1955 *Present :* Sansoni, J., and Fernando, A.J.

N. H. MOHAMED *et al.*, Appellants, *and* K. M. S. ABDUL GAFOOR, Respondent

S. C. 416–417—D. C. Kegalla, 4,483

Constructive trust—Minor—Person in fiduciary relation entering upon and possessing minor's estate—His liability as trustee—Agent—His status as express trustee—Prescription—Fraud—Trusts Ordinance (Cap. 72), ss. 82, 90, 92, 111.

Plaintiff was a minor and lived with his elder sister. Each of them was entitled to a half share of the business of a Tea Factory. Defendant, who was the husband of the sister, of his own accord undertook to manage the business on behalf of the plaintiff and conducted the entire business.

Held, (i) that under section 90, read with section 82, of the Trusts Ordinance the defendant was a constructive trustee as an agent who stood in a fiduciary relation to the plaintiff and, accordingly, held the half share of the business for the benefit of the plaintiff.

(ii) that, inasmuch as a person in the position of an agent is generally treated by English law as an express trustee, the provisions of section 111 (5) of the Trusts Ordinance precluded the defendant from pleading the benefit of the Prescription Ordinance.

(iii) that the liability of the defendant as trustee extended for a short period beyond the period of minority of the plaintiff in regard to profits derived from transactions with third parties.

(iv) that section 111 (1) (*b*) of the Trusts does not require the element of fraud to be proved in order to avoid the plea of prescription.

APPEAL from a judgment of the District Court, Kegalla.

N. E. Weerasooria, Q.C., with *V. A. Kandiah*, *S. W. Walpita* and *O. S. M. Seneviratne*, for the defendants (appellants in Appeal No. 416 and respondents in Appeal No. 417).

C. Thiagalingam, Q.C., with *H. W. Tambiah* and *V. Ratnasabapathy*, for the plaintiff (respondent in Appeal No. 416 and appellant in Appeal No. 417).

Cur. adv. vult.

January 3, 1955. FERNANDO, A.J.—

The plaintiff instituted this action on February 1946, claiming as against the 1st defendant an accounting in respect of a business carried on at premises known as " The Mawanella Tea Factory " for the period of three years prior to institution of action, and for judgment for Rs. 36,000 representing a one half of the profits of the business for the same period. The 2nd defendant (wife of the 1st) was for reasons which will presently appear added as a necessary party. The claim was founded on the averments :—

(*a*) that one Seyadu Lebbe, the father of the plaintiff and of the 2nd defendant, carried on the business of the manufacture of tea at the Factory ;

(*b*) that Seyadu by two deeds of 1938 (P2 and P3) transferred, to the plaintiff and the 2nd defendant, a half share each of the factory machine and business ;

(*c*) that from about 1939 (the year in which Seyadu died) the 1st defendant managed the business for and on behalf of the plaintiff, who was then a minor, and of the 2nd defendant.

The defendant first filed answer on July 4, 1946, substantially admitting the averments which I have summarized at (*a*) and (*b*) above, and in addition referring to a Deed of lease of 1928 (also numbered P3) which purported to be a lease to Seyadu of the Factory and the land on which it stood for a term of 50 years. They however denied the averment mentioned at (*c*) above and stated instead that, in 1939, one Naina Mohamed took charge of the Factory on an undertaking given by the plaintiff and the defendants to put the Factory in working order and on an agreement to pay Rs. 100 per month if the undertaking was carried out. The answer further stated that the Factory was only put into working order by 1942 (but solely by the 1st defendant and at a cost to him of about Rs. 6,000), and that Naina Mohamed paid Rs. 100 per month to the 1st defendant from February 1942. They further answered that the 1st defendant worked the Factory from May 1944 under his own name and with his own capital. The 1st defendant was also stated to have spent Rs. 1,600 on extensions to the Factory, and a further Rs. 1,300 in defending an action No. 1883 of the District Court of Kegalle, and to have paid sums aggregating to Rs. 1,200 to the plaintiff. The answer concluded by allowing credit to the plaintiff in a sum of Rs. 2,550 being his half share of the monthly rents, and claiming in reconvention the amount of the difference between the expenses incurred by the 1st defendant and the sum allowed as credit to the plaintiff.

Before I refer to subsequent history, it is helpful to note the obvious implications of this answer :—

(i) it is admitted that the plaintiff was entitled to a half share of the leasehold interest in the Factory as successor in title of his father Seyadu as from the date of Seyadu's death, if not earlier ;

(ii) it is admitted that the plaintiff was entitled to a half share of the rent of the Factory for 51 months from February 1942 (when rent was first paid by Naina Mohamed), i.e. until February 1946 (when the plaint was filed) ;

(iii) in view of (i) and (ii) above, the 1st defendant was from May 1944 the sub-tenant of the Factory under the plaintiff and the 2nd defendant ;

(iv) the plaintiff is liable to re-imburse the 1st defendant for the expenses incurred by him in installing machinery and extending the Factory, which expenses must therefore be presumed to have been incurred by the 1st defendant on behalf of the plaintiff. (The re-imbursement should correctly have been claimed only as to one half of the expenses, since the 2nd defendant held the other half share of the leasehold interest).

In January 1948 (18 months later !) the defendants filed an amended answer in which they sing quite another tune. They say at this stage that the interest which the plaintiff derived from his father was extinguished by a Partition Decree of May 1941 (which divided into Lots the estate on which the Factory stood among the co-owners of the estate and which did not expressly keep alive the lease granted to Seyadu in 1928), and that the plaintiff ceased to have any interest in the Factory or business after that decree ; as a second line of defence, they refer to Case No. 1883 (D13 of 1941) which was ended by a consent decree (D13 of 10th November 1943), and state that any rate the plaintiff ceased to have any interest from the latter date. The averments as to expenses incurred by the 1st defendant are pleaded again, but no claim in reconvention is now made. Nor does this answer refer at all to Naina Mohamed's alleged tenancy of the Factory. Furthermore the 1st defendant's alleged 'sole ownership' of the Factory is now ante-dated to November 1943, instead of May 1944.

The plaintiff (or his advisers) also appear to have had second thoughts. He moved in December 1948 to amend his plaint by deleting the references to the three year period before action, an amendment which in substance meant that his claim for an accounting and half the profits would cover the whole period from 1939 to the date of the plaint in 1946. The defendants objected to the amendment, but it was allowed by the District Judge on condition that the defendants could raise a plea of prescription without first amending their pleadings. The following were the principal issues raised at the trial. I have for convenience noted the answers of the learned Judge to each of them :—

4. Did the 1st defendant from 1939 manage the said business for or on behalf of the plaintiff who was a minor at the time ? *Answer*—Yes.

5. Is the 1st defendant the Manager and Agent of the plaintiff's half share of the said business ? *Answer*—Yes.

6. Is the plaintiff entitled to an accounting from the 1st defendant from the year 1939 ? *Answer*—Yes. Up to the end of December 1943.

7. If so what sum is due from 1st defendant to plaintiff ? *Answer*—To be determined after an accounting is taken.

8. Were the rights, if any, conveyed by deeds No. 53 and 54 wiped out by the partition decree dated 15th May 1941, in D. C. Kegalle Case No. 1415 ? *Answer*—No.

12. After the date of decree in Case No. 1883 (10.11.43) is the plaintiff entitled to claim any benefit under or on the basis of the said deed No. 53 ? *Answer*—No.

13. Did the 1st defendant work the said Factory as his sole business as from January 1944 ? *Answer*—Yes.

18. Does the plaint disclose a cause of action against the defendant ? *Answer*—Yes.

19. Is the claim, if any, of the plaintiff before 1.2.43 prescribed ? *Answer*—No.

21. In Case No. 1883 D. C. Kegalle, did the plaintiff acquiesce in the position that he was not entitled to any right or benefit by virtue of deed No. 53 ? *Answer—Yes.*

22. If so, is the plaintiff now estopped from claiming rights or benefits under the said deed ? *Answer*—Yes from December 1943.

It is noteworthy that the defendants did not, even as a counter to issues 4 and 5, put in issue the question (raised in the original answer) whether Naina Mohamed took charge of the Factory on his own account in 1939 and whether therefore the 1st defendant was not answerable to the plaintiff in respect of the profits derived during Naina Mohamed's regime. But this question was the one mainly agitated at the trial, and by far the largest part of the oral evidence and of the mass of documents in the case were relevant only to that question. The learned District Judge has, with admirable brevity, considered that question : he finds that Naina Mohamed did in fact " work the Factory " from 1939 until February 1944, *but that " the 1st defendant was the real person who was running the Factory "*. It is the latter part of his finding that Mr. Weerasooriya strongly challenges in appeal.

The parties are Muslims ; the plaintiff was in 1939 a youth of seventeen ; the 1st defendant was the husband of his elder sister by a former marriage ; when his father died, plaintiff lived with that sister and subsequently in the Factory, but often took his meals at the sister's house near the Factory ; he and his sister were at that time co-owners of the Factory ; the 1st defendant contrived at his own cost to settle a maintenance case instituted against the plaintiff. All these facts are not denied by the defendants. The plaintiff's evidence, which the learned Judge has believed in preference to that of the 1st defendant and Naina Mohamed,

is that the 1st defendant ' agreed to work the Factory for him and his sister '. If the business of the Factory had been conducted by the sister upon a similar understanding, Section 90 of the Trusts Ordinance would undoubtedly have applied to protect the interests of the minor plaintiff, and to my mind it makes no difference that the business was conducted by the sister's husband ; he was either a trustee, or at best an agent, for his own wife, and if he took charge of the Factory in either capacity he was bound to ' protect the interests ' of the minor plaintiff. The suggestion that the Factory was first worked after Seyadu's death by Naina Mohamed on his own behalf is contradicted by the documentary evidence, because the books of Bartleet and Co. show that from January to October 1940 the account for the Factory was in the name of the 1st defendant and not of Naina Mohamed. If indeed it is true that Naina Mohamed worked the Factory on his own account, one would expect him to have dealt with the books in his own name ; the learned Judge has rejected the specious explanation that dealings were conducted by the 1st defendant because of Naina Mohamed's ignorance of commercial transactions, and I feel quite unable to disagree with the Judge on this point. The finding which Mr. Weerasooriya attacks has therefore to be sustained, subject only to the modification that I would hold that, during the period ending in November 1943, the 1st defendant did not merely manage the business on behalf of the plaintiff, as respects a half share, but was under Section 90, read with Section 82 of the Trusts Ordinance, a constructive trustee, and accordingly held the half share of the business for the benefit of the plaintiff. The whole of the evidence in the case was read to us at the argument in appeal, parts of it more than once ; without now referring to various items of evidence, I am content to say that the case presented by the defendants was so full of inconsistencies and improbabilities that the learned Judge was rightly unable to rely upon the evidence they adduced ; the change of ground which they adopted when they filed their second answer was in the light of the admissions they were willing to make originally yet another reason why their defence had to be looked upon with deep suspicion.

There next arises for consideration the question of law raised by Mr. Weerasooriya, namely whether the order allowing the amendment of the plaint on December 22, 1948, was bad in that it permitted the inclusion of a cause of action which was time-barred at that date. I am inclined to think that the question does not arise, for the reason that the real effect of the amendment was not to add a new or distinct cause of action, but only to seek fuller relief on the same cause of action as was originally pleaded. But it is unnecessary to consider that aspect of the matter, because even if the amendment had the effect of adding a new cause of action, the new cause would not itself have been barred by the lapse of time.

Section 111 of the Trusts Ordinance makes the Prescription Ordinance inapplicable to a claim by a beneficiary against a trustee founded upon any fraud or fraudulent breach of trust, or to a claim to recover trust property or the proceeds thereof still retained by a trustee. But by sub-section (5) the exception does not apply to constructive

trusts, except in so far as such trusts are treated as express trusts by the law of England. The plaintiff's evidence (accepted by the learned Judge) shows that the 1st defendant of his own accord undertook to manage the business on behalf of the plaintiff. The 1st defendant was as I have held a constructive trustee as an 'agent' referred to in Section 90 of the Trusts Ordinance, and such an 'agent' is treated by English law as an express trustee and as such disabled from pleading the Statutes of Limitation. (Preston and Newsom—Limitation of Actions, 2nd Edn., p. 162, Halsbury, Hailsham Edn., Vol. 20, p. 755). This proposition is so clearly reasonable that I do not feel the need to examine it by reference to the authorities. I will only add that a 'commercial agent' would not necessarily be treated as an express trustee by the English law; but the 1st defendant cannot be said, in the circumstances of this case, to have merely acted in that capacity.

I pass now to consider the plaintiff's appeal against that part of the judgment and decree which denies to him an accounting in respect of the period commencing from December 1943. It is necessary in this connection to refer to the Action No. 1883 of the District Court of Kegalle which was instituted in 1941. One Susila de Silva had in the earlier partition action (to which I have already referred) been allotted the portion of the Estate on which the Tea Factory stood. In October 1941 she filed plaint against the present plaintiff and Naina Mohamed alleging that they were in wrongful possession of the Factory and claiming ejectment and damages; this plaint of course amounted to a denial by Susila de Silva of the plaintiff's leasehold interests. The present plaintiff and Naina Mohamed filed answer in 1942, pleading that the prior partition decree was not binding on them and that they were in occupation under the present 2nd defendant as successor of her father Seyadu. The present 2nd defendant was also added and filed answer on the footing that she was the lessee of the Factory. (I would point out, in passing, that the present plaintiff was then a minor and that according to the pleadings in the present case the 1st defendant claims to have spent Rs. 1,300 on behalf of the present plaintiff in connection with that Action No. 1883. In these circumstances, it is significant that the lawyers were not at that stage instructed to plead that the present plaintiff had a share in the leasehold interest.)

The action No. 1883 was ultimately settled in terms set out in the decree of 10th November 1943. The terms were that Susila de Silva will execute *in favour of the present plaintiff and the present 1st defendant* a lease of the Tea Factory for a period of 35 years at Rs. 75 per month. The lease was to be executed before the end of November 1943 at the expense of the lessees. It has to be conceded that the plaintiff was present at the settlement. He had attained majority five days earlier (5th November 1943). The evidence of Susila de Silva's husband was to the effect that, after the settlement, he wrote to both the plaintiff and the 1st defendant asking them to take up the lease, but that neither of them responded to this request. He says that thereafter (it is not clear when exactly), he gave an informal lease to the 1st defendant whom he thereafter regarded as his tenant.

The conclusion reached by the learned Judge upon the settlement decree of November 1943 and the evidence to which I have just referred is that the plaintiff agreed by the settlement to give up all his rights under the earlier lease to Seyadu and that his failure to take up the new lease in terms of the settlement disentitles him from making any claim against the 1st defendant in respect of the period subsequent to 1943.

I think this finding is open to criticism in one respect. The plaintiff has stated that the 1st defendant ' turned him out ' of the Factory in July 1944, and this was not contradicted. He must be taken to have been in the Factory during the first half of that year. Further, as I stated earlier, it is not clear when exactly the 1st defendant became the informal tenant of the Factory. He too had been written to several times by de Silva in regard to taking up the lease, but did not respond. All this must have taken some time. Moreover, although the defendants produced receipts for rent paid to Susila de Silva, the first of these is for the months of July and August 1944, a circumstance which supports the plaintiff's evidence that he was expelled in July. Hence it would seem that both the 1st defendant and the plaintiff (who as the Judge holds must be taken to have abandoned his *prior* right as lessee) were in occupation of the Factory in the faith of their rights under the decree of November 1943, so that the plaintiff was a joint lessee with the 1st defendant until July 1944, which was the month for which rent was proved to have been first paid by the 1st defendant.

The point of law raised by Mr. Thiagalingam is that, even though the informal lease was taken by the 1st defendant alone, he took it in right of an interest which he had jointly with the plaintiff, and must therefore hold it for the benefit of the plaintiff to the extent of the latter's interest. We have in this connection been referred to the leading cases. *Keech v. Sandford* (reported in White and Tudor's leading cases in Equity) and *Re Biss* [1]. The principle enunciated in the former case decided in 1726 is that if a person who holds a lease as trustee for an infant obtains a lease of the same property in his own name, he will still hold as trustee and be liable to account for the profits—this despite the fact that he may have taken the lease for himself only after the lessor had declined to renew it for the benefit of the infant. Snell (Principles of Equity, 21st Edition, page 124) states that " this principle has been extended to other persons who clearly occupy a fiduciary position, such as executors, administrators and agents, and the rule is in their case an absolute one just as in the case of an express trustee. " He says also that the rule has been extended " to persons who have a partial interest in a lease such as . . . . joint tenants and tenants in common, although such persons do not stand in a definite fiduciary relationship to the other persons interested . . . but the presumption of trust is in these cases rebuttable, and if they can show that they did not in any way abuse their position . . . . they can keep the renewed lease for their own benefit " (idem page 125). These principles of the English Law have been incorporated into sections 90 and 92 of our Trusts Ordinance, which sections must be applied in the same manner as these principles are applied by the English Courts.

[1] *1903, 1 Ch. 40.*

Having regard to these principles, I think that the settlement decree of November, 1943, is of no assistance to the 1st defendant. The decree recognised a prior claim (if not also the right) of the plaintiff to be a joint lessee, and gave him a right to a lease for approximately the balance period of the original 50-year term granted in 1928; it gave him that right jointly with the 1st defendant (presumably as husband of the 2nd); the two were accordingly jointly interested in obtaining the grant of the lease " although they may not have stood in a definite fiduciary relationship to each other ". I think therefore that the case is at least one where there is a rebuttable presumption of trust, and there is nothing in the evidence in this case which does rebut it. The continued joint occupation until July, 1944, " the turning out " of the plaintiff, and the contemporaneous assumption by the 1st defendant of the position of informal lessee indicate rather that he " abused his position ". Any doubt I might have had on the question whether the 1st defendant stood in a fiduciary capacity in July, 1944, is removed by the following observations :—*Halsbury* (Vol. 20 p. 717) :— " The entry on and possession of an infant's land by some person other than the father or mother may make the same rule applicable to such entry and possession. Where the person so held to be guardian or bailiff continues in possession after the infancy has ceased, he is supposed to continue in possession in the same capacity as before, unless something is done to change the character of the possession, and the statute will not run even after the infancy has ceased, until such character is changed. " *Lord Hardwicke* (cited in *Howard v. Earl of Shrewsbury* [1]) :— " Where any person, whether a father or a stranger, enters upon the estate of an infant and continues the possession this Court will consider such person entering as a guardian to the infant, and will decree an account against him, and will carry on such account *after the infancy is determined.* "

The case of *Waduganathan Chettiar v. Sena Abdul Cassim* [2] does not assist the defendants. Pulle J. was of opinion that a trust of the nature alleged in that case would not be treated in English Law as an express trust and he distinguished the case from that of *Arunasalam Chetty v. Somasunderam Chetty* which was decided by the Privy Council [3], where their Lordships approved the distinction stated by Lord Justice Bowen in *Soar v. Ashwell* [4] :—" An express trust can only arise between the cestui que trust and his trustee. A constructive trust is one which arises when a stranger to a trust already constituted is held by the Court to be bound in good faith and in conscience by the trust in consequence of his conduct and behaviour. " In the case before us the 1st defendant was no stranger who becomes bound by a trust already constituted, but an agent who stood in a fiduciary relation to the plaintiff.

It is claimed also for the defendants that fraud has not been pleaded and cannot therefore be regarded as having been established. But neither section 90 nor section 92, on which the appellant relies, render necessary the element of fraud ; those sections apply when two conditions exist, namely that a person is placed in a fiduciary relationship to another, and that he derives a personal advantage to the prejudice of the interests

[1] *1873 L. R. Equity Cases, at page 399.*
[2] *(1952) 54 N. L. R. 185.*
[3] *(1920) 21 N. L. R. 359.*
[4] *(1893) 2 Q. B. 390.*

of the other. The failure to aver fraud might also have been relied upon by the defendants as a ground for excluding the operation of section 111 of the Trusts Ordinance. But sub-section (1) (*b*) of that section does not require the element of fraud to be proved in order to avoid the plea of prescription.

Counsel also argued that the existence of a trust has been urged for the first time in appeal. This is not strictly so, because plaintiff's counsel had at the trial relied on the Trusts Ordinance. In any event, the plea and the issue that " the first defendant managed the business for and on behalf of the plaintiff, who was a minor at the time " were in my opinion quite sufficient to enable the trial Judge to decide the case on the footing of a trust. He erred in holding that the period for which the plaintiff is entitled to an accounting terminated in December 1943.

I would accordingly dismiss with costs the appeal of the defendants and allow the plaintiff's appeal with costs. The decree of the District Court will be set aside *pro forma*, and a decree entered ordering an account to be taken of the profits of the business of the Factory from 1939, until date of action and ordering the 1st defendant to pay to the plaintiff one half of the profits of the business until that date, together with the costs both of action and of these appeals.

SANSONI, J.—

I agree. I do not wish to recapitulate the facts. They establish the proposition, in support of which Mr. Thiagalingam cited authorities, that the 1st defendant was in a fiduciary position in relation to the plaintiff. He took charge of the Factory and worked it while the plaintiff was living with him and looked upon him as his guardian. It is probable that he sometimes put forward Naina Mohamed and sometimes himself as the proprietor of the business while they were in league to cheat the Income Tax Department and their creditors. It is almost impossible to unravel the tangled skein of their mutual dealings between the years 1939 and 1944. During that period their accounts seem to have been inextricably mixed together and both of them have represented themselves at different times as owners of the business. But I am satisfied that throughout that period it was the 1st defendant who was the actual manager, and not his brother-in-law Naina Mohamed. The legal position then is plain. When the 1st defendant entered into possession of the Factory he must be considered to have done so as the plaintiff's guardian and for the plaintiff's benefit; he became a trustee for the plaintiff and he is therefore liable to account from the time the plaintiff's title accrued. Leach, C. J., in *Kathorni Bi v. Abdul Wahab* [1] had a similar case to decide. He refers to the earlier English cases and points out that the equitable principles which they established have been embodied in sections 90 and 92 of the Trusts Ordinance (Cap. 72).

I shall assume that the lease in favour of Seyadu was wiped out by the Final Decree which was entered in May 1941 in the partition action. But that will not help the 1st defendant, because once he entered as the agent of the plaintiff, who at that time was regarded as a co-lessee with his step sister (the defendant's wife), his continued possession of the

[1] *A. I. R. (1939) Madras 313.*

Factory must be considered to have been on the same footing. On what other basis can the 1st defendant claim to have remained in possession ? It cannot be argued that the fiduciary relationship between the plaintiff and the 1st defendant could not exist apart from the lease which made no mention of either of them ; that relationship arose by operation of rules of equity, and the character of trustee with which the 1st defendant was clothed when he entered into possession could not be taken away from him by the acts of third parties, any more than he could rid himself of it by his own unilateral acts.

The settlement of 10th November, 1943, in case No. 1883 does not avail the 1st defendant either. The first point to be noted about it is that it was entered into only five days after the plaintiff attained the age of twenty-one. Where, as in this case, the relationship of guardian and ward had existed between the plaintiff and the 1st defendant for some years previously, there is a presumption in equity that undue influence continued for a short period after the relationship had ceased. See the cases cited by de Silva, A. J., in *Perera v. Tissera* [1] where a similar situation arose. Even at the time of the settlement and for some months thereafter the plaintiff was still working in the Factory and was clearly under the influence of the 1st defendant. No evidence at all has been led to show that before the plaintiff entered into the settlement he received honest and disinterested advice, nor has any attempt been made to establish the good faith of the transaction as required by section 111 of the Evidence Ordinance (Cap. 11). All throughout that case, it must be remembered, the plaintiff was under twenty-one years of age and no guardian ad litem was appointed to represent him. The 1st defendant, on his own admission, was conducting the defence of the plaintiff and financing it. This strengthens the presumption that any settlement entered into was reached in a situation where the 1st defendant considered his own interests, rather than the duty he owed to the plaintiff. Any advantage which the 1st defendant gained under that settlement—which was obviously made while the parties had in mind the earlier lease to Seyadu—must be held by him for the benefit of the plaintiff for he gained it by availing himself of his fiduciary position. It is not open to him to say that he ceased to be a trustee merely because of this settlement. Under Section 90 he continued to be subject to the disabilities of a trustee even though the terms of settlement do not make a reference to the earlier position of the parties.

The evidence established that the 1st defendant had ample means to obtain a lease for 35 years ; the husband of Susila de Silva was anxious that the lease should be executed ; yet for obvious reasons the 1st defendant did not choose to enter into the lease. He preferred to become a monthly tenant in respect of the Factory, fondly thinking that he would thereby extinguish the rights of the plaintiff. I do not believe that the plaintiff did not wish to enjoy the benefits of the contemplated lease. The receipt dated 10th May, 1944, which was issued to the plaintiff for rent paid by him to de Silva for the months of March and April, 1944, shows that the plaintiff's attitude was anything but one of indifference as regards his continuing as a tenant of de Silva. The defendant did

[1] *(1933) 35 N. L. R. 257.*

not even pay the costs of the action No. 1883. His conduct throughout has been dishonest and he crowned his dishonest dealings, which had begun from the time he entered into possession of the Factory, by turning the plaintiff out of the Factory in July 1944, and becoming the monthly tenant of de Silva. How aptly do the words of Lord King, L. C., in *Keech v. Sandford* (supra) fit this situation when he said :—" If a trustee, on the refusal to renew, might have a lease to himself, few trust estates would be renewed to cestuis que trusts ". The monthly tenancy which the 1st defendant created for himself alone, as he thought, must be presumed to be a tenancy for the benefit of the plaintiff and the 2nd defendant. As I hold that the 1st defendant was a trustee for the plaintiff both at the time of the settlement and at the time he became a monthly tenant, the presumption that he did so for the latter's benefit is absolute and irrebuttable according to the rule in *In re Biss* (supra). Romer, L. J., said in that case :—" The equitable doctrine I am considering is not limited in its application to cases where the old lease was renewable by agreement or custom, or where the new lease was obtained by surrender or before expiration of the old lease . . . . . And further I may note here that the cases show that, with regard to a person obtaining a renewal, who occupies a fiduciary position, it is contrary to public policy to allow him to rebut the presumption that in obtaining a renewal he acted in the interests of all persons interested in the old lease ". The 1st defendant continued to be a trustee for the plaintiff throughout and I hold therefore that the 1st defendant is liable to render an account for the entire period up to the time of filing this action.

On the question of the amendment of the plaint, this is one of those exceptional cases where, even if the claim covered by the amendment had been barred at the time of the amendment, the judge was fully entitled to allow the amendment. Lord Esher, M. R., in *Weldon v. Neal* [1] said that under very peculiar circumstances the Court might perhaps have power to allow such an amendment. But the plaintiff need not rely on this exception because the amendment did not set up a new cause of action. Further, the claim was not barred at the time of the amendment because a person in the position of the 1st defendant cannot plead the benefit of the Prescription Ordinance.

Finally, I do not agree with the submission of the 1st defendant's counsel that the question of a trust was not raised until the hearing of the appeal The averments in the plaint are sufficient to enable the plaintiff to rely on the equitable principles which we have applied in our judgments. It was not necessary for the plaintiff to plead those principles in his plaint ; their application to the facts as found is automatic. If there were any doubt in the matter I think the course suggested by Lord Atkinson in *Jayawickreme v. Amarasuriya* [2] could be adopted. The plaintiff has " established a good and meritorious cause of action according to the system of law applicable to the case " and the absence of the word " trust " from the plaint and issues should not bar his right to relief.

Appeal 416 dismissed.
Appeal 417 allowed.

[1] *(1887) 19 Q. B. D. 394.*

[2] *(1915) 20 N. L. R. 289.*