1943 *Present :* **de Kretser and Wijeyewardene JJ.**

THANGAMMA, Appellant, *and* PONNAMBALAM, Respondent.

19—D. C. Jaffna, 15,752.

Negotiorum gestio—*Claim based upon the doctrine—General principles—Roman-Dutch Law.*

A claim made on the footing of a *negotiorum gestio* is governed by the following principles :—

(*a*) there must be two parties ;
(*b*) the person benefited must be ignorant of the act ;
(*c*) there must be an intention to act as *negotiorum gestor*.

***Semble*, a person may not conduct litigation on behalf of another except in the limited way provided by the Civil Procedure Code.**

APPEAL from a judgment of the District Judge of Jaffna. The facts appear from the judgment.

N. Nadarajah, K.C. (with him *N. Nadarasa*) for defendant, appellant.

The plaintiff was not authorised to conduct the litigation. The principle of *negotiorum gestio* cannot apply to litigation. (*3 Maasdorp, p. 453*)— no person may manage the litigation of another except to the limited extent allowed by the Civil Procedure Code.

Even if the principle of *negotiorum gestio* is applicable to this case, the maternal relatives having also benefited, a part of the expenses should have been charged to them also—the defendant is not, therefore, liable to pay as much as a half-share of the expenses which is what the plaintiff claims.

S. J. V. Chelvanayagam (with him *T. Nadaraja*), for plaintiff, respondent.

Even if the plaintiff was not authorised to conduct the litigation, and indeed even if plaintiff had been expressly forbidden to do so, the defendant is liable to pay a half share of the expenses by reason of the fact that she has been benefited by the plaintiff's action. (*Pothier. Neg. Gest. s. 182 ; Groenewegen de Leg. Abrog ad C 219 ult ; voet 3.5.11.*) The principle by virtue of which the plaintiff can recover, even in the extreme case of her being forbidden to act, is the general principle "*nemo debet locupletari cum alterius detrimento*"—the same principle as that on which the idea of *negotiorum gestio* itself is based. See *Wessels' Contract* (*1937 1st Edition*) *para. 3563.*

There is no reason why litigation alone should be excluded from the application of the principle of *negotiorum gestio* (see *Prince. q.q. Dieleman v. Berrange* [1]) and *3 Maasdorp, p. 453.*

April 9, 1943. DE KRETSER J.—

The facts are as follows :—

One Kandiah died leaving a widow but no children. Under the *Thesavalamai* his property would devolve on his relatives on his father's side and on his mother's side but if he left a stepbrother then that stepbrother would exclude all the others.

[1] *1 Menzies Reports 435.*

His widow applied for letters of administration naming certain persons as respondents and valuing the deceased's estate at Rs. 7,178.31. The 1st defendant was the 37th respondent.

One Kandappu then filed papers alleging that he was the son of Kandiah's father, Saravanamuttu, by a subsequent marriage and that the bulk of the deceased's estate had been acquired while he was living in separation from his wife. He claimed letters. He valued the estate at Rs. 6,906.62½.

Some of the respondents filed a petition of objections claiming that they and the 37th respondent, *i.e.*, the present 1st defendant, were the deceased's heirs on the father's side and that Kandappu was an illegitimate son of Saravanamuttu. They call him the 39th respondent but in the widow's application the 39th is one V. Thiagarajah, M.C., Delft. They denied the widow's right to letters, claimed letters themselves, and alleged the widow had not disclosed a sum of Rs. 15,000 due to the deseased. One has to infer from another petition given by Kandappu later that the widow had been granted letters. In this later petition Kandappu prayed that he be declared heir to all the *mudusom* property and to half the *tediatetem*. An inquiry followed and the court held that he was not the deceased's heir but made no order as to costs.

According to the evidence, the paternal half of the estate, if I may so call it, went half to the present 1st defendant and half to the 2nd plaintiff and her four sisters. The 1st defendant was in India where she married the 2nd defendant, who had held judicial office there. They had had notice presumably of the application of the widow and they certainly had notice of Kandappu's later application for he had prayed for an *order nisi* against all the respondents. The case has been argued on the footing that they did have notice but chose to take no part in the contest. preferring to let the law take its course.

The plaintiffs bring the present action alleging that they spent Rs. 1,500 in contesting Kandappu's claim and claiming that defendants should pay half, *i.e.*, Rs. 750, in terms of an agreement made in December, 1935, at Chundikuly in Jaffna. In the alternative they claim that they had rendered service to the 1st defendant and saved the property and so were entitled to recover Rs. 750 being the proportionate share of the expenses. Defendants filed answer denying the claim and alleging that instead of litigation incurring such fabulous expenditure the difference between the parties could have been settled satisfactorily by other means. They denied that plaintiffs could maintain the action and put them to the proof of the alleged expenses.

The trial judge, who seems to have been much impressed by the 2nd plaintiff's poverty and the fact that defendants were well off and ought to pay, held quite easily that there had been no such agreement as plaintiffs had alleged, that on a generous estimate she could not have spent more than Rs. 800, and putting the claim on the same footing as one for compensation when one lifts a burden on a property by paying a mortgage debt condemned defendants to pay Rs. 400 and fixed costs at Rs. 60! In this hotly contested claim he allowed only Rs. 60 as costs but thought plaintiffs had incurred Rs. 800 in the previous inquiry, and he does not explain why in the absence of proof plaintiff's expenditure

should be fixed on a generous scale. If there was no proof he could accept, it was not open to him to speculate generously. He has also lost sight of 2nd plaintiff's statement in D 2 that she had spent Rs. 85 up to the stage of inquiry. It is inconceivable that she could have spent nearly nine times as much for the inquiry itself. I should be surprised if the expenses exceeded Rs. 200. Besides, the heirs on the maternal side were interested in resisting Kandappu's claim and they did not do so. They too benefited in the same way as the 1st defendant did.

The plaintiff starts with a heavy burden of falsehood on her shoulders. Such falsehood is hardly in keeping with her position as friend and benefactor of the 1st defendant.

On the appeal it was not attempted to uphold the trial judge's reasoning but it was sought to justify his order on the footing that this was a case of *negotiorum Gestio.*

Before passing to a consideration of the law applicable to the case it is necessary to deal with two letters written by the 2nd plaintiff, D 2 and D 3. In the first written on the 2nd of July to the 1st defendant's father, Rev. Anketell, who appears to have been a stranger to her, she states how the parties claim from Kandiah's estate. She goes on to say that 1st defendant had asked why there should be litigation as the inheritance would devolve on the plaintiff spontaneously. She discloses the existence of Kandappah and states that although he had been given the surname of Saravanamuttu his mother's marriage was not registered and there had been no tying of *thali* and no dowry, but that Saravanamuttu had described her as his wife in a document; that as her husband was a practical man in courtwork and as her sisters were not well off they had given him a power of attorney and filed a petition; that certain documents had been obtained and up to that date they had spent Rs. 85 and the case was fixed for the 8th instant, *i.e.*, six days from the date of the letter, and they required more money for expenses. She called upon the minister to think of God, that she was a poor woman and 1st defendant was in comfort, that giving to the poor was lending to the Lord, that 1st defendant knew nothing about "this inheritance" or who her relatives were and that 2nd plaintiff had therefore begged of the District Judge to give "this inheritance" to her; that if 1st defendant were to take her half she (plaintiff) would have no share and if the 1st defendant had an *urumai* (by which is meant, I understand, a right of inheritance) she (plaintiff) would have dropped the matter; that the minister should speak to first defendant, who had at first thought the inheritance would devolve on her spontaneously but had later spoken of retaining a proctor. She goes on to ask him to intercede and send her some money; that 1st defendant might think Rs. 85 an exorbitant sum but she would give the information later; that if 1st defendant took her half, she (plaintiff) would get very little after all the funeral and testamentary expenses had been defrayed and that there was no use in her spending money if the others remained silent. She suggests that 1st defendant should give her a power of attorney and then *she* (plaintiff) would be benefited. She adds a postscript that it could not be stated what providence would do in court business and they could not expect to win the case. She had

previously estimated her share as 3 lachams and Rs. 10 or Rs. 15 only; she adds that a lacham would not fetch more than Rs. 30 or Rs. 40 and each would get about two lachams.

It is quite apparent from this letter that she was seeking only her own benefit and that her suggestions were twofold, namely, that 1st defendant would either be so charitable as to send her some money, considering it a loan to God, or at least abandon her rights in plaintiff's favour. There is not the slightest suggestion of her acting on 1st defendant's behalf; on the contrary she states that 1st defendant had intimated that if she were to take action she would be retaining her own lawyer.

D 3 was written to the 1st defendant about eleven months later. She says the trial date was the 16th June—about two months ahead, that she had sold even her *thali kody* for expenses, that a sum of Rs. 150 was required for proctor and advocate, Rs. 30 for witnesses, and copies of four deeds had still to be obtained; that she had made two unsuccessful attempts previously, through her husband apparently, and would be sending him in a week's time: and she begged first defendant to sympathize and help. From this letter too it is clear that all she wanted was financial assistance, and that she was aware that first defendant had chosen to abstain from taking part in the contest.

Turning to the law, Counsel for respondent relied very strongly on certain passages in *Wessels' Law of Contract in South Africa* and repeatedly referred to the fact that the 1st defendant had benefited from plaintiff's action and that no one should be made richer at the expense of another. *Wessels* undoubtedly is an authority that is entitled to the highest respect. Let us see what he says. He starts with this statement: "It is a general principle of our law that it is wrongful for one person to interfere, uninvited, with the affairs of another" . . . . "To this general rule, however, there is an exception. A person, who from a sense of duty or out of friendship, undertakes to administer the affairs of one who is absent in a way beneficial to the latter, does a meritorious and not a wrongful act." Note that the exception is made because it is a meritorious act and is intended to encourage a sense of duty and of friendship towards one who is unable to look after his own interests. *Wessels* goes on to say that the person who interferes must justify his interference and show that he acted in the interests of the person whom he intended to benefit and that in fact his interference proved to be, or might have been anticipated to be, useful to the absent person.

He states that the English law does not recognize *negotiorum gustio* and quotes an authority.

It is clear that plaintiff does not come within the terms of the exception. In *Union Bank v. Beyers*[1] de Villiers C.J. had said: "The doctrine that a person can act as trustee or mandatory or occupy some similar relation towards another person who is *sui juris* without his will and without his consent has no place so far as I am aware in our law". *Wessels* gives the following as the general principles which govern *negotiorum gestio* (*a*) there must be two parties; (*b*) the person benefited must be ignorant of the act; (c) there must be an intention to act as *negotiorum gestor*. Accordingly under (*a*) he says "There is no *negotiorum gestio* if a person

[1] *(1884) 3 S.C 89, at page 102.*

administers his own affairs under the false belief that he was managing those of another. If, however, the *negotiorum gestor* in managing his own affairs at the same time manages those of another, then quoad the interest of the other party there is *negotiorum gestio*".

Counsel for respondent seizes on this latter statement. But it must be remembered that *Wessels* is now dealing only with his statement that there must be two parties, and is not throwing overboard all other principles governing the question. Besides, a person may by mistake manage affairs which are partly his own and so escape from the rule *Wessels* has just laid down. It is possible that a person may manage at the same time his own affairs and those of another which are quite distinct from his.

Under (*b*) he states that "the *quasi*-contract of *negotiorum gestio* presupposes that the unauthorised act is done on behalf of a person who is ignorant of it and who has not instructed the *negotiorum gestor* to do it. . . . . Hence, if the person whose affairs are being administered is aware of what is being done, and being able to, raises no objection, there is no *negotiorum gestio* but a tacit contract of Mandate". In the present case the 1st defendant was not ignorant of the pending litigation, nor was she aware that plaintiff was managing her (defendant's) affairs; as far as she was aware plaintiff was managing her own affairs.

Counsel next seized upon a statement made by *Wessels* under this sub-head (*b*). In para 3563 he gave the opinion of *Pothier* that a person whose affairs had been well administered against his will and had in fact been benefited should recoup the *negotiorum gestor*. He states that *Groenewegen* and *Voet* had expressed similar opinions."- But *Wessels* himself pointed out that the maxim *nemo debt locupletari cum alterius detrimento* applied only where there was *damnum* and *injuria*. It may be true that the *dominus* is enriched and that the unauthorised manager has suffered a detriment, but the detriment was not suffered *cum injuria* but voluntarily. If the *negotiorum gestor* suffers a loss he does so with open eyes and deliberately.

If *Wessels* was not merely placing before the reader a number of possible views, as I believe he was, then his comment means that the maxim did not apply as *Pothier* thought it did. He goes on to say—"There may, however, be cases where the court would grant a *negotiorum gestor* his *utiles et necessarias impensas* even though the *dominus* was opposed to the interference, on the same principle that such expenses are accorded to the *mala fide* possessor; though these cases should be the exception and not the rule". Counsel argues that that statement applies to the present case.

To begin with, *Wessels* does not state that such is the law, nor does he give a single instance. But he is careful to point out that there may be exceptional cases, and that even in such cases one should be slow to allow the expenses. They would be cases which would approximate to the case of a *mala fide* possessor, where something necessary had been done to preserve a property owing to a sudden emergency which might be taken to override the general objection of the *dominus* to interference in his affairs. In this case too the *dominus* would be ignorant of the danger, and the act of the *negotiorum gestor* would still bear on it the

stamp of meritoriousness. I can scarcely believe that if the *dominus* knew of the danger and deliberately abstained from taking steps, and the *negotiorum gestor* knew of his objection, that nevertheless he would be entitled to interfere and to claim compensation.

Immediately after setting out the opinions of *Pothier, Groenewegen,* and himself, *Wessels* quotes the opinion of de Villiers C.J., in the case of the *Union Bank v. Beyers* (*supra*) and, consistently with his previous opinion states that " the South African Courts may follow *Groenewegen, Voet* and *Pothier* and allow *impensas utiles et necessarias* where the general rule may be considered to be too harsh, as where the *dominus* has been manifestly enriched and no donation was intended ".

The decision of de Villiers C.J. was given in 1884 and the edition of *The law of Contract in South Africa* by *Wessels* from which I am quoting was published in 1937, and apparently no case had yet arisen in which the law there laid down had been questioned. When *Wessels* himself only says that the South African Courts *may* follow a certain course, I do not think we would be justified in acting in the belief that they will do so. And here again we must remember that he still dealing with the case of a person who is benefited but ignorant of the act. In the present case the 1st defendant was well aware of her rights and plaintiff had at no time prior to this case pretended that she was acting on behalf of the 1st defendant.

This brings us to the third principle (c), under which *Wessels* states that it is essential that a person who without authority manages the affairs of another should have *intended* to act as a *negotiorum gestor* and should have intended to claim the cost of his voluntary administration. He quotes, among other authorities, the case of *Molife v. Barker.* In the succeeding paragraphs *Wessels* states that the above proposition is not universally admitted and that in strict law there can be no reciprocal actions *de negotiis gestis* unless the voluntary agent had the *animus negotium gerendi.*

I can find nothing therefore in *Wessels* to support the contention of respondent's Counsel that in the circumstances of the present case plaintiff is entitled to succeed.

Counsel for the appellant raised a further point, and that was whether it was possible for us to recognize that one person may manage the litigation of another except to the limited extent allowed by the Civil Procedure Code.

As plaintiff herself indicated in her letter, litigation is not a business in which one can look for success with any degree of certainty, and it would be a very serious state of things—certainly in Ceylon—if it were possible to indulge in litigation on the excuse that one was carrying on the business of another. The Civil Procedure Code does not allow it. I do not think it is the policy of the law to throw open the door to doubtful transactions of a champertous nature. The relations of co-ownership have created sufficient complications without our adding to them, but hitherto no co-owner has indulged in litigation and then brought an action against the other co-owners to recoup himself for expenses. Even plaintiff has not asserted her right in a logical way, for it was conceded that the maternal relatives had also benefited. That being so, she should have charged a part of her expenses to them.

Maasdorp (*III. 453,—4th Edn.*) says: "As regards the business or property to be administered, it may, with one exception, be of any kind whatsoever, provided it be not either physically or legally impossible. The exception referred to is that no one is entitled to institute an action in Court on behalf of another without having a proper power of attorney from the latter for the purpose; nor will he be allowed to defend such action without such power".

As Mr. Nadarajah put it, spppose A being poor retains a proctor and B eminent Counsel, and A's proctor is content to leave the management of the case to B's Counsel, would B be entitled to claim a proportion of his expenses from A? Clearly not. Supposing A did not retain a proctor at all but appeared in person and conducted his own case, there would be no difference. Why should there be any if A merely kept away?

Mr. Chelvanayagam could not meet this argument although he was given a second opportunity of addressing the court. All he could do was to refer us to the case of *Prince, q.q. Dieleman v. Berrange* alias *Anderson*[1] which is referred to by *Maasdorp* just before he made the statement quoted above. But *Maasdorp* does not use it as an argument in the way Counsel did. He uses it in connection with another proposition, namely, that where a person undertakes the affairs of another with a view to his own benefit rather than that of the owner, the latter will only be liable in so far as he was actually benefited thereby. He is dealing very briefly with the subject and is only stating that a person's own business may be mixed up with that of another. With all due respect, I do not think he has correctly stated the conclusions reached in the case he quotes. The case is very briefly reported. The facts are as follows:—One Dieleman and his wife, the defendant, executed a mutual will. He died and his widow subsequently married Anderson. The joint estate had been valued on the basis that it included a slave called Steyntje and her children. After litigation the Privy Council ruled that Steyntje was free and not a slave, with the result that the value of the estate was reduced by 6,000 rix-dollars. Prior to her second marriage the defendant had executed a kinderbewys in favour of her two sons (plaintiffs) for one half of the joint estate.

The action was brought by the attorney of the two sons, who conceded that the value of the slave should be deducted although the sons had been promised half of the estate as originally valued. Defendant, however, claimed to be allowed to deduct one-half of the expenses incurred by her in the litigation. It was admitted that during that period defendant was not the guardian of the plaintiffs, who had other guardians that plaintiffs had not by themselves or their guardians been in any way pparties to the action or given defendant any guarantee for her costs. It will be noted that it was not alleged that either the children or their guardian had been ignorant of the litigation. The Court held that defendant had instituted the action *causa sui proprii commodi*, and as it had been unsuccessful the minors had derived no benefit from it and therefore those costs had not been *in rem versum* of the plaintiffs. Here the reasoning seems to have been that a minor is not bound by a

[1] *1 Menzies Reports 435.*

contract unless it be to his benefit, and besides the plaintiff had sued for her own convenience only, she having the usufruct of the estate. The court went on to say that as they had not been *locupletiores facti* the defendant could not claim as a *negotiorum gestor* and plaintiffs were under no equitable obligation to pay any part of the costs.

The decision therefore appears to have gone on many grounds, and it is not correct to fix on any one ground as the basis of that decision.

For the reasons which I have given I think the decree entered in this case cannot be sustained, and would therefore allow the appeal with costs and order that plaintiff's action be dismissed with costs.

WIJEYEWARDENE J.—I agree.

Appeal allowed.