common law associated with the forms of actions and its quasi-penal character can be applied in its pristine absoluteness to a cause of action for declaration of title to the office of the chief incumbent of a Buddhist temple, an office with perpetual succession, and more particularly after the coming into operation of the Buddhist Temporalities Ordinance, where subject to certain exceptions all property movable and immovable together with all issues, rents, moneys and profits of the same is vested in the chief incumbent for the time being.

The tendency to apply indiscriminately legal maxims which are general in their scope and operation as a ready-made solution to any problem without any definition and limitation had, in fact, induced Lord Esher, M. R. in *Yarmouth v. France,* (1887) (19) Q. B. D. 647 at 653, to protest :

> "I detest the attempt to fetter the law by maxims. They are almost invariably misleading : they are for the most part so large and general in their language that they always include something which really is not intended to be included in them."

Lord Wright in the House of Lords case of *Liesenden v. Bosch, Ltd.,* (1940) A.C. 412 at 435, added this caution :

> "Indeed, these general formula are found in experience often to distract the Court's mind from the actual exigencies of the case, and to induce the Court to quote them as offering a ready made solution. But it is not safe to act upon them unless and to the extent that they have received definition and limitation from juridicial determination."

Under section 392 if the action is pure and simple a personal action like an action for seduction under the Roman Dutch Law, then the death of the plaintiff or the defendant will abate the action as the right to sue cannot survive. There are no interests in the action which can devolve on any other person. I agree that an action to be declared entitled to an office likewise is generally a personal action and cannot survive in the event of the death of the plaintiff or the defendant as with his death the holder of the office ceases to hold office. The question is whether an action for the declaration of title to an office of Viharadipathi of a temple the succession to which is regulated by *sisyanu sisya paramparawa* as in the present case, is an action for a status or office which abates on the death of the plaintiff or the defendant. A proper understanding of the nature and character of the office of Viharadipathi, the creation and devolution of title to the office will be useful to determine this question.

Every Buddhist temple is presumed to be dedicated and regulated by the form of pupillary succession known as *sisyanu sisya paramparawa* unless the contrary is proved. It is not in dispute that the temple in question in this case is regulated by this mode of succession. Under this mode of succession after the death of the chief incumbent of a Buddhist temple in the absence of a deed or will nominating another particular pupil as his successor, the eldest pupil succeeds unless he has deserted his duties or suffered what may be termed "ecclesiastical death" such as by disrobing. The office is one which an imposter cannot acquire by prescription nor can the rights of a true incumbent be extinguished by prescription. With the coming into operation of the Buddhist Temporalities Ordinance, by section 20, subject to certain exceptional cases, the title to temple property is vested by law in the controlling Viharadipathi for the time being. The office is therefore one in which continuity of succession is assured by the operation of law, so much so in the case of a temple which is regulated by *sisyanu sisya paramparawa* one cannot conceive of such a temple without a Viharadipathi or the Viharadipathi

without the temple quite apart from its temporalities or properties. There is privity of estate or interests between a proved incumbent and his pupil.

In regard to the office of Viharadipathi of a temple whether there are lesser rights in property which by virtue of his office as Viharadipathi he acquires besides those under section 4(2) and section 20 of the Ordinance was considered by Sansoni, J. in *Podiya v. Sumangala Thero*, 58 N. L. R. 29. In this case the question was whether a pupil was a privy of his tutor for the purpose of the law of *res judicata*. Sansoni, J. held that this was so and made the following relevant observations :—

> " 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 v. Punchi Banda Korale*, (1926) 28 N.L.R. 145. 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 v. Deevamitta*, (1921) 23 N.L.R. 24."

It would therefore appear that the office of Viharadipathi is not a nominal or titular office.

Two concepts can therefore be associated with the office of Viharadipathi of a temple. Firstly there is a holder of such an office, secondly by virtue of the office there are interests which are attached to such office. Regarding the first, although the holder on his death ceases to hold such office yet, by operation of law there is always continuity of succession and there is always a priest on whom the office devolves. Secondly, the interests which go with office despite the death of the holder of such office devolve on each successive holder of the office of Viharadipathi by operation of the law. Therefore in action for a declaration of title to the office of Viharadipathi of a temple on the death of the plaintiff pending the action although his title to the office dies with him, his interests in the temple devolve on his successor in title. Apart from section 392 I have therefore to examine whether

under section 404 if the interests of the plaintiff priest on his death devolves on his successor in title the latter can continue the action in substitution for the person from whom it has passed, although the original plaintiff's right to sue does not survive. In *Pannananda Thero v. Sumangala Thero,* 68 N.L.R. 367, the plaintiff had sued for a declaration that he was the Viharadipathi of a Vihare and entitled to the temporalities thereon and also for possession of a number of properties stated to be temporalities of the Vihare. The dispute between the plaintiff and the defendant in this case chiefly concerned the question of the right to possess the temple properties. The plaintiff's action was dismissed and an appeal against the dismissal was taken. During the pendency of the appeal the plaintiff died and an application for substitution in place of the plaintiff was refused by the District Court, although the petitioner sought to prove that he had succeeded the plaintiff as Viharadipathi of the temple. In appeal H. N. G. Fernando, A.C.J. allowed the substitution for the following reasons :—

> "In my opinion the difficulty is met by section 404 of the Civil Procedure Code. The title to temple property is vested by law in the controlling Viharadipathi for the time being (subject of course to certain exceptional cases.) Therefore, on the assumption that the deceased plaintiff was the incumbent of the Vihare, then, on his death, the title to the temple property is vested by law in his successor. If, therefore, the present petitioner is the lawful successor of the plaintiff, the title to the property which is the subject of this action, has now vested in him. The position taken up by the petitioner, therefore, is that there has been by operation of law a creation or a devolution in his favour of interests in the lands which are the subject of this action ; and if he can establish to the satisfaction of the District Court that he would be the successor in title to the incumbency upon the assumption that the deceased-plaintiff himself had been the incumbent, then the petitioner will be entitled to substitution under section 404. The correctness of that assumption will, of course, have to be decided in the substantive appeal."

In this case, no doubt, H. N. G. Fernando, A.C.J. emphasised the fact that temple property and title to property were in dispute and these were interests within the meaning of section 404 which devolved on the person claiming to be the successor-in-title of the deceased incumbent. But as Sansoni, J. remarked in *Podiya v. Sumangala Thero* (*supra*), "There are lesser rights in property which a Viharadipathi by virtue of his office acquires." Temporalities or property belonging to a temple

merely provide income for the maintenance of the temple. They are not absolutely essential appurtenances for a temple. While a Viharadipathi must have a temple the fact that he does not own temporalities or immovable properties does not disqualify a priest from being a Viharadipathi of a temple. A Viharadipathi by virtue of his office has interests and rights in relation to his temple, quite apart from the temporalities, which must devolve on his successor-in-title by operation of law.

At this stage, it would be relevant to consider the language used in section 404 in relation to section 392. Section 392 deals with the right to sue on the cause of action surviving. Section 404 does not say "In other cases of assignment, creation or devolution *of the right to sue on the cause of action.*" Section 404 makes no reference to "the right to sue on the cause of action." It has to be considered independently of section 392. It only speaks of "devolution of interests" pending the action in which event the action may be continued by or against the person to whom such interests had come either in addition or substitution for the person from whom it has passed. In the case of a temple subject to *sisyanu sisya paramparawa* it will be the successor-in-title of the deceased incumbent.

In my view, in an action for declaration of title to the office of Viharadipathi of a temple, on the death of the plaintiff or the defendant (if he too claims to be Viharadipathi) the action can be continued by or against the successor-in-title under section 404. The maxim *actio personalis moritur cum persona* will not apply in such a case to abate the action. The action though in form an action for a status or an office, is in substance an action for the temple and the temporalities which by operation of law belong to the Viharadipathi of the temple.

When an usurper, imposter or trespasser disputes the rights of a lawful Viharadipathi of a temple, this usually takes the form of occupying the temple and or its temporalities, the temple being a symbol of the office of the Viharadipathi. In the result in an action for declaration of title to the office of Viharadipathi of a temple though in form it is an action for an office or status, it is in substance an action for the temple and all its temporalities. In the present case, the plaintiff who is asking for a declaration of title for the incumbency also asks for an order of ejectment. Ejectment from what ? Obviously from the temple and its temporalities. The action is therefore not merely for the office of Viharadipathi but also other interests attached to that office, which as I have pointed out earlier are disclosed in the plaint. Ejectment of the defendant cannot therefore be said to be purely incidental to the claim to be the incumbent. The temple and

the office are so inextricably interwoven that it is almost impossible to visualise the one without the other. To eject means to oust the defendant from the temple and put the plaintiff in possession of the same temple.

I shall now deal with the case of *Deerananda Thero v. Ratnasara Thero,* 60 N.L.R. 7. In this case the plaintiff claimed to be the pupillary successor to one Piyadassi Thero. He instituted this action to the incumbency of a temple against Piyaratna Thero alleging that the latter was—

(*a*) unlawfully disputing his rights to the incumbency; and

(*b*) is disobedient and disrespectful to him and obstructing him in the lawful exercise of his rights as incumbent.

He prayed that he be declared the incumbent and the defendant and his agents be ejected from the temple. During the pendency of the trial Piyaratana Thero died. The plaintiff's proctor filed an application which stated that any rights that the defendant had to the incumbency had devolved on Deerananda Thero and it had become necessary to substitute the latter in place of the deceased defendant. Deerananda Thero consented to this substitution and he was made the substituted defendant. Trial proceeded and judgment was entered for the plaintiff against the substituted defendant declaring the former the incumbent and ordering the ejectment of the defendant. In appeal it was contended for the plaintiff-appellant that the judgment cannot stand as the action instituted by the plaintiff abated on the death of Piyaratana Thero. It was 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 on the maxim *actio personalis moritur cum persona.*

T. S. Fernando, J. (H. N. G. Fernando, J. and Sinnethamby, J. agreeing) took the view that the action as framed was undoubtedly one of a personal nature and was limited to seeking a declaration to this alleged status of incumbency. Although it was 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 "parajika conduct" of the latter. Secondly, that the question of title for the possession of temporalities did not arise in the action. It was held that on the death of the original defendant the action abated by virtue of the provisions of section 393 of the Civil Procedure Code. Although an alternative argument was put forward that the substitution was justified under section 404 the Court did not consider it necessary to examine this submission and therefore

did not consider 404. The action being one of a personal nature against the original defendant the right to sue ceased on the death of that defendant. The cause of action did not survive on the death of the original defendant and the maxim *actio personalis moritur cum persona* was applicable. T. S. Fernando, J. relied on the Indian cases of *Sham Chand Giri v. Bhayaram Panday,* (1894) (22) Calcutta 92, and *Ramsarap Das v. Rameshwar Das,* (1950) A.I.R. (Patna) 184.

I shall examine these decisions to see whether the maxim *actio personalis* was applied not so much because the actions were personal actions for an office but because in fact the person claiming substitution could not establish that the interests of the original plaintiffs devolved on them as they were laying rival claims in conflict with the claim of the original plaintiffs and in the circumstances their only remedy was separate suits.

In Sham Chand Giri's case the plaintiff prayed for a declaration that he was the duly constituted Mahanth of the shrine and for possession thereof and for an injunction to restrain the defendant from interfering or dealing with the properties of the shrine and for other reliefs. He prayed for a declaration that he was the duly constituted Mahanth of the shrine. On the death of the plaintiff, the petitioner asked that his name be substituted in place of the deceased plaintiff. The argument adduced was that,

(*a*) the right to sue had not abated by reason of the death of the plaintiff, and

(*b*) there had been a devolution of interests in favour of the petitioner.

Sale, J. examined section 361 (our Code section 392), section 362 (our Code 393), section 363 (our Code 394), section 365 (our Code section 395) and section 372 (our Code section 404) of the Indian Civil Procedure Code. The petitioner claimed as the Chela or disciple not of the original plaintiff but of his predecessor and this claim in reality put him in opposition to the original plaintiff whose case was that his predecessor had no Chela besides himself as regards to whom the ceremonies of initiation and installation were performed. Sale, J. took the view that the petitioner therefore was in the position of a rival claimant who was desirous of setting up a claim of his own which was not only not dependent upon the claim of the original plaintiff but was in conflict with it.

On this finding therefore the petitioner who sought substitution could not establish there had been any devolution of the interests of the original deceased plaintiff in him as such he could not resort to section 372 of the Indian Code which corresponds to section 404 of our Code. His only remedy was to have instituted a fresh action as his cause of action was entirely different, as the real object of the petitioner was to establish a rival claim to the office of Mahanth which could only be done by a separate suit. The case, therefore, could have been decided on this ground but, I find that Sale, J. thereafter had proceeded to state as follows :—

> "The suit was of a personal character in as much as its object is to establish a right to a personal office, and for that reason it appears to me that the right to sue does not survive. The result is that the action abates."

If in fact the petitioner could have established that there was a devolution of the interests of the original plaintiff in him the action need not have abated.

I shall next deal with the case of *Ramsarup Das v. Rameshwar Das,* (1950) A.I.R. (Patna) 184, relied on by T. S. Fernando, J. This was an action for declaration of title for the recovery of properties by the plaintiff as shebait of the deity. The plaintiff prayed for a declaration that according to the terms of the document of 1919 he was the Mahanth and shebait after the death of the last shebait.

The first defendant claimed as shebait of the last Mahanth. In the original Court decree was entered for the plaintiff against the 1st defendant, holding that the plaintiff was the Mahanth and shebait of the deity in accordance with the terms of the document of 1919 and that the possession of the first defendant was wrongful. The defendant appealed and during the pendency of the appeal the plaintiff died and an application was made by another person as the chela of the deceased plaintiff for substitution in his place. It was contended in appeal that the suit was abated as a result of the death of the plaintiff who had sued for his personal rights.

The person who sought substitution in the place of the original plaintiff could only succeed by virtue of an appointment in terms of the document of 1919 and not by virtue of the fact that he was the chela of the deceased plaintiff. Here too the person who sought substitution was a person on whom the interests of the original plaintiff could not have devolved because he was not a person who claimed to be appointed according to the document of 1919, but claimed office as a chela

of the deceased plaintiff. Here also as in Sham Chand Giri's case the person seeking substitution was setting up a claim of his own which was not dependent upon the claim of the original plaintiff but was in conflict with it. His only remedy was to have instituted a fresh action as his cause of action was entirely different. The person seeking substitution could not therefore claim that the interests of the original plaintiff had devolved on him, so that with the death of the original plaintiff the action had to abate. The person seeking substitution could not invoke the section corresponding to section 404 of our Civil Procedure Code. I also find that section 372 of the Indian Civil Procedure Code which is the same as section 404 of our Code has not been referred to in the course of the judgment.

In *Charlis Appu Kapurala v. Manis Appu,* 71 N.L.R. 351, section 404 was considered but on the facts of the case it was held that the action abated on the death of the 2nd defendant as the claim in the action was in respect of which the 2nd defendant was liable personally.

The action framed against the original 2nd defendant alleged a wrongful act on his part in collusion with the 1st defendant and the action against the 2nd defendant was an action in tort. The action, therefore, being framed against the original 2nd defendant personally and in tort, section 404 could not have been invoked as there was no devolution of the liability incurred by the original 2nd defendant on his death. No liability or interest passed from the original 2nd defendant to the substituted 2nd defendant. The facts and conclusion in this case, therefore, do not apply to the present case.

The decision in *Vajiragnana Thera v. Anomadassi There,* (1970) 73 N.L.R. 529, is also not helpful to the appellant. In this case, the plaintiff sued the defendant for a declaration that he was the controlling Viharadhipathi of the temple and for its temporalities and for the ejectment of the defendant from that temple. The plaintiff's predecessor had instituted an earlier action against the same defendant for a declaration that he is controlling Viharadhipathi of the temple and its temporalities and for the ejectment of the defendant from the temple. That action was abated upon the death of the plaintiff on the ground that the cause of action did not survive the death of the plaintiff. Thereafter the plaintiff sued the same defendant for the similar relief which his predecessor claimed. The learned District Judge held that because of the abatement of the former action section 403 of the Civil Procedure Code was applicable and he dismissed the plaintiff's action. It was held that it was competent for the person who claimed to be the deceased plaintiff's successor in

office to institute a fresh action against the same defendant for similar relief. Here the original action which was brought by the deceased plaintiff was not only for a declaration that he is the controlling Viharadhipathi of this temple but he sued for its temporalities and also for the ejectment of the defendant from the temple. In view of the decision in *Pannananda Thero v. Sumangala Thero,* (1965) 68 N.L.R. 367, it would have been competent for the successor in title of the original plaintiff to continue the action under section 404 of the Civil Procedure Code as a person on whom his interests devolved.

The most that can be said of the three Bench decision in Deerananda Thero's case is that the principle laid down in that case must be confined to the facts of that case and cannot be applied as a general proposition of law. In that case the plaintiff not only alleged that the original defendant denied his title but also that he was disobedient, disrespectful to him and obstructed him in the lawful exercise of his rights as incumbent. He was, therefore, alleging contumacious conduct on the part of the defendant which if established would have lost the defendant the right of residence in the temple. This contumacious conduct therefore cannot be attributed to the defendant's successor-in-title on the death of the defendant. If the plaintiff's contention was merely that the defendant denied his title then should the interests of the defendant have devolved on the substituted defendant as his lawful successor-in-title, unless the substituted defendant admitted plaintiff's title he too would be denying the plaintiff's title in which event the cause of action would still be the same, namely, a denial of plaintiff's title. But in Deerananda Thero's case there was the added circumstance that the plaintiff attributed contumacious conduct against the defendant which was a distinct cause of action in the sense that it was in addition alleging a wrong for the prevention or redress of which the action was originally instituted.

I, therefore, take the view that despite the death of the 1st defendant-appellant, the plaintiff's action does not abate but could proceed under section 404 of the Civil Procedure Code. No substitution has been made in place of the deceased 1st defendant-appellant. Although Attadassi Thero was noticed by the plaintiff to appear in Court on the basis he had been appointed by the 1st defendant to be his successor, Attadassi Thero stated to Court that he was not taking any steps for substitution. In the result I would hold that the appeal of the 1st defendant-appellant stands abated.

Mr. Amerasinghe submitted that in the event of the 1st defendant-appellant's appeal being declared abated there would

appear to be no merit in the appeal of the 3rd defendant-appellant. His argument is that the 3rd defendant was admittedly an agent of the 1st defendant in occupation of the temple. The 1st defendant's appeal having been abated and dismissed it was in effect a declaration that he had no rights to the temple *vis-a-vis* the plaintiff, and therefore the 3rd defendant his agent too had no rights to the temple. The 3rd defendant's appeal therefore should be dismissed as on the face of it there was no merit in this appeal and at most it was academic. The answer to Mr. Amerasinghe's contention is that this is an action for a declaration of title to the Viharadipathiship of the temple, and the 3rd defendant in his answer has denied the plaintiff's title to the said temple. It was therefore incumbent on the plaintiff to establish his title not only against the 1st defendant but also against the 3rd defendant. For these reasons we decided to hear argument on behalf of the 3rd defendant-appellant.

We have therefore to consider Mr. Koattegoda's submission on behalf of the 3rd defendant-appellant urged before us.

The 1st defendant had taken up the position that the decree in D.C. 3102/L (D12) dated 27.11.1947 affirmed in appeal by the Supreme Court (D4) of 5.6.51 operated as *res judicata* against the plaintiff in regard to his right to the incumbency of the temple. This action was instituted on 18.11.43 by the 1st defendant against Mailawalane Seelaratana Thero in which he claimed that as senior pupil of Dhammarakkhitha Thero having been robed in 1924 he was entitled to the incumbency of the temple. Seelaratana Thero too claimed the incumbency as senior pupil and that the 1st defendant was not a pupil of Dhammarakkhitha Thero. Vajiragnana Thero sought to intervene in the action and in an ex-parte application made by him he was made the 2nd defendant and in fact filed an answer in which he claimed that he was the senior pupil of Dhammarakkhitha Thero having being robed in 1915 and that the 1st defendant was never a pupil of Dhammarakkhitha Thero. The 1st defendant thereafter objected to the intervention of Vajiragnana Thero. The learned District Judge thereupon vacated the ex-parte order adding Vajiragnana Thero as a party and he was discharged from the case. Thereafter the case proceeded to trial and decree was entered in favour of the 1st defendant against Seelaratana Thero. The Court held that the 1st defendant was the senior pupil of Dhammarakkhitha Thero. The caption in the decree entered in the District Court incorrectly shows Vajiragnana Thero as the 2nd defendant but this is not so. I do not think that this decree can operate as *res judicata* against the plaintiff who claims to

be the senior pupil of Vajiragnana Thero as the latter was not a party to Case No. D.C. 3102/L. On this decree Seelaratana Thero was ejected from the temple in 1932. I, therefore, agree with the learned District Judge that that decree in D.C. 3102/L does not operate as *res judicata* against the plaintiff in the present case.

On the question whether Vajiragnana Thero or the 1st defendant is the senior pupil of Dhammarakkhitha Thera, the learned District Judge has held that Vajiragnana Thero was the senior pupil and that the 1st defendant was not his pupil but the pupil of Napagoda Seelaratana Thero. This finding was strongly criticised by Mr. Koattegoda who invited us to reverse it as he submitted the evidence in fact established that the 1st defendant was the senior pupil.

The plaintiff has relied on Vajiragnana Thero's Upasampada Declaration (P8) dated 28.3.32 which states that he was robed on 15.3.1915 by Gnaninda Thero and Dhammarakkhitha Thero, the Viharadipathi of Mahaloluwa Temple, the temple in question. He was ordained on 9.6.1930 and the tutors presenting him for ordination were Dhammarakkhitha Thero and Chandasarabindana Thero.

The 1st defendant claimed that he too was robed by Dhammarakkhitha Thero and relied on his Upasampada Declaration (P64) dated 29.3.32 which purported to be a certified copy. According to P65 the names of his robing tutors in cage 7 appear firstly as Dhammarakkhita Thero and secondly as Napagoda Seelaratana Thero. Only the year of robing was given as 1924 with no date. The date of ordination was 26.6.1928. The tutor presenting him for ordination was Napagoda Seelaratana Thero who had also robed him. The 1st defendant thus relied on his Upasampada Declaration (P65) in cage 7 to prove that he was robed by Dhammarakkhitha Thero. The 1st defendant also produced D5 which according to him purported to be a certified copy of the Upasampada Declaration of the plaintiff which is different from P8. The Upasampada Declaration produced by the 1st defendant D5, in Cage 7 mentions only the name of Gnaninda Thero as the plaintiff's robing tutor, the name of Dhammarakkhitha Thero being absent, whereas P8 includes Dhammarakkhitha Thero as his robing tutor.

At the trial the plaintiff challenged that the 1st defendant was never a pupil of Dhammarakkhita Thero and that the declaration produced was a counterfeit document, that an examination of the originals in the custody of the Registrar-General and

the Malwatte Chapter would reveal that the name of Dhammarakkhitha Thero had been subsequently interpolated in cage 7 of the Upasampada Declaration of the 1st defendant for the purpose of supporting his alleged claim that he was the robed pupil of Dhammarakkhitha Thero.

The evidence is that Dhammarakkhitha Thero in his life time discovered that his name has been falsely entered in P63, the Upasampada Certificate of the 1st defendant kept in the custody of the Malwatte Chapter. He made representations to the Chapter on 30.6.1930 stating that the 1st defendant was not his pupil. This was about 3 weeks after the ordination of Vajiragnana Thero which took place on 9.6.1930. The Chapter went into this complaint and by its decision dated 21.7.1930 (P63a) ordered that the 1st defendant was not a pupil of Dhammarakkhitha Thero and deleted the name of Dhammarakkhitha Thero as the tutor of the 1st defendant. On the reverse of this document the Maha Nayake of the Chapter has certified this decision on the same day.

An examination of the original of the 1st defendant's Upasampada Declaration kept in the custody of the Registrar-General, the photostat copy of which is marked P65a clearly shows that in cage 7 the name of Dhammarakkhitha Thero had been interpolated as the robing tutor in addition to Napagoda Seelaratana Thero. The year of robing has been altered from 1926 to 1924. There is much in the suggestion of Mr. Siriwardena, learned Counsel for the plaintiff-respondent before us that this was done by someone at the instance of the 1st defendant to defeat the rights of Seelaratana Thero in the action No. 3102/L in which he too claimed that he was robed by Dhammarakkhitha Thero in 1924. In that action the 1st defendant claimed that he was robed in January 1924 whereas Seelaratana Thero claimed that he was robed in October 1924. In case No. 3102/L only the certified copies appear to have been produced and the Court did not have an opportunity of examining the originals where the interpolations are seen.

P66 is a duplicate of the Upasampada Declaration of the 1st defendant in the custody of the Malwatte Chapter which under the Ordinance had to be sent by him to the Registrar-General who in turn had sent it to the Malwatte Chapter. The photostat

copy P66a (the original P66 would have been produced at the trial) again shows the interpolation in cage 7 of the name of Dhammarakkhitha Thero as the 1st defendant's robing tutor.

No supporting evidence was led at the trial by the 1st defendant to prove that he was robed by Dhammarakkhitha Thero. No witnesses have been called by him to say that he was robed by Dhammarakkhitha Thero. The 1st defendant was unable to give the date on which he was robed. He did not have an explanation for the alterations and interpolations in the documents I have referred to as to when, why and by whom they were made. There is no doubt that the only person who could have taken any advantage of these interpolations and alterations was the 1st defendant. It therefore follows that these alterations and interpolations, to say the least, were made by someone at the behest of the 1st defendant. The learned District Judge in the present case who had seen the originals in which the interpolations and alterations were made and the photostat copies thereof was undoubtedly right in coming to the conclusion that these were fabrications for the purpose of establishing that the 1st defendant was robed by Dhammarakkhitha Thero.

It is also in evidence that when the 1st defendant received his higher ordination the notice that the ordination ceremony would take place on 20.6.28 was only issued by Napagoda Seelaratana Thero who referred to the 1st defendant as " my pupil ".

I, therefore, agree with the finding of the learned District Judge that the 1st defendant was not the pupil of Dhammarakkhitha Thero but was the pupil of Napagoda Seelaratana Thero.

I shall next examine the question whether Vajiragnana Thero was the senior pupil of Dhammarakkhitha Thero. The Upasampada Declaration P8 no doubt states that he was robed by Dhammarakkhitha Thero on 15.3.1915 and he was therefore both the robed and ordained pupil of Dhammarakkhitha Thero. The 1st defendant, however, took up the position that Dhammarakkhitha Thero in his life time had dismissed him from his pupilage, and in evidence he produced a notice alleged to have been published by Dhammarakkhitha Thero in the Sinhala newspaper " The Dinamina " of October 7, 1932 (P6), which stated that Dhammarakkhitha Thero had expelled Vajiragnana Thero

from his pupilage. The plaintiff's answer to this was that this was a bogus notice published without the knowledge of Dhammarakkhitha Thero at a time he was very ill. In fact, he died on 16.4.1933. There was a refutation of this notice by Vajiragnana Thero in the Sinhala newspaper called "The Swadesha Mitraya" of 25.3.33 (P7).

In the meantime someone has stolen a letter-headed paper containing the printed name of Dhammarakkitha Thero with his seal and sent a letter purporting to be from him to the Maha Sangha Sabha of the Malwatte Chapter requesting the cancellation of the pupillary rights of Vajiragnana Thero. The Chapter accepted the letter on the face of it without doubting that it was a letter written by Dhammarakkitha Thero. On 25.10.32 a letter was sent by the Maha Nayake to Dhammarakkitha Thero deleting the name of Dhammarakkitha Thero as the tutor of Vajiragnana Thero. Dhammarakkitha Thero died shortly afterwards in 1933. The Dayakayas of the Mahaloluwa Temple including D. P. Rajakaruna who gave evidence for the plaintiff in this case, thereupon sent a petition to the Maha Nayaka Thero alleging that the alleged letter purporting to be sent by Dhammarakkitha Thero was sent at the instance of 1st defendant and that the signature of Dhammarakkitha Thero on it was forged.

An inquiry was duly held by the Maha Sangha Sabha in August and September 1934 and it came to the conclusion that the letter alleged to be sent by Dhammarakkhitha Thera was in fact a forgery. The Maha Sangha Sabha thereafter ordered that the letter sent on 25.10.32 to Dhammarakkhitha Thero cancelling the pupillary rights of Vajiragnana Thero should be revoked and further ordered that the remarks in the Upasampada Seetu No. 132 of 9.6.30 of Vajiragnana Thero which contained the words "cancel the pupillary rights" be also cancelled. The Maha Sangha Sabha accepted the fact that Vajiragnana Thero was a pupil of Dhammarakkhitha Thero. It also declared that the notice appearing in "The Dinamina" of 17.10.32 was an untruth. The judgment of the Sangha Sabha is marked P2 and was delivered on 8.11.1934, and has been certified under the signature of the Maha Nayaka. This evidence leaves no room to doubt that Vajiragnana Thero was the senior pupil of Dhammarakkhitha Thero and was never removed from his pupilage. Saranapala

Thero, the 3rd defendant, who at the time he gave evidence was 70 years old, under cross-examination by counsel for the plaintiff admitted that at the ordination of the plaintiff on 9.8.1930 he had by his side his tutors Dhammarakkhitha Thero and Chandasara Thero. His answer to the following question is revealing and important.

> "*Q.* If Panagoda Vajiragnana falsely stated he was a pupil of Ahugammana Dhammarakkhitha that would have been corrected then and there by Ahugammana Dhammarakkhitha ?
>
> *A.* He should have said so at that time."

Five days after having successfully opposed the intervention of the plaintiff in D. C. Case No. 3102/L the 1st defendant on 10.8.47 made one more attempt to challenge the claim of Vajiragnana Thero that he was robed by Dhammarakkhitha Thero. By this time it must be noted that the 1st defendant had been disowned by Dhammarakkhitha Thero as his pupil vide P63a of 21.7.1930 the order of the Maha Nayaka deleting the reference to the 1st defendant that he was a pupil of Dhammarakkhitha Thero from the Upasampada Register. The 1st defendant sent a petition P43 to the Maha Sangha Sabha on 10.8.47 alleging that cage 7 in the plaintiff's Upasampada Declaration was false and that the plaintiff was in fact robed by Gnaninda Thero who belonged to the Kotte Nikaya. He called for an inquiry. The Maha Sangha Sabha by letter dated 6.9.47 (P42) gave notice to Vajiragnana Thero that the inquiry would be held into this matter on 5.10.47 and wanted his reply before 25.9.47. He was ordered to produce two witnesses to show that he was robed by Dhammarakkhitha Thero. He was further told that if he failed to be present ex parte inquiry will be held and if it was proved that the entry in cage 7 was false that portion would be struck off after which the Registrar-General would be informed. Vajiragnana Thero replied by letter P44 that the entry in cage 7 was true and referred to the judgment of the Maha Sangha Sabha. This refers to the judgment P2 of 8.11.34 which I have mentioned earlier. He indicated that it would be unnecessary for him to produce his witnesses until the complainant proved that the statement contained in cage 7 in his Upasampada

Declaration was false. In taking this stand Vajiragnana Thero was relying on a previous judgment of the Maha Sangha Sabha (P2) of 8.11.34 countersigned by the Maha Nayake which had held that he was a pupil of Dhammarakkhitha Thero. The Maha Sangha Sabha, however, without holding a preliminary inquiry as was the usual practice and without taking into consideration the previous decision, P2, made a decision dated 2.11.47 to the effect that Vajiragnana Thero although he was ordained by Dhammarakkhitha Thero was not robed by him. The Maha Nayake thereafter without first taking action as ordained by law to rectify his own register by letter 10.10.48 (D15) informed the Registrar General of this decision and requested him to delete the name of Dhammarakkhitha Thero as the robing tutor of Vajiragnana Thero in Cage 7 of his Upasampada Declaration. This accounts for the absence of the name of Dhammarakkhitha Thero as the robing tutor in cage 7 of D5, the Upasampada Declaration of Vajiragnana Thero produced by the 1st defendant.

The learned District Judge has held that Vajiragnana Thero had refused to submit to the jurisdiction of the Chapter and therefore the Chapter had no jurisdiction to try the matter and could not have therefore given the decision. He has commented on the fact that the proceedings conducted by the tribunal were not available for reference and that there had been no proper assembly of the Chapter.

Mr. Siriwardane for the plaintiff has severely criticised the constitution of this tribunal, the procedure it has adopted and the decision it has given and submitted that the defendant was not bound by the decision. He urged the following broad grounds in support of his contention.

(1) That the Maha Sangha Sabha had no jurisdiction to deal with that question and the matter had not been dealt with by a proper assembly of the Chapter.

(2) That there was no submission on the part of the plaintiff to abide by the decision of the tribunal.

(3) That no preliminary inquiry was held by the Chapter before the final decision was made by it in accordance with its practice.

(4) That the tribunal failed or refused to take into consideration a material fact, namely, the decision of the Maha Sangha Sabha (P 2) of 1934 which had already held that Vajiragnana Thero was the pupil of Dhammarakkhitha Thero.

(5) That the Maha Sangha Sabha itself has not recognized or given effect to this decision.

Gratiaen, J. in *Saranankara Thero v. Dharmmananda Thero,* 55 N.L.R. 313 at 314, refers to the well-established rule of law whereby persons who voluntarily submit a dispute to a non-judicial or domestic forum must abide by its decision unless it is vitiated by misconduct or substantial irregularity of procedure or by the violation of the principles of natural justice. He then refers to the procedure in the Ecclesiastical Court of the Malwatte Chapter which deals with disciplinary matters relating to Buddhist priests owing allegiance to the Malwatte Chapter. The traditional procedure for the settlement of disputes was for the one party or the other to start proceedings before the Chapter by sending a petition ; the Chapter thereupon issues notice to the party against whom the complaint was made ; and the preliminary investigation of a quasi-judicial nature was then held by one or more priests selected for the purpose, after which the final decision was reached by the Sangha Sabha. The other imperative requirements are that the rule expressed in the maxim *audi alteram partem* must be observed—*Dhammarama v. Wimalaratne,* (1913) 5 Bal. N.C. 57, and that the jurisdiction must not be exercised arbitrarily but with due regard to regularity and fairness. It was open to an individual if his civil rights have been involved to question the findings of any such tribunal before the Civil Courts on the ground of gross irregularity or improper conduct on the part of the tribunal but the onus of establishing such or any other ground he may urge was upon the person averring them. When an Ecclesiastical Court has jurisdiction to give a decision on any matter, the Court on proof thereof and in the absence of irregularity or improper conduct enforces such a decision. (See *Attadassa Unnanse v. Revata Unnanse,* 29 N.L.R. 361 ; *Terunnanse v. Terunnanse,* 6 T.C.L.R. 22.)

The learned trial Judge appears to be justified in not acting on the material produced at the trial in proof of such proceedings. The Secretary of the Chapter who gave evidence stated that the documents relating to the proceedings spoken to by the defendants could not be traced at Malwatte where they should have been properly deposited. Reference has also been made to the fact that on a termination of proceedings it was in the first instance, incumbent on the Malwatte authorities to rectify their own records before requesting the Registrar-General to alter his registers. The existing records at Malwatte remains unaltered and in no way reflects the outcome of this inquiry. Mr. Siriwardene has accordingly contended that the absence of such rectification is indicative of the informal and irregular nature of the alleged inquiry.

Further, what we have before us are some isolated documents pertaining to the inquiry and they do not appear to constitute a proper record of the proceedings coming from the authority who should have custody of the material. Undoubtedly some sort of inquiry did take place. The documents produced show that the matter had come before the Sangha Sabha at one of the monthly meetings of the Chapter. Mr. Siriwardene submitted that this was not a proper meeting of the Chapter for this purpose. There seems to be some doubt even on this question. He also argued that the decision was one that has not been arrived at in accordance with the practice obtaining at such meetings.

Other irregularities in the proceedings have also been brought to our notice. The evidence led at the trial indicated that the practice was to hold a preliminary investigation before the matter was finally decided. Such a preliminary investigation has not been held in this case. As regards the inquiry itself, the letter P2 sent to the plaintiff giving notice of the inquiry, has stated that the inquiry was to be held on the 5th October, 1947. The judgment D7, however, shows that the actual inquiry took place on the 2nd November, 1947. There is no material to show as to what transpired on the 5th October nor is there evidence to show that the plaintiff was noticed to appear again on the 2nd of November.

As regards the evidence at the inquiry, Rev. Gnanissara Thero who had come forward to give evidence in favour of the plaintiff was excluded from the inquiry on the ground that he refused to be sworn. It has been suggested that an unnecessary obstacle —as this was not the normal practice—was placed to prevent this witness from giving evidence. It seems to us that even the burden of proof has been placed wrongly on the plaintiff who was asked to establish matters (which were *prima facie* matters of record contained in documents in their custody) more than forty years after their occurrence. In this connection it should be mentioned that the judgment of the Sangha Sabha contains no reference to the previous decisions of the Maha Sangha Sabha, where in 1934 it cancelled an earlier order (mistakenly made by the Sanga Sabha) and by its judgment confirmed the the fact that Dharmmarakkhitha Thero was the plaintiff's robing tutor. *This was a serious omission of a material fact.* In all these circumstances, I feel that the learned trial judge was right when he thought it was unsafe to hold that the material placed before him constituted an adequate record of proceedings before a valid tribunal. In any event, there is, in this case such substantial irregularities in the procedure at such inquiry and a violation of the principles of natural justice that little reliance can be placed on that decision, even assuming that the tribunal had jurisdiction to consider the matter.

I would, therefore, hold that the purported decision of the Maha Sangha Sabha (D7) dated 2.11.47 does not operate as an estoppel or as *res judicata* against the plaintiff's claim that Vajiragnana Thero, his tutor, was the robed pupil of Dhammarakkhitha Thero.

I shall next deal with the question whether the plaintiff is successor-in-title of Vajiragnana Thero to the incumbency. Vajiragnana Thero had two pupils by robing, the senior of whom was Gnanawasa Thero who was robed according to his Upasampada Declaration P74 in 1934 and the plaintiff who according to the Upasampada Declaration D39 was robed in 1940.

The plaintiff's case is that Gnanawasa Thero abandoned his right to the Viharadipathiship of the temple and thereupon he became the lawful Viharadipathi. On this point Gnanawasa Thero himself gave evidence for the plaintiff and stated quite

categorically he was not claiming any rights to the temples of Vajiragnana Thero. In any case he is not claiming any right to the Viharadipathiship of the temple in question. He is not challenging the plaintiff's claim that he had abandoned his rights to the Viharadipathiship of the temple. He is at the moment the Viharadipathi of Diyawadanaramaya temple. Although learned Counsel for the appellant submitted that this evidence was insufficient to prove abandonment I would, however, agree with the finding of the learned District Judge that Gnanawasa Thero had abandoned his rights and therefore the plaintiff succeeded to the rights of Vajiragnana Thero as Viharadipathi of the temple in question.

The 1st defendant has claimed title to the Viharadipathiship by prescription. The learned District Judge held that the 1st defendant was not a robed pupil of Dhammarakkhitha Thero, and that therefore he was occupying the temple in the character of an imposter or trespasser. I have already agreed with this finding. He cannot by mere occupation of the temple acquire prescriptive title to the Viharadipathiship of the temple (see *Saranankara Thero v. Dhammananda Thero,* 55 N.L.R. 313). An argument was presented to us on the basis that the plaintiff's cause of action arose only on the death of the 1st defendant which took place in 1972 as the 1st defendant was entitled to the incumbency until his death. I cannot agree with this contention as it is tantamount to holding that an imposter can acquire rights to an incumbency by prescription and till his death his rights cannot be interfered with. It is settled law that an imposter cannot acquire an incumbency by prescription. It may well be that Vajiragnana Thero in his life time may not have been able to institute an action to eject the 1st defendant after the relevant period of prescription had passed. But on the death of Vajiragnana Thero on 28.5.62, a fresh cause of action has accrued to his pupil, the plaintiff, and he can bring an action within the prescriptive period which he has done.

The 3rd defendant also took up the position that the plaintiff's action was barred by lapse of time in that it had been instituted 3 years after the date of ouster from the temple. The learned District Judge has held that the right to sue accrued to the plaintiff only in 1962 after the death of his tutor Vajiragnana Thero and that it was only after that event that the plaintiff was entitled on his own right to file an action. I agree with the learned District Judge. The plaintiff's action, therefore, having been brought within 3 years, even on the assumption that the prescriptive period is 3 years, is not barred by lapse of time.

The learned District Judge has held that the 1st defendant was an imposter or trespasser and the 3rd defendant was an agent of the 1st defendant and had no rights of his own, therefore, neither the 1st defendant nor the 3rd defendant was entitled to reside in that temple or be maintained from the temple funds. I, therefore, agree with the judgment of the learned District Judge ejecting the 3rd defendant from the temple in question.

The appeal of the 1st defendant-appellant is declared abated and dismissed. The appeal of the 3rd defendant-appellant is dismissed with costs.

MALCOLM PERERA, J.—I agree.

WANASUNDERA, J.—I agree.

Appeal of 1st defendant-appellant abated.

Appeal of 3rd defendant-appellant dismissed.