1938 *Present :* **Poyser S.P.J.**

FERNANDO *v.* GRERO.

554—M. C. Colombo, 1.

Residence—Place used as a sleeping apartment—Right to create residence for acquiring qualification—Municipal Council (Constitution) Ordinance, No. 60 of 1935, s. 2 (2) (a).

A place which a person uses as his sleeping apartment three or four times a week may be deemed to be his residence within the meaning of section 2 (2) (*a*) of the Colombo Municipal Council (Constitution) Ordinance, No. 60 of 1935.

A person is entitled to constitute a place as his residence in order to give him a qualification as a voter.

APPEAL from an order of the Municipal Magistrate of Colombo.

H. V. Perera, K.C. (with him *Shelton de Silva* and *H. A. Chandrasena*), for the appellant.

N. E. Weerasooria, K.C. (with him *J. E. M. Obeyesekere* and *M. M. I. Kariapper*), for the objector, respondent.

Cur. adv. vult.

October 3, 1938. POYSER S.P.J.—

In this case the objector-respondent objected to the appellant being included in the list of voters for the Modera Ward on the ground that he was not resident on May 1, 1938, at No. 205, Modera street, or in any other qualifying property in the Modera Ward. The facts are as follows :— The appellant's wife and family reside in Mayfield lane, Kotahena, which

is in another Ward. The appellant however has a dispensary at No. 205, Modera street, in which locality his practice principally is and he has a sleeping apartment at the dispensary and spends three or four nights a week there. The Magistrate considered that the appellant's residence at No. 205, Modera street, was not *bona fide*. To use his own words, he says, "It was a colourable residence of three or four nights out of the week for the mere purpose of gaining a qualification". I am unable to agree with the Magistrate. A person may have more than one residence. Many persons do. Under the Colombo Municipal Council (Constitution) Ordinance, No. 60 of 1935, section 2 (2) (*a*) "a person shall be deemed to reside in, or to be a resident of, any place, if he has, and from time to time uses, a sleeping apartment in any dwelling-house therein". I have already in *S. C. No. 573—M. C. Colombo, No. 2*, expressed the opinion that a dwelling house means a house in which any person or persons dwell and that the house need not be one that is used exclusively for residential purposes. The appellant, the Magistrate finds, used the sleeping apartment at No. 205, Modera street, three or four times a week, that is as much or more than he uses the sleeping apartment in his other house.

In regard to the Magistrate's opinion that the respondent's residence at No. 205, Modera street, is not *bona fide* but a colourable residence, I would refer to the case of *Etherington v. Wilson*[1]. In that case a person took a house temporarily and became a parishioner with the object of qualifying his son for admission to a certain school. Vice-Chancellor Malins held that the person in question was not a *bona fide* householder and parishioner and his qualification as such was colourable. It was held on appeal, reversing this decision, that if the law enabled a man to qualify for any particular thing he was entitled to do so and that no Court had the right to attach any condition or modification of such qualification, and if it was intended to put any restriction upon such qualification, that restriction must be put by special enactment or by other special provision. James L.J. in the course of his judgment pointed out that a man constantly acquired qualifications for voting. He instanced the case of a man who buys a 40s. freehold for the sole purpose—the undisguised purpose—of giving himself a vote in a county with which he has not and does not mean to have any other connection whatever. Another passage in this judgment which is material in this case is as follows:—"A man has a right to give himself, if he can, a qualification. If he does so, then he is qualified, and there is no equity to deprive a man of that qualification which the law entitled him to get". In regard to the use of the word "colourable", this word was used by Vice-Chancellor Malins in his judgment and James L.J. considered that the fallacy of that judgment arose from the use of that word. He pointed out that if a man never did take a house but only got some person to put up his name over the door or something of that kind, then his occupation would have been colourable as it would have been a sham. In this case I think there is a simliar fallacy in the Magistrate's order. The appellant only did what the law permits him to do. If for any purpose he wishes to be qualified as a voter in any particular ward, he is entitled to obtain such

[1] *(1875) 1 Ch. Div. 160.*

qualification and it is immaterial for what purpose he does so. I therefore consider the Magistrate was wrong in upholding the objection to the residential qualification of the appellant.

On appeal a further point was raised that the appellant was not a tenant within the meaning of section 14 (3) of the Ordinance. The point appears to have been raised before the Magistrate but the latter in his order has not dealt with such point. The grounds in support of this other objection are that there was evidence that the appellant was not a tenant but a sub-tenant. The appellant in his evidence before the Magistrate stated that the landlord of the Modera street house was Mr. K. S. Fernando. The objector in his evidence stated that the latter person had transferred this property to a certain Dr. de Silva and Dr. de Silva had leased the same premises to Mr. K. S. Fernando from November 1, 1937. However that may be, I do not think that on appeal one can go into a question of the ownership of any qualifying property when such question has not been adjudicated on by the Magistrate. In the absence of such adjudication it must be assumed that the appellant paid the rent of the premises in question to the owner.

I would further add that in this case, as in *S. C. No. 573—M. C. Colombo, No. 2*, the Magistrate held that Ordinance No. 14 of 1938, which amended the Colombo Municipal Council (Constitution) Ordinance, No. 60 of 1935, was not applicable as the proceedings were initiated before such amending Ordinance came into force. If the provisions of the amending Ordinance were applicable, it is conceded that on the latter point there would be no grounds for upholding the objection. As I think that the appellant is entitled to be registered as a voter for this ward under the principal Ordinance, it is unnecessary to consider whether the Magistrate's view was correct or otherwise.

I allow the appeal and set aside the order of the Magistrate deleting the appellant's name from the list of voters for Modera Ward. The objector-respondent will pay the appellant the costs of the inquiry and of the appeal.

Appeal allowed.