1944 *Present:* **Howard C.J. and Wijeyewardene J.**

DULLEWA *et al.*, Appellants, *and* SOMAWATHIE UPASIKA *et al.*, Respondents.

1—D. C. (Inty.), Kandy, 582.

Action under section 101 of the Trusts Ordinance—Alleged breach of charitable trust—Denial of trust by defendants—Right of plaintiffs to institute action.

An action may be instituted under section 101 of the Trusts Ordinance even where the defendants deny the existence of the alleged trust.

Where plaintiffs bring an action under that section for an alleged breach of a charitable trust they must allege and prove—(1) the existence of a charitable trust, (2) the breach of such trust by the defendants.

Where the cause of action is the necessity for the direction of Court for the administration of a trust the plaintiffs must allege and prove —(1) the existence of a charitable trust, (2) the necessity for the direction of Court.

APPEAL from an order of the District Judge of Kandy. The facts appear from the argument.

M. T. de S. Amerasekere, K.C. (with him *E. B. Wikremanayake*), for the plaintiffs, appellants.—This is an action instituted under section 101 of the Trusts Ordinance (Cap. 72). The first defendant denies that the property which is referred to in the plaint is subject to any charitable trust and claims it for herself. The third and fourth defendants also deny the existence of any trust and claim for themselves certain shares of the property. The learned District Judge has dismissed the action on the preliminary ground that an action under section 101 of the Trusts Ordinance cannot be maitained in view of the denial of the existence of a trust by the defendants. He has purported to follow *Jamal-uddin v. Mujtaba Husain et al.*[1] and *Khursaidi Begum v. Secretary of State for India*[2]. In each of those two cases the action was solely for a declaration of trust. In the present case, however, various other reliefs which are provided for under section 101 of the Trusts Ordinance are sought for. *Deo Saran Bharthi et al. v. Deoki Bharthi et al.*[3] where *Jamal-uddin v. Mujtaba Husain et al.* (*supra*) is considered supports the view that the present action is maintainable although the trust is denied by the defence. See also *Eralappa Mudaliar v. Balakrishniah*[4]; *Anjaneya Sastri v. Kothandapani Chettiar*[5]; *(Syed Shah) Muhammad Kazim v. (Syed) Abi Saghir*[6]; *Abdul Majid v. Akhtar Nabi*[7]; *Loke Nath Mukerjee et al. v. Abani Nath Mukerjee et al.*[8]; *Said Mahar Husein v. Haji Alimahomed Jalaludin*[9].

N. E Weerasooria, K.C. (*H. V. Perera, K.C.*, with him *S. P. Wijewickreme*), for the third and fourth defendants, respondents.—A. suit under the special provisions of section 101 of the Trusts Ordinance

[1] *I. L. R. (1903) 25 All. 631.*
[2] *A. I. R. (1926) Patna 321 at 326.*
[3] *A. I. R. (1924) Patna 657.*
[4] *A. I. R. (1927) Mad. 710.*
[5] *A. I. R. (1936) Mad. 449.*
[6] *A. I. R. (1932) Patna 33.*
[7] *A. I. R. (1935) Cal. 805.*
[8] *A. I. R. (1941) Cal. 68.*
[9] *A. I. R. (1934) Bombay 257.*

cannot be maintained in law when the existence of the trust is denied by the defendants. Section 101 has a special application under special circumstances and provides for a case dealing with purely the internal administration of an admitted trust. The position is fully discussed in *Budree Das Mukin v. Chooni Lal Johurry et al.*[1]. The first part of the judgment in *Eralappa Mudaliar v. Balakrishniah* (*supra*) is at variance with the concluding portion. In each of these cases cited on behalf of the appellant a trust was at some stage or other admitted and the dispute was only as to internal administration. See also *Swaminathapillai v. Kanagamuttu*[2].

[WIJEYEWARDENE J. pointed to section 107 of the Trusts Ordinance and to the absence of a similar enactment in India.]

Section 107 lays down only a rule of evidence in view of the earlier section 5, and does not affect the view taken in the Indian cases. Nor does section 106 make any difference, because that section refers specifically to section 102 and has no application to a proceeding under section 101.

Stamping in a case under section 112 of the Trusts Ordinance is on an *ad valorem* basis whereas in a proceeding under section 101 it is on a different basis. See section 27 (3) of Ordinance 47 of 1941, and *Thambiah v. Kasipillai.*

G. P. J. Kurukulasuriya for the first defendant, respondent.

H. W. Jayewardene for the second defendant, respondent.

M. T. de S. Amerasekere, K.C., in reply.—Stamps of the proper value have been affixed in this case.

It cannot be said that in all the Indian cases which have been cited the trusts were admitted.

Cur. adv. vult.

May 2, 1944. WIJEYEWARDENE J.—

The plaintiffs-appellants filed this action under section 101 of the Trusts Ordinance with the written consent of the Attorney-General and prayed for an order—

(*a*) declaring the property mentioned in the plaint to be comprised in a charitable trust;

(*b*) appointing trustees and giving " directions to the succession to the trusteeship ";

(*c*) setting a scheme for the management of the trust;

(*d*) vesting the property in such person or persons as the Court may direct and

(*e*) granting such other relief as the nature of the case may require.

In view of the questions that have been discussed on this appeal, it is desirable to give a summary of the pleadings. The plaintiffs-appellants alleged—

(*a*) that they were persons having an interest in the trust;

(*b*) that Amaris Fernando, William Dunuwille and some others formed themselves into a society about 1905 " with the object of founding, establishing and maintaining in the Town of Kandy

[1] *I. L. R. (1906) 33 Cal. 789 at 804.*

[2] *(1930) 7 Times 134.*

a Nunnery for Buddhist women and a school for Buddhist girls " and established a fund for that purpose with contributions made by the public and the members of the society;

(*c*) that the property mentioned in the plaint was bought in 1907 out of the moneys belonging to the above fund, in the name of Magiris Fernando and William Dunuwille;

(*d*) that the nunnery and a school were established in 1907 and " Sister Sudharmachari was installed as chief nun and preceptor ";

(*e*) that William Dunuwille who held the property from about 1907 " as the sole surviving and continuing trustee " died some time ago and the executors of his last will executed a deed by which they " appointed and instituted the second defendant Society (registered under the Societies Ordinance) the trustees of all the property " and conveyed the property to the second defendant; and

(*f*) that disputes had arisen " as to the management and administration of the trust . . . . and as to whether the said property . . . . is comprised in a charitable trust and as to the person or persons in whom the title to the said property is vested."

The first defendant filed an answer pleading with regard to certain material averments in the plaint that she was unaware of them and putting the plaintiffs to the proof of those averments. While admitting the purchase of the property in the name of Magiris Fernando and William Dunuwille, she denied " that the subject-matter of the action constituted a charitable trust " and said that the property " was dedicated to Sister Sudharmachari . . . . to enable her to establish a nunnery, vihare . . . . and a school for Buddhist girls under the superintendence, direction and control of herself ". She stated, further, that Sister Sudharmachari died in 1902, having appointed her as her successor. She prayed that the action be dismissed or " in the alternative, on the Court holding that the Institution comprises a charitable trust, that her position as the head of the Institution, Manageress and Superintendent thereof be confirmed."

The second defendant-Society filed an answer supporting the plaintiffs.

The third and fourth defendants, who were added as parties at their request, claim to be the heirs of Magiris Fernando, and state that the third defendant had " the control and management of the Institutions which were carried on by Sister Sudharmachari and after her death by the first defendant and the Manager of the Buddhist Girls' School ".

Several issues were framed at the trial but the Court proceeded to try three issues as preliminary issues under section 147 of the Civil Procedure Code. These issues were—

Issue 23.—In view of the averment in paragraph 13 of the plaint that disputes have arisen as to whether the said land or premises is comprised in a charitable trust, is this action maintainable under section 101 of the Trusts Ordinance?

Issue 24.—In view of the averment in paragraph 13 of the plaint that disputes have arisen as to the person or persons in whom the title to the property is vested, is this action maintainable as one under section 101 of the Trusts Ordinance?

Issue 33.—Is this action maintainable in view of the denial of the defendants, other than the second defendant, of the existence of a charitable trust?

The District Judge answered these issues against the plaintiffs-appellants. His reasons may be stated briefly as follows:—

(i.) the plaintiffs have not stated in definite terms that a charitable trust existed or indicated clearly the trustees and beneficiaries of the trust but appear to ask the Court to discover a trust in order that the Court may be enabled to declare that the property mentioned in the plaint is subject to the trust so discovered;

(ii.) that the Court cannot exercise jurisdiction under section 101 as the contesting defendants deny the existence of the trust.

As regards the first reason, it may be conceded that the averments in the plaint could have been and, perhaps, should have been made clearer. I think, however, that the plaint shows with sufficient clearness the purposes of the trust alleged by the plaintiff, and the trustees and beneficiaries of the trust.

As regards the second reason given by him, the District Judge relied on two Indian decisions and *Swaminathapillai v. Kanagamuttu*[1]. After a detailed examination of section 101, the learned District Judge lays down the proposition that "the denial of the existence of a trust by the defendants deprives the plaintiffs of their right to institute" an action under that section. Immediately afterwards, he appears to qualify that statement by introducing an exception, as he proceeds to say, "This is not a case where the defendants capriciously or without any *bona fides* dispute the existence of the trust with the ostensible object of frustrating the plaintiffs' attempt to obtain relief by virtue of this section, for in such a case it may be argued with a certain degree of plausibility that such a denial on the part of the defendants should not be viewed with favour by the Court. In this case, however, the dispute is a real one, for the plaintiffs themselves aver that disputes as to whether the land is comprised in a charitable trust—the emphasis being laid on the words, 'a charitable trust'—had arisen before the institution of the action". Now, no evidence whatever has been led in this case and, therefore, the abence of bad faith or caprice on the part of the contesting defendants has to be inferred, according to the observations of the District Judge, solely from the averment in the plaint that disputes arose before the institution of the action whether the land was comprised in a charitable trust. I am unable to draw such an inference from that averment. Generally speaking, parties come to Court in any action to settle through the intervention of the Court the disputes that have arisen between them before the action. The existence of a dispute is the cause of the plaintiff instituting an action, but I fail to see how the existence of a dispute could show that the defendant is not acting capriciously or in bad faith. The fact that the dispute in the present case is with regard

[1] *(1930) 7 T. L. R. 134.*

to the question whether the land is comprised in a charitable trust is undoubtedly of the most vital importance, if section 101 is not applicable to disputed trusts. But the existence of such a dispute is not an index to the good faith of the contesting defendants in denying the trust in their answer. Both the denial in the answer and the dispute before the action could be due to the defendants acting capriciously and in bad faith. There are, of course, no express words in section 101 to justify the formulation of such an exception. Nor is that exception deducible by necessary implication from the words of that section. I am not impressed at all by this exception of " bad faith and caprice " which the learned Judge has advanced in a tentative manner as a means of escape from the somewhat startling results which would necessarily follow from his interpretation of section 101. The correctness of that interpretation has to be determined without reference to this exception. If that interpretation is correct, it means that the jurisdiction of the Court will be ousted by the mere denial of the existence of a trust in the answer of the defendant, though the denial may be false in fact and could be proved to be false. Such an interpretation would make section 101 worse than useless, as a defendant would have merely to file an answer denying the trust to get the plaintiffs' action dismissed with costs and compel the plaintiff to bring what may be called a regular action. Under such circumstances it is difficult to believe that any plaintiff would run the risk of bringing an action under section 101. But, of course, effect must be given to the interpretation of the District Judge if that interpretation is correct, though it may result in the practical deletion of that section from the Trusts Ordinance.

Section 101 of the Trusts Ordinance contemplates the institution of an action " in case of any alleged breach of any express or constructive charitable trust or whenever the direction of the Court is deemed necessary for the administration of any such trust ". By virtue of its position in the sentence, the word " alleged " may perhaps direct one's attention to an " alleged breach " more than to an " alleged trust ", but I fail to see any reason why the word " alleged " should be made to qualify only the word " breach " and not the whole phrase " breach of any express or constructive charitable trust ". The cause of action is an alleged breach of trust and " cause of action means the whole cause of action, *i.e.*, all the facts which together constitute the plaintiffs' right to maintain the action " (See *Dicey's Parties to an Action Chapter 11, Section A*). Thus where the plaintiffs bring an action under this section for an alleged breach of a charitable trust, they must allege and prove, in the absence of an admission by the defendants, (1) the existence of a charitable trust and (2) the breach of such trust by the defendants. Similarly if the cause of the action is the necessity for the direction of Court for the administration of a trust, the plaintiffs must allege and prove, (1) the existence of a charitable trust and (2) the necessity for the direction of Court. There is nothing in the language of the section to justify one in saying that the trust referred to in that section must be a trust admitted by the defendants. The jurisdiction of the Court to try an action in respect of a disputed trust appears to me to be placed beyond any doubt by section 107. Both sections 101 and 107 are included in

Chapter X. of the Trusts Ordinance dealing with charitable trusts and section 107 enacts—

> " In dealing with any property alleged to be the subject of a charitable trust, the Court shall not be debarred from exercising any of its powers by the absence of evidence of the formal constitution of the trust, if it shall be of opinion from all the circumstances that a trust in fact exists, or ought to be deemed to exist."

That section contemplates disputed trusts clearly, as it refers to property " alleged " and not admitted to be subject to a charitable trust and then proceeds to state how, in certain cases, the Court may infer the existence of the trust from " all the circumstances of the case ".

The plaintiffs, appellants have asked, *inter alia*, for a declaration that the property is comprised in a charitable trust, and, as section 101 does not provide in express terms for such a declaration, it is argued that the plaintiffs action falls outside the section. In spite of several Indian decisions to the contrary, I do not think it would be difficult to have such a declaration in view of clause (*c*) of the section which provides for an order " declaring what proportion of the trust property or of the interest therein shall be allocated to any particular object of the trust ". Under that clause the Court may declare that a certain proportion of the trust property should be set apart for the nunnery and the residue of the property for the school. By doing so, the Court, in fact, will declare that the various properties are comprised in the trust. Even if the Court cannot make such a declaration as asked for by the plaintiffs, that does not debar the Court from giving the other relief under section 101 and from considering the various matters necessary for giving such reliefs: (See *Eralappa Mudaliar v. Balakrishniah*[1]). As was laid down in *Anjaneya Sastri v. Kothandapani Chettiar*[2], " once the Court is moved, the scope of the inquiry must be determined in the light of what is germane to the various matters indicated in section 92 (of the Indian Code of Civil Procedure) and not by reference to the right of the plaintiffs to particular reliefs ".

It was urged by the Counsel for the contesting defendants that, if section 101 was not so constructed as to take away from the jurisdiction of the Court cases of disputed trusts, an opportunity would be afforded to persons who wanted to establish title to valuable property to achieve their object by bringing an action under section 101 and stamping the proceedings as in the Rs. 5,000 class instead of bringing a regular action for vindication of title and paying *ad valorem* duty. If this argument is sound, it will, no doubt, afford a means of testing the correctness of the interpretation. But the argument is clearly fallacious. Persons who sue under section 101 will either get no order in their favour or an order on the footing that the property is comprised in a charitable trust. Such an order will not assist them in asseting subsequently that the property is their private property. In fact, an order of that nature will be a serious, if not an insurmountable, obstacle in their way in making such an assertion successfully.

[1] *A. I. R. (1927) Madras 710.*

[2] *A. I. R. (1936) Madras 449.*

Before proceeding to consider some of the Indian decisions, it is necessary to make a brief reference to some of the provisions in our law in relation to the provisions of the Indian Code of Civil Procedure with regard to trusts. Section 101 of the Trusts Ordinance replaced section 639 of the Civil Procedure Code, 1889. As pointed out by the District Judge, section 101 omits the reference to a vesting order that appeared in section 639 of the Code. That omission is probably due to the fact that section 112 provides for such vesting orders. The section corresponding to section 639 of our Code was section 539 of the Indian Code of Civil Procedure, 1882. That section was replaced later by section 92 of the Indian Code of 1908. In reply to a question put to them, Counsel for the contesting defendants stated they were unable to find in the Indian Code of Civil Procedure or any other Indian enactment, a provision analogous to section 107 of the Trusts Ordinance.

The two Indian decisions on which the District Judge relied in support of his view that section 101 did not apply to disputed trusts are *Jamal-Uddin v. Mujtaba Husain*[1] and *Khursaidi Begum v. Secretary of State for India*[2]. *Jamal-Uddin v. Mujtaba Husain* (*supra*) was an action instituted by a plaintiff to have it declared that certain property was endowed for a mosque and other charitable purposes. The defendants denied the endowment and claimed to be the owners of the property. The defence took the plea that the action was not maintainable as it had been instituted by one person and no written consent had been obtained from the Legal Remembrancer as required by section 539 of the Indian Code. In rejecting this plea, the judges said:

" Section 539 appears to us to have no application to the facts of this case. That section presupposes the existence of a trust . . . . If the plaintiff in this case . . . . had applied to the Legal Remembrancer . . . . for liberty to institute a suit, it would have been the duty of the person so applying to have satisfied the Legal Remembrancer that there was an express or constructive trust existing, and if he failed to satisfy the Legal Remembrancer of this fact, then we take it that it would have been his duty to refuse to entertain the application. Here the suit is not brought for any of the purposes enunciated in section 539, ... —It is a suit instituted simply and solely for the purposes of having a declaration of the Court that certain property is Waqf. It is in no way a suit for the Administration of the Waqf property, or for the removal of the trustees of that property or for any of the other purposes to which we have referred ".

Though there are passages in the judgment which taken by themselves support the view that a Court has no jurisdiction under section 539 to entertain an action where the defence denies a trust, yet the passage cited above seems to suggest that the written consent of the Legal Remembrancer serves to furnish such *prima facie* proof of the existence of the trust as is sufficient for the Court to enter upon an adjudication of the disputes between the parties. Again, in considering decisions of Indian Courts prior to the Indian Code of 1908, we have to bear in mind the possibility that those decisions may have been influenced by the view

[1] (*1903*) *I. L. R. 25 Allahabad 631.* [2] *A. I. R.* (*1926*) *Patna 321.*

then held by some of the judges that section 539 was not mandatory but permissive and enabling. That position is clearly brought out in the following passage in the judgment of Woodroffe J. in *Budree Das Mukim v. Chooni Lal Johurry*[1].

> " In the latter view (*i.e.*, if the section did not take away pre-existing rights or remedies) the first thing to be ascertained is whether the suit comes within the scope of the section. If it does not, then no question as to its mandatory character arises. If, however, the suit is one upon a cause of action and for relief mentioned in that section, then it is to be determined, whether that particular suit would have lain prior to the enactment of the section. If it would have so lain, it will lie now. This is a question of substantive law, and if that law affirms the right of suit, the latter may be instituted in the ordinary jurisdiction and as so instituted will be governed by the ordinary procedure. If it would not have lain, then it is obvious that the suit must be instituted according to the provisions of this section. "

Khursaidi Begum v. Secretary of State for India (*supra*) was an action instituted by the plaintiffs *on their own behalf* and on behalf of the Shiah community to have it declared that a certain escheated property was subject to a trust in favour of the Shiah community. The plaintiff's pleaded that " they had no objection to the right of the government to hold possession of the estate " but that the government was bound to apply the income for the religious purposes enjoined by the Shiah law. The plaintiffs did not obtain the written consent referred to in section 92. The defence took the plea that the plaintiffs should have obtained such consent. The Court held that section 92 did not apply, as the suit was to establish the existence of the trust itself and the whole question involved was whether such a trust existed or not. In a later case (*A. I. R. 1936 Madras 449, at 460*) Stoddart J. expressed the view that, in *Khursaidi Begum v. Secretary of State for India* (*supra*) the judges had placed too narrow a construction on section 92. Moreover, the Patna High Court itself took a contrary view in (*Syed Shah*) *Muhammad Kazim v.* (*Syed*) *Abi Saghir*[2]. In the course of his judgment, Mohamed Noor J. said (at page 52)—

> " It is contended that as there is a prayer for the declaration of the disputed properties to be a trust, section 92, Civil Procedure Code does not apply. It is argued that the section only applies when the trust is admitted and not when the very existence of the trust is in dispute. There is no force in this contention. "

Moreover, the case we have to consider is not on all fours with *Jamal-Uddin v. Mujtaba Husain* (*supra*) and *Khursaidi Begum v. Secretary of State for India* (*supra*), as in this case one of the reliefs asked for falls clearly under clause (*e*) of section 101 (1).

The High Courts of Bombay, Calcutta and Madras have taken the view that under section 92 of the Indian Code, a Court has jurisdiction to entertain an action even where the trust is denied by the defence.

[1] *(1906) I. L. R. 33 Calcutta 789.*

[2] *A. I. R. (1932) Patna 33.*

In *Jafarkhan v. Daudshah*[1] (followed in *Said Maher Husein v. Haji Alimohomed Jalaludin*[2], Batchelor J. and Rao J. allowed an appeal against an order of the original Court dismissing an action under section 92 and said:

"The learned judge relying upon *Jamal-Uddin v. Mujtaba Hussain* (*supra*) thought that this suit could not be referred to s. 92 of the Civil Procedure Code, because the trust alleged by the plaintiffs was not admitted by the defendants. In our opinion, however, that is no reason for taking the suit outside the scope of s. 92. *Jamal-Uddin's* case, as we understand it, is not an authority for more than it decides, and all that it decides is that a suit asking for a mere declaration that certain property is trust property does not lie under the old s. 539. It will be seen that the proposition is incontestible if reference be made to the sub-clauses of s. 539 which prescribe the particular purposes for which such a suit may be brought under that section, which purposes do not include the purpose of obtaining a mere declaration; but in this present suit there are prayers which bring the case within the ambit of s. 539. We think that no difficulty is caused by the use of the words "any alleged breach of any trust" occurring in s. 539, for we do not read those words as equivalent to any alleged breach of any admitted trust".

In *Abdul Majid v. Akhtar Nabi*[3], Mitter J., said at p. 806—

"In support of the appeal it has been contended on behalf of the appellants that in a suit under section 92 it is competent for the Court to decide the question as to whether the trust in respect of which the suit is brought is a public charitable trust or not, so as to attract the application of section 92, Civil Procedure Code and that a separate suit for the declaration that the property is a trust property is not necessary. This position has not been disputed on the other side, and authorities were shewn that in a suit such as this an issue may be raised as to whether the trust was a trust contemplated by section 92, Civil Procedure Code."

In *Anjaneya Sastri v. Kothandapani Chettiar*[4] Stoddart J. said that persons suing under section 92 "have to establish at their cause of action (1) that there is a trust express or constructive created for public purposes of a charitable or religious nature and (2) that it has been broken". Varadachariar J. suggests in the course of his judgment that the reason for the proposition, that persons claiming a title adverse to a trust should not be made parties to a suit for the execution of a trust, is to be found in the division of jurisdiction between the Common Law Courts and the Court of Chancery and the distinction between Common Law actions and Proceedings in Equity. He then proceeds to state—

"An action raising a question of title must be filed in the Common Law Courts and the Court of Chancery would not undertake to decide such a question. This principle coloured the legislation in England as well as the decisions relating to charities.

In the Charitable Trusts Act of 1853 there was an express provision excluding proceedings in which any person shall claim any property

[1] *(1911) 13 Bombay Law Reporter 49.*
[2] *A. I. R. (1934) Bombay 257.*
[3] *A. I. R. (1935) Calcutta 805.*
[4] *A. I. R. (1936) Madras 449.*

or seek relief adversely to any charity. Section 92, Civil Procedure Code, has no doubt been modelled on the practice of the Chancery Courts, but as that division of jurisdiction is not part of the law of this country, limitations arising out of that conflict of jurisdictions have no direct application here ".

There remains for consideration the following passage in the judgment in *Swaminathapillai v. Kanagamuttu*[1] cited by the District Judge:— " It would seem rather that the section (section 102) is concerned with matters of internal administration, and it may well be that the provisions of the section may be put into operation for the purpose of getting trustees appointed who would then be in a position to institute proceedings to recover property of the temple ". This case of *Swaminathapillai v. Kanagamuttu* is a difficult case to understand. The appellants filed this action under section 102 asking for an order appointing them as trustees of a Hindu Temple and vesting certain property in them as such trustees and " for certain other relief. " The report does not indicate the nature of this " other relief. " The defendant raised no objection to the appointment of trustees but claimed the property as her own personal property. Only three issues were framed at the trial and these dealt solely with the title to the property. The parties were not at issue as to the maintainability of the action. The District Judge held in favour of the defendant on all the three issues and dismissed the action. When the case came up in appeal, there was no appearance for the defendant. The Appellate Court stated in a short judgment:—

(*a*) that the District Judge had acted prematurely in dismissing the action as there were " further questions involved in such an action which remained undecided; "

(*b*) that it was premature for this Court to express an opinion on the District Judge's findings as to title;

(*c*) that it was not possible for the Appellate Court to decide whether the defendant had any interest in opposing the plaintiff's claim other than on the question of title;

and then sent the case back " to be further dealt with under the provisions of section 102 ".

If the passage cited above shows that the Appellate Court was of opinion that an action under section 102 could not be maintained when there was a dispute as to the property alleged to be comprised in a charitable trust, it is not clear why the appeal was allowed as the order dismissing the action could have been sustained on the ground of want of jurisdiction.

It is sufficient for the purposes of the present case to observe that the opinion referred to is in the nature of an *obiter dictum* with regard to the scope of section 102 while the section we have to consider in the present case is section 101.

For the reasons given by me I hold that the issues 23, 24, and 33 should be answered in favour of the appellants.

I allow the appeal and send the case back to the District Court for trial on the other issues the 1st, 3rd and 4th defendants, respondents,

[1] *(1930) 7 Times Law Reports 134.*

will pay the plaintiffs, appellants, and the 2nd defendant, respondent, the costs of the proceedings on September 20, 1943, and the costs of this appeal.

In order to prevent any future difficulty in assessing evidence that may be led in the District Court, I wish to point out that the 1st defendant who is described as an " Upasikawa " has stated in her answer that she has " ordained a large number of Buddhist Nuns ". If the term " Nun ", is used to mean a " Bhikkuni ", I find it difficult, as at present advised to understand how an " Upasikawa " could ordain " Bikkhunis ". I think it would save a great deal of confusion if in leading evidence the terms as known to the Buddhist Ecclesiastical Law are used, and, where necessary, English translations of those terms are given.

HOWARD C.J.—I agree.

Appeal allowed.
Case sent back.