1933 *Present :* **Garvin A.C.J. and Maartensz A.J.**

HANIFFA *v.* OCEAN ACCIDENT AND GUARANTEE CORPORATION, LIMITED.

122—D. C. (Inty.) Kandy, 43,078.

Cause of action—Accident insurance—Obligation to indemnify—Where does the cause of action arise?—Jurisdiction—Roman-Dutch law.

The obligation to indemnify contained in a policy of insurance against damage by accident must be determined in accordance with the Roman-Dutch law.

In that law, the place where the cause of action arises must be ascertained with reference to the rule that, in the absence of a special agreement, an obligation must be performed at the place at which the contract was entered into.

Where the main purpose of an insurance policy is to indemnify the insured against damage from accident, the circumstance that, incidentally, the policy also gives cover in case of damage by fire does not convert what is in its essence and substance a policy of accident insurance into a policy of fire insurance.

THIS was an action to recover a claim based upon a policy of insurance against accident made in respect of a motor lorry. The defendants took the preliminary objection that the District Court of Kandy had no jurisdiction to entertain the action. The defendant company was resident in Colombo and it was held that the contract was also entered into at Colombo. But it was contended by the plaintiff that the cause of action, which was the failure to pay his claim, arose within the jurisdiction of the District Court of Kandy as the plaintiff was resident at Wattegama which was within that jurisdiction. The learned District Judge upheld the contention.

H. V. Perera (with him *Gratiaen* and *D. W. Fernando*), for defendant, appellant.—The only point that arises on this appeal is a question of jurisdiction. Plaintiff has sued the defendant company on an accident insurance. There are two causes of action—(1) in respect of actual loss, (2) third party claim. The action has been instituted in the District Court of Kandy. Defendant is resident in Colombo and contract was entered into in Colombo. The learned District Judge has gone on the question of convenience, but no sufficient cause has been given for conferring jurisdiction on the District Court, Kandy.

[MAARTENSZ J.—Where was the accident ?]

At Kadugannawa. Accident alone would not do. There must be a claim. Until such claim be made one of the contracting parties would not know that events had taken place making them liable. Immediately the claim is made liability arises.

[GARVIN J.—Where has the claim to be made ?]

The claim has to be made in Colombo as the condition of the policy so states.

Cause of action here is the repudiation of the liability and hence the Colombo courts have jurisdiction.

[GARVIN J.—What is the ground on which the District Judge has assumed jurisdiction ?]

The District Judge has applied English law, the principle being that the debtor must seek out the creditor. The cases under the English law arise under specific provisions, *e.g.*, Sale of Goods Act, Fire Insurance. It is submitted that in this case the English law would not apply as it is a case of accident insurance. The appropriate rule to be applied is the rule of the Roman-Dutch law that the creditor must make a demand from the debtor and this can be done only where the debtor resides. The refusal giving rise to the immediate cause of action would thereby arise where the debtor resides.

Ordinance No. 22 of 1866 (Vol. I., p. 648) does not introduce principles of the English Common law. In any event in cases of insurance this Ordinance applies only to fire and life insurance but not to accident insurance.

[MAARTENSZ J.—Is the rule of Roman-Dutch law that the creditor must seek out the debtor ?]

Yes, *vide Subetheris v. Singho*[1] and *Lee (1st ed.), p. 225.*

Under English law the principle that a cause of action arises at place of payment has been applied always where there has been a credit sale.

Even under English law where there is an unliquidated claim it is doubtful whether the above principle would apply, or, in such a case, it is inappropriate to speak of creditor and debtor.

The term "creditor" is discussed in *Fernando v. Fernando*[2]. Counsel cited Morice on *English and Roman-Dutch Law, p. 95,* and *Van Leeuwen 4. 40. 6.*

The principle of the Roman-Dutch law is now simple—where parties agree on a place of payment it should be made there ;—if not, where parties choose to enter into the contract. This is also reasonable as all obligations arising from the contract, unless specifically exempted, must have been expected to be fulfilled at the place of execution of agreement.

E. Navaratnam, for plaintiff, respondent.—The cause of action is to be proved by examination of two documents, viz., the proposal and the policy. There is no obligation to repair the vehicle. This can only be fulfilled at the place of accident which is admittedly within Kandy jurisdiction. If there is any doubt, the document should be construed against the insurers, *vide 17 Halsbury 1138.*

[1] *32 N. L. R. 360.* [2] *26 N. L. R. 292.*

November 24, 1933. GARVIN A.C.J.—

The only question which arises upon this appeal is whether the learned District Judge was right in his view that he had jurisdiction to entertain the action. The claim is based upon a policy of insurance against accident made in respect of a motor lorry. It was alleged that as a result of an accident which took place at Kadugannawa the plaintiff has sustained the damage in respect of which this action was brought. The defendant company took the preliminary objection that the District Court of Kandy had no jurisdiction to entertain the action. The parties are agreed that the defendant company is not resident within the jurisdiction of the District Court of Kandy. It has also been found by the learned District Judge that the contract was entered into at Colombo within the jurisdiction of the District Court of Colombo. But it was urged upon the learned District Judge that the cause of action which was the failure of pay the plaintiff's claim arose within the jurisdiction of the District Court of Kandy for the reason that as the plaintiff was resident at Wattegama within that jurisdiction it was the duty of the defendant company to pay these damages to him at his residence. The learned District Judge has upheld this view and it remains for us to consider whether he is right.

The main ground upon which the learned District Judge has arrived at his conclusion that he had jurisdiction is that this is a case to which the English law is applicable and that therefore the obligation of the defendant company must be determined with reference to the maximum of the English law that the debtor must seek out his creditor and make payment to him.

The first objection to the judgment is that this is not a case to which the English law is applicable. This is a form of insurance which is generally referred to as accident insurance. The obligation which was undertaken by the defendant company was to indemnify the insured in respect of the motor vehicle in question up to a limit of Rs. 15,000 in respect of claims resulting from death or bodily injury to third parties and accidental damage to property and various other risks amongst them damage by fire. The law applicable in the case of life and fire insurance in the English law—see Ordinance No. 22 of 1866, and Ordinance No. 5 of 1852. The learned District Judge seems to think that inasmuch as some of the risks covered by this policy relate to death or bodily injury and to destruction or damage by fire that the policy is brought into close approximation with life insurance on the one side and fire insurance on the other and that therefore he was justified in his view that the law applicable was the English law. But in so far as the policy refers to death or bodily injury, the learned District Judge is mistaken in treating it as akin to a policy of life insurance in that the risk is what is generally known as a third party risk and has no relation whatever to the life of the insured. Nor is it possible to accept the learned District Judge's view that, inasmuch as one of the risks covered by the policy is fire, that immediately entitles him to treat this as a policy of fire insurance. An examination of the policy and all its terms and conditions clearly takes it outside both the category of life insurance and that of fire insurance. It is a form of policy with which we are now familiar. The main purpose of it is to indemnify the insured against damage from

accident. The main risks are clearly specified and the mere circumstance that incidentally the policy also gives cover in the case of damage by fire does not convert what is in its essence and substance a policy of accident insurance into a policy of fire insurance. The matter, therefore, must be determined with reference to the rules of the Roman Dutch law. Contracts of indemnity are not unknown to that system and if the matter be determined in accordance with the rules of the Roman-Dutch law the place where the cause of action arose must be ascertained with reference to the rule, that in the absence of a special agreement an obligation must be performed at the place at which the contract was entered into—see Lee's *Roman-Dutch Law (1915 ed.), p. 225,* and also Morice's *English and Roman-Dutch law (2nd ed.), p. 95.* In this view the cause of action, *i.e.,* the failure to indemnify the plaintiff, arose at Colombo outside the jurisdiction of the District Court of Kandy.

There are other objections which have been raised to the application of the principles of the English law, namely, that it is a question whether it is possible to treat a person who makes a claim for unliquidated damages as a creditor. But it is unnecessary to examine this argument further since the matter appears to be concluded for the reasons already given.

Learned counsel for the respondent did not appear to us to endeavour seriously to support the judgment for the reasons given by the learned District Judge but he submitted for our consideration a somewhat different contention. He urged that in reality the cause of action here arose in Kadugannawa where the accident occurred. It was urged that inasmuch as by reason of certain provisions in this policy there was reserved to the defendant company the right in certain circumstances to take over the vehicle, to repair it themselves or to cause it to be repaired and alternately to exercise various rights, that it must be taken that, where upon notice of the accident they failed to exercise any of these rights, a cause of action arose and that that cause of action arose at Kadugannawa. I am unable to accede to this contention. The obligation which the defendant company had undertaken was to indemnify the insured. Their failure to exercise any of the rights reserved to them does not give the plaintiff a cause of action. They were entitled to an opportunity in terms of this agreement to exercise any of these rights if they so desired, but their obligation from the first to the last was an obligation to indemnify the plaintiff and the cause of action was their failure to do so.

For reasons already given, it seems to me that any cause of action based upon an alleged failure on the part of the defendant company to pay a claim based upon this policy must be taken to have arisen within the jurisdiction of the District Court of Colombo.

The appeal must therefore be allowed and the plaintiff's action will stand dismissed with costs both here and below.

MAARTENSZ A.J.—I agree.

Appeal allowed.