

been received, it is equally not possible to say that the balance was agreed to be paid thereafter. There is therefore in this case no conflict between the attestation and the statement in the body of the deed that the full consideration had been paid, for the attestation is consistent with the view that the balance had previously been paid or settled in some way acceptable to the vendee. It is therefore difficult to say that the attestation clause contains an agreement or undertaking to pay the balance. The present case, therefore, falls within the principle laid down in *Thomassie v. Kanapathipillai* (*supra*) which was followed in the later case of *Thamotherampillai v. Kanapathipillai* ¹.

I hold, therefore, that the plaintiff's action having been instituted after the lapse of three years of the accrual of the cause of action is prescribed. Plaintiff's action fails and is dismissed with costs both of this court and of the lower court.

Appeal allowed.

1950

Present: Windham J.

MOHAMED CASSIM, Petitioner, and ABDUL HAMEED, Respondent,

*S. C. 348.—Application for a Writ of Quo Warranto on
M. Y. Abdul Hameed.*

Quo Warranto—*Licensed process server—Right to be member or Chairman of Village Committee—Meaning of "holder of any public office under the Crown"—Fiscals Ordinance (Cap. 8), s. 4—Local Authorities Elections Ordinance, No. 53 of 1946, s. 10 (1) (d).*

A process server licensed as a Fiscal's Officer under section 4 of the Fiscal's Ordinance is not the holder of a public office under the Crown within the meaning of section 10 of the Local Authorities Elections Ordinance, No. 53 of 1946, and is, therefore, not disqualified to be elected as a member of a local authority.

APPPLICATION for a writ of *quo warranto* challenging the right of the respondent to be elected Chairman of the Village Committee, Sainthamaruthu, Karawaku South.

C. S. Barr Kumarakulasinghe, with *A. I. Rajasingham*, for petitioner.

S. Nadesan, with *S. Mahadeva* and *M. A. M. Hussein*, for respondent.

Cur. adv. vult.

February 9, 1950. WINDHAM J.—

The petitioner is a registered voter for Ward No. 7, Sainthamaruthu, Karawaku South Village Committee. At the election to the Village Committee on June 11, 1949, the respondent was elected a member of the Committee for Ward No. 7. On July 13, 1949, the respondent was elected Chairman of the Village Committee, and since then has functioned as such.

¹ (1940) 41 N. L. R. 265.

I am satisfied upon the evidence before me that prior to his nomination and election as member of the Committee and during the period of election the respondent exercised the functions, and that he still exercises the functions, of a Fiscal's Officer, a licence to act as such having been issued to him with effect from February 1, 1942, by the Fiscal, Eastern Province, who on January 28, 1942, had purported to appoint him to that office by letter of appointment enclosing the licence. It would seem that the letter of appointment and the licence were issued by the Fiscal in exercise or purported exercise of his powers under section 4 of the Fiscal's Ordinance (Cap. 8). Section 4 provides as follows:—

"4. For the service and execution of processes issued by the courts in this Island the Fiscal shall license as many process servers for each district as shall appear to him to be necessary and the licences to be issued by him shall be substantially in the form B to the Schedule. The Fiscal shall also have authority to revoke any licence granted by him whenever it shall appear to him necessary to do so :

Provided that it shall be lawful for the Fiscal or Deputy Fiscal to appoint, by writing under his hand, any person to execute process in any particular case".

Now, section 4 does not empower the Fiscal to "appoint" anybody as Fiscal's Officer or as process server, or to office of any kind; nor does the section specifically empower the Fiscal to license any person as "Fiscal's Officer", but only to license persons as process servers. I am satisfied, however, upon the evidence of the Additional Deputy Fiscal who testified before me, and after hearing learned counsel, that, while the respondent was licensed under the designation "Fiscal's Officer", his functions as such would fall within those of a process server, namely, to execute writs, and if necessary to seize and sell in execution property of under Rs. 1,000 in value; and that accordingly the powers of the Fiscal under the first part of section 4 of the Ordinance included the power to license him as a "Fiscal's Officer", though not the power to appoint him as such.

It is the petitioner's contention that the respondent held the office of "Fiscal's Officer" or "Fiscal's Writ Officer" (the two terms appear in practice to be synonymous) and that this office is a "public office under the Crown in Ceylon", and that accordingly the respondent was not qualified to be elected to the Village Committee by reason of section 10 (1) (d) of the Local Authorities Elections Ordinance, No. 53 of 1946, which disqualifies the holder of such an office from being so elected. The question for decision is whether the respondent, by reason of being licensed as a Fiscal's Officer, was the holder of a public office under the Crown in Ceylon.

The term "public office under the Crown" is nowhere defined in the Ordinance, but there have been a number of decisions, both in the English courts and in those of Ceylon, wherein it has been laid down that there are certain tests to determine whether a person is the holder of an office under the Crown; I refer in particular to the recent decisions of this court in *Podi Singho v. Goonesingha*,¹ and *Jayasinha v. Soysa*². Two of the most important of these tests are (1) who makes

¹ (1946) 40 N. L. R. 344.

² (1949) 51 N. L. R. 231; 41 C. L. W. 26.

the appointment to the office? (2) who pays the salary? If the answer to both these questions is not the Crown, then the person concerned cannot, in my view, be said to be holding a public office under the Crown.

Now in the case of a Fiscal's Officer, who is a species of process server, there is in my view a failure to pass either of these tests, and the failure, moreover, arises from a *petitio principii*, a begging of the question in each case.

For, as regards the first test, it seems to me that the respondent was never appointed to any office at all. The purported appointment by the Fiscal under section 4 was, as I have pointed out, outside the powers conferred by that section, which only provides for the *licensing* of process servers. The only section in the Ordinance which provides for the appointing of officers is section 9, wherein the power is vested in the Governor. Nor is this distinction between licensing and appointing merely a technical one. For an appointment to an office presumes that there is an office in existence as distinct from the individual who is appointed to hold it; it presumes the office to have independent existence and some degree of permanence, even though it may have been created simultaneously with the appointment. But where an individual is merely licensed, as was the respondent in the present case, to do from time to time, as occasion may arise, certain acts under the authority and protection of the law, then I do not consider that he is holding an office at all, any more than a licensed auctioneer could be said to be the holder of an office by reason of his being licensed to hold auctions from time to time under the authority of the law. While not going so far as to stretch the common meaning of language by holding, as learned counsel for the respondent asks me to hold, that a process server cannot be called a process server save when he is in the process of serving a process, I do hold that he is not the holder of an public office under the Crown, or indeed of any office at all, but is merely a person licensed by the Crown to do certain acts which, though they may relate to private rights and disputes, are broadly speaking in the public interest.

And with regard to the second question, namely, who pays the respondent's salary, the test again fails at the threshold, for the answer is that the respondent is paid no salary. His only remuneration, as Fiscal's Officer, is the receipt of a commission of two per cent. on the amount of sales effected by him. These commissions are paid to him, it is true, by the Fiscal from the Kachcheri funds, and thus by the Crown; but they do not constitute a salary. They are *ad hoc* and contingent payments, while a salary is something regular and permanent, albeit alterable in amount. It seems to me that the receipt of a salary (though in exceptional cases it might be a nominal one) is an essential requirement for the holding of an office. For this further reason, I hold that the respondent was not and is not the holder of an office at all, and therefore not the holder of a public office under the Crown in Ceylon.

The petition accordingly fails, and is dismissed with costs.

Application dismissed.