1934 *Present:* **Garvin S.P.J. and Akbar J.**

SIRIMANE *v.* NEW INDIA ASSURANCE COMPANY, LIMITED.

111—D. C. Kandy, 42,277.

Jurisdiction—Action to recover money under fire insurance policy—Cause of action—English law.

In an action to recover money due under a policy of fire insurance the principle of the English law that the debtor must seek out the creditor applies. In such a case the cause of action, *i.e.*, the failure to pay, arises where the claimant resides.

APPEAL from a judgment of the District Judge of Kandy.

This was an action to recover a sum of money due on a policy of fire insurance, made in Colombo, relating to a property at Kegalla, which was alleged to have been destroyed by fire. The learned District Judge held that the District Court of Kandy had no jurisdiction to entertain the action.

N. E. Weerasooria (with him *Batuwantudave*), for plaintiff, appellant.—This being an action on a contract of fire insurance, the English law relating to fire insurance applies. See Ordinance No. 22 of 1866. Therefore, the English law rule that the debtor must seek out the creditor also applies. Hence the District Court of Kandy (the district where the assured resides) has jurisdiction.

A. B. Cooray (with him *T. S. Fernando*), for defendants, respondents.—It may not be possible in the present state of the law to argue that English law is not applicable in all matters relating to contracts of fire insurance. But the English law rule in question applied only in the case of a liquidated debt, and not in the case of a claim for unliquidated damages. There is no definite sum actually due. The policy is to make good the damage suffered. A claim for unliquidated damages is not a claim for a debt. In cases of claims for unliquidated damages the cause of action arises where the contract was made or was broken. A contract must be examined to see where it was intended to be performed—see *per* Walsh C.J. in *Tika Ram v. Daulat Ram*[1].

A contract of fire insurance is defined as a contract of indemnity against losses actually sustained—see *Welford and Otterbarry on Fire Insurance*, p. 6. A contract of debt is defined in Smith's *Mercantile Law, at p. 688.*

The breach of contract (the refusal to pay) occurred at Colombo. See Halsbury's *Laws of England, Vol. VII., s. 274, p. 194,* on "Place of Performance."

A claim for unliquidated damages becomes a claim for a debt only when the debtor accepts liability or when an arbitrator has fixed the amount.

Counsel also cited *Leake on Contracts, re* "Mode of Payment," at p. 658.

[1] *46 I. L. R. Allahabad 465, at p. 467.*

Weerasooria, in reply.—So long as a premium has to be paid by the assured, it has to be paid at Colombo. But the assured has to be indemnified in the place where he resides, *i.e.*, Kandy.

See Morice's *English and Roman-Dutch Law, pp. 94 and 95,* on Extinction of Contractual Obligations.

The words, debtor and creditor, in the maxim are to be understood in their widest possible sense.

Where the place of performance is not specified the place of the promisee is the place of payment, see *Halsbury, Vol. VII., ss. 274-5, p. 194.*

Counsel also cited Van Leeuwen's *Censura Forensis, Part I., bk. IV., Ch. 32, s. 14.*

Cur. adv. vult.

March 13, 1934. AKBAR J.—

The appeal is from a judgment of the District Judge dismissing plaintiff's action with costs on the ground that the District Court, Kandy, had no jurisdiction to try this case. The action was for the recovery of a sum of money due on a fire insurance policy, made in Colombo, and relating to a property at Kegalla, which was said to have been completely destroyed by fire.

According to the policy (D 2) the Company consented to pay all loss or damages to an amount not exceeding Rs. 25,000 if the property or any part of it was destroyed or damaged by fire or lightning while the policy remained in force. The plaint in paragraphs 3 and 4 alleged that the property insured was completely destroyed by fire and the loss sustained exceeded the sum of Rs. 25,000, the maximum amount payable under the policy, and that the plaintiff had submitted his claim to the defendant Company and had demanded the sum of Rs. 25,000, and that no payment had been made. Various issues were suggested but the case was decided, as stated by me, on the question of jurisdiction.

The learned District Judge, in reviewing the case law on the subject, observed that there was a conflict between my judgment reported in *Subatheris v. Singho*[1] and that of de Sampayo J. in *Silva v. Jayatilleka*[2].

There is no conflict at all between the decisions of this Court on this point; all the decisions were based on the footing that where the English law was applicable on a question of the place of payment, the English rule was to be followed, and that where the Roman-Dutch law was to govern the question, the Roman-Dutch law rule was to be resorted to. (See in particular *Haniffa v. The Ocean Accident & Guarantee Corporation, Ltd.*[3].) Here there can be no doubt as in fact it was admitted by counsel that the law applicable on the subject of fire insurance is the English law.

Under Ordinance No. 22 of 1866, all questions arising with respect to the law relating to fire and life insurance are to be decided according to the English law. Now the English rule is that the debtor must seek out the creditor and tender payment where the creditor resides. Admittedly the creditor resides in Kandy, and, if the word "debt" will include moneys alleged to be due on a fire insurance policy, the Kandy District will undoubtedly have jurisdiction.

[1] *32 N. L. R. 360.* [2] *6 C. W. R. 360.*

[3] *35 N. L. R. 216.*

Mr. Cooray argued that the English rule did not apply to an obligation to pay unliquidated damages and that it only applied to a claim for liquidated damages. He was unable to cite any direct authority on the point, and I am unable to accept his view that the English rule should be restricted in the sense urged by him. The English rule has not only been applied to payments of money due on sales of goods (*Robey & Co. v. Snaefell Mining Company, Ltd.*[1]), but also to sums due on a salvage claim [2], and money due as rent on a lease (*Haldane v. Johnson*[3]), and even to an allowance payable by a husband to his wife on a deed of separation (*Drexel v. Drexel*[4]). The rule was applied to a case where the defendant had to tender promissory notes. In *Cranley v. Hillary*[5] the head note is as follows:—"Where plaintiff, the drawer of a bill of exchange accepted by defendant, agreed with him and the rest of his creditors to take a composition of 8*s*. in the pound to be secured by promissory notes to be given by defendant payable on days certain, and that defendant should assign to the creditors certain debts, upon which they should execute a general release; and the assignment was executed, and all the creditors except plaintiff received their composition and executed the release, and plaintiff might have received his promissory notes if he had applied for them, but it did not appear that the defendant had ever tendered them to plaintiff, or that he had ever applied for them; and the plaintiff afterwards, and after the days of payment of the promissory notes had expired, sued the defendant on the bill of exchange: Held that he was not precluded by the agreement from recovering."

Lord Ellenborough C.J. said: "The rule is, that the person to be discharged is bound to do the act, which is to discharge him, and not the other party. If the defendant had offered the notes at the time of action brought, it might have been a ground for staying the proceedings." Dampier J. said: "It is laid down by Littleton that the obligor of a bond conditioned for the payment of money at a particular day, is bound to seek the obligee, if he be in England, and at the set day to tender him the money, otherwise he shall forfeit the bond. So in this case, the defendant was to give the notes, and therefore to go with them to the plaintiff, and he was not to go to the defendant. Suppose the condition had been to pay a sum of money, I apprehend the defendant must have sought out the party in order to pay it."

In *Haldane v. Johnson* (*ubi supra*) Baron Martin said:—"But two other authorities were referred to in the argument, viz., *Rowe v. Young*, in the House of Lords, and the judgments of the Judges there, and *Poole v. Tumbridge*, which, in our opinion, clearly show the plea to be bad. The covenant (as has been already observed) is a covenant to pay a sum of money to the lessor on a particular day: no place is mentioned for the payment, either expressly or by implication. In such case it is clearly laid down in both the above cases, that it is the duty of the covenantor to seek, on the appointed day, the person who is to be paid, and pay or tender him the money. And in *Poole v. Tumbridge*, it is stated by Parke B., as the conclusion from the authorities, "that nothing can discharge

[1] *20 Q. B. D. 152.*
[2] *(1893) The Eider Law Reports Pro. Div. 116.*
[3] *8 Exchequer Reports, 689.*
[4] *(1916) 1 Chan. Div. 251.*
[5] *2 M. & S. 120.*

a covenant to pay on a certain day but actual payment or tender on that day, although, if the party afterwards choose to receive the money, such payment may be pleaded by way of accord and satisfaction."

"This is in exact conformity with the rule of law laid down in *Sheppard's Touchstone, p. 378,* that when an obligation is to pay a sum of money, or do any like transitory thing to the obligee on a day certain, but no place is set down where it shall be done, it must be done to the person of the obligee wheresoever he be, if he be within the four seas."

"No precedent was cited for such a plea in an action upon a covenant, and we are satisfied that none exists, otherwise it would have been discovered in the investigation which was made in reference to the case of *Rowe v. Young,* above cited."

"In *Comyns' Digest, title "Pleader"* (2 W. 49, p. 402), the plea seems to be approved of in the action of debt; but nothing of the kind is to be found in regard to the action on the covenant (2 V. 14, p. 360); indeed, on the contrary, there is a passage which shows that even a subsequent levy by distress is not a good answer to an action of covenant for the rent, for (as is said) this admits the rent not paid on the day."

"We are therefore of opinion, that a covenant for the payment of rent, at the time and in manner as reserved, when no particular place of payment is mentioned, is analogous to a covenant to pay a sum of money in gross on a day certain, in which case it is incumbent upon the covenanter to seek out the person to be paid, and pay or tender him the money, and for the simple reason, that he has contracted so to do."

"Our judgment upon the main question being for the plaintiff, it is unnecessary to refer to an objection to the plea of a mere technical character, suggested by Mr. Willes."

Where there is a covenant to pay a sum of money, as in this case, the English rule is definite that the debtor must seek out the creditor. The fact that there may be a dispute as to the exact amount which may be due or as to whether it is due at all cannot affect the question at all, to my mind.

The obligation here arises on a contract, that is to say on a definite covenant to pay. It is interesting to note here that although the Roman-Dutch law is the exact reverse, Van Leeuwen in the *Censura Forensis* disagrees. Part I., Book IV., Chapter 32., s. 14, is as follows:—

"Hence arises the question whether a debtor, to get a discharge from his debt, ought to go to the creditor's house or the creditor ought to exact payment at the place where the debtor lives, and whether he is bound to demand payment of the debtor; and this appears from *arg. 1, 18, ff. de Constit. pecun.* Nor is the opinion of the Glossators and the Doctors plausible, or generally accepted, who make the distinction that as soon as a debtor and creditor are of different jurisdictions, the creditor must follow the domicile of the debtor, and should demand payment of him in his own country; but if they belong to the same forum, the debtor is bound to go to the creditor's house. This is wrong, because that law says generally that the man who wishes to clear himself of delay, or acquire any rights for himself ought to go to the creditor."

The appeal is allowed with costs and the case will go back to be concluded in the ordinary course.

GARVIN S.P.J.—I agree.

Appeal allowed.