*Present:* Lyall Grant J. and Maartensz A.J. 1926.

DE SILVA *v.* DHEERANANDA THERO.

*388—D. C. Galle, 21,331.*

Quia timet *action—Right of a trustee—Buddhist Temporalities—Prescription—Transfer by incumbent.*

The trustee of a Buddhist temple may maintain an action *quia timet* to set aside a deed by which a priest, claiming by virtue of pupillary succession, transferred land belonging to the temple, even though the trustee's enjoyment of the land has not been interfered with.

APPEAL from a judgment of the District Judge of Galle. The plaintiff, as trustee of a temple called Dhammayuttikaramaya, sought to set aside a deed which the 1st defendant had executed in favour of the 2nd defendant for certain lands alleged to be part of temple property. The 1st defendant claimed the land by pupillary succession from a previous incumbent. He also had a residence on the land. The learned District Judge gave judgment for the plaintiff.

*H. V. Perera* (with *D. B. Jayatilleke*), for defendants, appellants.

*J. S. Jayewardene*, for plaintiff, respondent.

September 3, 1926. LYALL GRANT J.—

In this action the plaintiff, as the trustee of the temple called Dhammayuttikaramaya, sought to set aside a deed which the 1st defendant had executed in favour of the 2nd defendant for certain lands alleged by the plaintiff to be part of the temple property.

The learned District Judge has entered judgment in favour of the plaintiff, with costs. It is common ground that there has been no formal dedication of these lands to the temple, but the learned District Judge has held that the trustee has acquired by prescription the right now to regard the land as temple property.

This finding by the District Judge answers the 1st, 2nd, and 5th issues in the case. He has not dealt specifically with the 3rd and 4th issues, but he has impliedly answered them in the affirmative as he has entered judgment for the plaintiff.

The 3rd issue is: Under the circumstances, is a *quia timet* action appropriate? And the 4th issue is: Is the plaintiff entitled to have deed No. 878 of 1922 set aside and cancelled?

1926.

LYALL GRANT J.

*De Silva v. Dheerananda Thero*

On appeal it was not seriously disputed that the plaintiff had acquired a prescriptive right to the lands, but it was argued that this did not give him a right to get the deed set aside.

Counsel for the appellant relied mainly upon two arguments:— (1) Assuming the plaintiff has full title to the lands, he is not entitled to maintain a *quia timet* action inasmuch as his enjoyment of the lands has not been interfered with, and (2) even though a full owner could maintain such an action, a person relying merely on a prescriptive right has not full title to the land and therefore cannot do so.

On the former of these points we were referred to a number of cases, the effect of which is to define the circumstances under which a *quia timet* action can be maintained.

In *Medankara Terunanse v. Charles Dias* [1] it was decided by Burnside C.J. and Clarence J. that a person entitled to the right of possession under a Crown grant could maintain an action of ejectment and have his own title declared although no ouster had been proved. In that case the possession was apparently by the defendant. Clarence J. indicated that the Court will not investigate a question of title merely because somebody disputes the title without going the length of disturbing the plaintiff's enjoyment. The learned Judge, however, adds the words: "excepting, of course, in cases which fall under the definition of actions *quia timet*."

In *De Silva v Ondaatjee*,[2] Burnside C.J. said that the mere sale by one man of the lands or goods of another, without doing any act to disturb the physical possession or title of the owner gives the latter no cause of action. Dias and Lawrie JJ. do not appear to have agreed with this dictum. Lawrie J. said that where it was admitted that a defendant claimed to be the sole owner of land to which he was entitled jointly with the plaintiff, and that he executed a notarial deed of sale purporting to sell the whole land and delivered the instrument to the vendee, who registered it, there was a sufficient cause for action against him by the plaintiff for a declaration of the plaintiff's title and damages.

In *Atchy Kannu v. Nagamma*,[3] Middleton J. and Wood Renton J. held that where a person, who is entitled to the life interest of a property only, executes a deed conveying the *corpus*, those in whom the *dominium* is vested are entitled to maintain an action to have such conveyance set aside to the extent of their interests.

In *The Ceylon Land and Produce Co., Ltd. v. Malcolmson*,[4] Hutchinson C.J. and Wood Renton J. held that where a person takes a mortgage of a land belonging to another from a third party

[1] *(1886) 7 S. C. C. 145.*
[2] *(1890) 1 S. C. Rep. 19.*
[3] *(1906) 9 N. L. R. 282.*
[4] *(1908) 12 N. L. R. 16.*

and puts such mortgage in suit and obtains decree thereon, the true owner has a sufficient cause of action against such person to maintain an action *quia timet*. In this case Wood Renton J. reviewed the previous cases at some length, and stated that the necessary ingredients in an action *quia timet* are (*a*) actual or imminent injury and (*b*) prospective damage of a substantial but not irreparable kind.

In that particular case the deciding factor which contained both these ingredients was the registration of the competing document.

In the present case the 1st defendant claims to have acquired the land by pupillary succession from a previous incumbent, and on one of the lands there is a residence for a priest.

It appears to us that there is ample reason for the plaintiff to fear that the deed in question may be used to his prejudice. The 1st defendant has a residence on the land; by the execution of this deed he has made a definite claim that that residence is independent of the plaintiff, and if the plaintiff does not now assert his rights, he may be taken in future as having acquiesced in the possession.

It was, however, also argued that as the plaintiff himself could not show title to the land, but relied merely upon prescriptive possession, he was not entitled to maintain this action. I am unable to follow this argument. Section 3 of the Prescription Ordinance allows the plaintiff, who has possessed land for ten years, to bring an action for the purpose of being quieted in that possession or to prevent encroachment or usurpation thereof or to establish his claim in any other manner.

We were referred to the case of *Terunnanse v. Menike.*[1] The facts, however, in that case are materially different. There the plaintiff endeavoured to set up a third person's title, and what was laid down was that the actual possessor must be a party to the suit.

The plaintiff in the present action appears to us to fall entirely within the scope of section 3 of the Prescription Ordinance.

For these reasons we dismiss the appeal, with costs.

MAARTENSZ A.J.—I agree.

*Appeal dismissed.*

[1] *(1895) 1 N. L. R. 200.*