1937 *Present :* **Moseley J. and Fernando A.J.**

57—D. C. Kalutara, 18,108.

DHAMMASIRI THERUNNANSE *v.* SUDIRANANDO THERUNNANSE.

Buddhist Temporalities—Appointment by incumbent of a successor—Notarial instrument not essential.

Where the incumbent of a Buddhist vihare appoints one of his pupils as his successor, the appointment need not be by a notarial instrument.

Terunnanse v. Terunnanse (*28 N. L. R. 477*) referred to.

APPEAL from a judgment of the District Judge of Kalutara.

H. V. Perera, K.C. (with him *Ranawake* and *Koattegoda*), for defendant, appellant.

N. E. Weerasooria (with him *A. E. R. Corea*), for plaintiff, respondent.

June 10, 1937. FERNANDO A.J.—

The plaintiff filed this action for a declaration that he is entitled to the incumbency of the Poojaramaya temple and to have the defendant ejected therefrom.

It is common ground that the previous incumbent was Seelaratne who was the tutor of the plaintiff as well as of the defendant. Admittedly the incumbent has the right to select his successor to the incumbency from among the pupils, and in the absence of any such appointment, the senior pupil is entitled to succeed. It is also admitted that the defendant was the senior pupil of Seelaratne, while the plaintiff claims to be entitled to the incumbency on the ground that he was appointed by Seelaratne to succeed him.

The learned District Judge held that on the documentary evidence there was no room for doubt that the plaintiff had been selected by Seelaratne as his successor from among his pupils. He, therefore, held on issue 5, that the plaintiff had in fact been nominated by Seelaratne. This conclusion is amply supported by the evidence in the case, and I see no reason to interfere with that finding.

Counsel for the appellant, however, contended that the appointment of one of the pupils to the incumbency must be by deed or by last will, and it would appear that in most of the cases that have come before the Court, the appointment has in fact been by last will or by deed.

Counsel for the respondent, however, contends that there is no provision of law that requires such appointment to be by a notarial instrument.

In the case of *Rewata Unnanse v. Ratnajothi Unnanse*[1], Shaw J. did not think it necessary to discuss the question whether a deed within the meaning of our common law was necessary for the purpose of appointing a successor to an incumbency, because in that case there was a notarial

[1] *3 C. W. R. 193.*

document entitled a "testament" executed for the purpose. Schneider J., however, held that the document there produced was not a last will". "It cannot operate as a will", he said, "because it has none of the attributes of the characteristics of a will. It appears to follow a form commonly used in days anterior to legislation as regards Buddhist temporalities, when the succession was not only to the status, from a religious point of view of the incumbent, but also to the management and control of the temporalities of the temple. I regard this instrument as only a pure act of appointment or nomination or selection to the succession to the incumbency. In this view the instrument may be in any form. As at present advised, the act of appointment may be done even by word of mouth".

In the case of *Terunnanse v. Terunnanse*[1], Garvin J. said that, "by the Buddhist Temporalities Ordinance, the property of the Vihare both movable and immovable is vested in the trustee, who in that case was the second defendant. An incumbent clearly has no title to the immovable property of the temple, nor a right to the possession thereof. Apart from his ecclesiastical duties an incumbent of a vihare has certain rights of administration and control of the vihare itself, but these are not such rights as are contemplated by section 3 of Ordinance No. 22 of 1871". This decision appears to lend support to the argument of Counsel for the respondent that no notarial document is necessary in a case where an incumbent appoints one of his pupils as his successor to the incumbency, inasmuch as such appointment does not effect or convey any title to the immovable property belonging to the vihare which vests in the trustee of the vihare. I think, therefore, the respondent's contention must succeed.

Mr. Weerasooria also argued that the will P 6 did in fact appoint the plaintiff as the successor of Seelaratne to the incumbency. In P 6 Seelaratne did "nominate and appoint" the plaintiff being his "chief pupil", to be "the sole and universal heir of all the estate and effects which shall be left me after my death whether movable or immovable and of what nature or kind soever. I am not satisfied, however, that by this document Seelaratne did convey the right to succeed him in the incumbency, inasmuch as there is no specific reference to the office, and the property covered by the will was only property which would be left by Seelaratne after his death. It is clear, however, from the evidence both oral and documentary that Seelaratne did nominate the plaintiff as his succesor out of his pupils, and although the petition P 7 in which Seelaratne states that he bequeathed all his rights including his ecclesiastical position in the temple to the plaintiff that statement cannot in my opinion be accepted as sufficient to enable me to hold that the last will had this effect. Still there can be little doubt that it was the intention of Seelaratne to do so, at least at the time he wrote the petition P 7. It follows, therefore, that the appointment of the plaintiff by Seelaratne need not have been a notarial instrument and that he was in fact appointed by Seelaratne.

In view of these conclusions, the appeal must fail on the principal points in the case. Counsel for the appellant, however, also referred to the fact, that the learned District Judge in his judgment ordered that the defendant

[1] *28 N. L. R. 477.*

be ejected from the temple premises. It is true as the learned Judge states that the state of feelings between the parties appear to be such that to use the defendant's own words, " both of us cannot live in the same temple ", but the defendant is himself one of the pupils of Seelaratne, and has been residing in this temple for some years. The contest between the parties is with regard to the incumbency and it is probably that as senior pupil the defendant did resent the fact that the plaintiff who was his junior was claiming to be the incumbent. It may be that once it is held that the plaintiff is entitled to the incumbency, the defendant will abide by that decision, and there appears to me no sufficient reason to anticipate any breach of the peace as the learned District Judge appears to have done. The defendant may remain in the temple as one of the priests attached to it if he so desires, but his residence in the temple will not in any way affect the rights of the plaintiff as incumbent. If by reason of any future conduct on the part of the defendant, the plaintiff finds it difficult to allow him to remain in the temple, plaintiff will have the right as incumbent to have the defendant ejected on good cause shown. In all the circumstances, I would affirm the judgment of the learned District Judge, but omit from the decree that portion of it which orders the ejectment of the defendant from temple. The defendant-appellant will pay to the plaintiff-respondent his costs of this appeal.

MOSELEY J.—I agree.

Appeal dismissed.