Present: Lascelles C.J. and Wood Renton J. 1912.

CATHIRAVELU *v.* DADABHOY.

116—D. C. Colombo, 33,550.

Issue whether answer discloses a defence—No evidence taken—Court has power to dismiss action on issue of law only—Civil Procedure Code, s. 147.

The plaintiff raised the issue. Does the answer disclose a defence to the plaintiff's claim?

No evidence was taken, and no admissions were recorded. The District Judge answered the issue in the negative. On appeal it was contended that the District Judge had no right to dispose of the case on an issue in regard to which no evidence had been taken.

Held, that the Court had the power to do so.

WOOD RENTON J.—Section 147 expressly enables the courts of first instance to dispose of a case on issues of law alone, and for that purpose to postpone the settlement of issues of fact until after the issues of law have been determined.

Gauder v. Gauder [1] commented upon.

THE facts are set out in the judgment of Wood Renton J.

Bawa, K.C. (with him *J. Joseph*), for the defendant, appellant.

Walter Pereira, K.C. (with him *F. M. de Saram*), for the respondent.

Cur. adv. vult.

June 26, 1912. WOOD RENTON J.—

The plaintiff-respondent sues the defendant-appellant in this action as his lessee, under a monthly tenancy, of No. 31, Sea street, Colombo, alleging that the tenancy had been determined by notice to quit, and praying for the ejectment of the appellant from the premises leased, and for compensation at the rate of Rs. 125 a month—the monthly rent under the tenancy—in respect of the appellant's occupation of the premises as an over-holding tenant from September 1, 1911. The appellant in his answer stated that the premises had been let to him for a period of five years from June 1, 1910, at a rent of Rs. 125 a month; that the respondent received from him a sum of Rs. 375 in advance; and that he is, therefore, not entitled to have him ejected from the premises. The respondent admits in his plaint that he did receive the sum of Rs. 375 in advance from the appellant; alleges that it was agreed that that sum should be set off against the last three months of the monthly tenancy; and says that he has appropriated the amount in respect of the rent due to him by the appellant for June, July, and August, 1911. As already mentioned, the compensation claimed by

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the appellant in this action dates from September 1, 1911. The agreement of tenancy on which the respondent relies is in writing, is an agreement for a monthly tenancy alone, and is not notarially executed. In the case of a monthly tenancy, of course, notarial execution is unnecessary. Such execution would, however, be necessary in the case of a lease for a period of five years. The appellant alleges that the agreement between himself and the respondent was, in the first instance, verbal. The terms of that alleged agreement I have already partly stated. The only other terms to which it is necessary to refer are that the appellant was to have an option to terminate the agreement at any time within twelve months from June 1, 1911, on payment to the respondent of a sum of Rs. 100 on account of certain improvements which the respondent undertook to effect on the premises, and that all taxes were to be paid by the respondent. The appellant states that on the conclusion of this verbal agreement he requested the respondent to " make the same legally effective and binding by executing the necessary documents "; that the respondent thereupon caused the agreement sued on to be executed in the English language, of which the appellant was ignorant, and thereafter made additions to it in writing in Tamil. The allegation in the answer next following is important:—

> " The plaintiff represented to the defendant that the said document was valid, effectual, and sufficient in law to secure to the defendant the due carrying out of the terms of the said agreement. The defendant, relying on the said statement and representation of the plaintiff, handed the plaintiff a cheque for Rs. 375."

The appellant also states that he entered on the premises leased in pursuance of the agreement. On the grounds stated in his answer the appellant prayed that the respondent's action might be dismissed. A number of issues were framed. But the case was decided, without any evidence having been taken, on an additional issue suggested by Mr. de Sampayo, the respondent's counsel, " Does the answer disclose a defence to the plaintiff's claim? " The learned Additional District Judge answered this question in the negative, and dismissed the appellant's action with costs. The grounds of this decision are in substance two: (1) That under the law of Ceylon the entry by the appellant on the premises demised under the informal lease was not such a part performance of the alleged agreement relied upon by the appellant as would entitle him to succeed, even if he were able to establish it as a fact; and (2) that no estoppel could arise against the respondent on the allegations in the paragraph of the answer which I have set out in full above, inasmuch as the alleged misrepresentation was one of law and not of fact, and the appellant was not entitled to plead ignorance of law. The reasons given by the learned District Judge in support of the

first of these findings are conclusive, and the appellant's counsel stated to us in the argument of the appeal that he did not propose to challenge them. He contested, however, relying on the decision of Wendt J. and Sir John Middleton J. in *Gauder v. Gauder*,[1] the right of the District Judge to dispose of the case on an issue in regard to which no evidence had been taken, and he further urged that the misrepresentation relied upon by the appellant was a misrepresentation of fact and not of law, and that, therefore, the plea of estoppel was maintainable. The decision of the Supreme Court in *Gauder v. Gauder*,[1] in which it would appear from the headnote to have been held that a Court cannot in Ceylon decide a preliminary issue as to whether the answer disclosed a defence to the action, on the assumption that all the averments in the answer are correct, must clearly be limited to the particular facts with which the Judges deciding that case had to deal. Section 147 of the Civil Procedure Code expressly enables the courts of first instance to dispose of a case on issues of law alone, and for that purpose to postpone the settlement of the issues of fact until after the issues of law have been determined. It would, in my opinion, have been contrary to the express language of section 147 of the Code, and highly inconvenient in practice, if the Supreme Court had laid down any such general rule as is stated in the headnote to *Gauder v. Gauder*.[1] I may mention that that case was subsequently cited in the argument of an appeal before Sir John Middleton and myself, and that we both interpreted it in the sense which I have just stated. Our decision is unfortunately unreported, and I have myself no note of it. I do not think that the first point taken by the appellant's counsel against the judgment under appeal can be maintained. With regard to the second point, however, I would allow the appeal to a limited extent. The appellant's answer as drawn is ambiguous, and is expressed in terms which gave the District Judge some ground for holding that the misrepresentation alleged against the respondent was merely one of law. At the same time the present case is an important one. It is stated in the petition of appeal that the value of the unexpired term of a lease for five years of the premises in question would be Rs. 6,000. Moreover, there are circumstances in the case entitling the appellant to further inquiry. In proof of this statement, I will merely refer for the present to the fact that, while the actual agreement sued on—a document written in the English language, which the defendant says he does not understand—is one for a monthly tenancy only, the writing on the back of that agreement in Tamil—a language which the appellant does understand—is shown by the certified translation filed of record, the correctness of which was not impeached at the argument of the appeal, to have been an agreement for a five years' lease, determinable at the instance of the appellant alone, under the circumstances alleged by him in his answer.

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In view of the admission of the appellant's counsel that he would not challenge the judgment under appeal in so far as it deals with part-performance, that question must be regarded as finally decided. But I would set aside the decree of the learned District Judge giving the respondent judgment in terms of the prayer of the plaint, and send the case back for further inquiry and adjudication on issues 4, 5, and 6 at pages 20 and 21 of the record. Under issue 6 only estoppel by misrepresentation of facts may be raised. I have omitted the issues bearing on the questions whether the action can be maintained, of part performance, of *dolus malus*, which is amply covered for the purposes of the present case, by the issue as to fraud, and as to whether the appellant is entitled to call upon the respondent to execute a valid lease. The appellant will be at liberty to amend his answer if the Court considers such an amendment necessary; and he ought, I think, to be allowed, if he is so advised, to plead *non est factum*, and to claim damages against the respondent in reconvention.

As the language of the appellant's own answer has given rise to a good deal of the difficulty in this case, I would leave all costs, including the costs of the appeal, to abide the event.

LASCELLES C.J.—

I entirely agree. The case is one in which further inquiry is necessary in the interests of justice.

Sent back.