1938 *Present* : **Maartensz S.P.J. and Keuneman J.**

DE LIVERA *et a.* *v.* ABEYSINGHE *et al.*

16—D. C. Galle, 33,082

Evidence Ordinance—Last will—Translation of a Dutch will—Proof by secondary evidence—Res judicata—*Question not decided in appeal*—Ordinance No. 14 of 1895, s. 63.

An English translation of a document in another language cannot be regarded as secondary evidence of the original document under section 63 of the Evidence Ordinance.

Even if a document is admitted to the record by consent, that alone will not enable either party to prove by that document anything which under the Evidence Ordinance cannot be proved.

Where an appeal has been taken from the decision of an original Court and the Appellate Court does not think fit for some reason to decide the matter, the question is left open and is not *res judicata.*

THE plaintiffs brought this action against 203 defendants for the partition of Pokunebodawatta *alias* Pokunewalawwa. The plaintiffs contended that the original owner of the land was Nicholas Dias Abeysinghe Amerasekera, who left a last will dated May 21, 1793, whereby he devised the land in question to his heirs subject to a *fidei commissum.*

The 139th and 140th defendants denied that Nicholas Dias Abeysinghe left a last will dated May 21, 1793, and, even if he had, it did not create a valid *fidei commissum* binding to the 4th degree of succession. They further contended that the plaintiffs were not the only heirs of the 3rd and 4th degree of succession. Further, the defendants objected to the admission of the copy of the will which was not the original. It was a copy of a translation. The learned District Judge held in favour of the plaintiffs and the defendants appealed from this order.

F. A. Hayley, K.C. (with him *E. B. Wikremanayake*), *for the* 139th and 140th defendants, appellants.—The appeal involves three points of law. Firstly, the will must be proved. An alleged translation had been filed. It had been the subject-matter of several actions, but no probate had been granted. The procedure under the Dutch is unknown. The will must be proved. There is no evidence that the document is a last will so as to enable secondary evidence to be led under section 65 (3) of the Evidence Ordinance. Section 63 of the Ordinance defines the nature of secondary evidence. A translation is not a certified copy. In *Abdul Rahiman v. Kanni Umma*[1], it was held that a translation of a deed of conveyance would not be admissible as secondary evidence to prove the contents of the original deed.

Secondly, this case involves the number of generations to whom the *fidei commissum pass.* The *obiter dictum* of Koch J. in *Siri Kantha v. Thiagarajah*[2] that a *fidei commissum* extends up to and including the fourth generation should not be followed. The only reference to the four generations is a decision in D. C. Galle, 23,376[3], but it is a decision with regard to the same will. Walter Pereira deals with this question on p. 446 of his *Laws of Ceylon.* Juta says that a *fidei commissum* is confined to four generations counting from the first fideicommissary heir or legatee (*Juta on Wills, p. 103*). *Steyn, p. 200,* says the same thing. Though the plaintiffs claim that they have an absolute title, the defendants submit that they have only a life-interest as the testator must not be included in the four generations.

Thirdly, as the plaintiffs have no absolute title, a partition should not be allowed. There are limits to the proposition that *fidei commissum* property can be partitioned. This point is discussed in *Kuda Etana v. Ran Etana*[4], though the question in that case was different. In *Fernando v. Fernando*[5], Sampayo J. stressed the inadvisability of dividing land subject to *fidei commissum.* The same proposition was laid down in wider terms by the learned Judge in *Dassanaike v. Tillekeratne*[6].

[MAARTENSZ S.P.J.—Is there any provision corresponding to Ordinance No. 17 of 1852 during the Dutch times?]

Walter Pereira refers to Dutch wills at page 400 of his book, *Laws of Ceylon.* Members of the Court referred to must be Judges—See *Grotii II., 17, 18.*

[1] *(1911) 14 N. L. R. 279.*
[2] *(1935) 37 N. L. R. 270.*
[3] *(1869) Vand. 32.*
[4] *(1912) 15 N. L. R. 154 at 155.*
[5] *(1915) 1 C. W. R. 46.*
[6] *(1917) 4 C. W. R. 334 at 335.*

N. Nadarajah (with him *G. E. Chitty*), for the plaintiffs, respondents.—The will had been produced and acted upon. Portions of the will are quoted in D. C. Galle, 23,376 [1]. This was considered in *Doraisamy v. Raman Chetty and Supramaniam Chetty* [2].

A copy can be made from a copy. A copy of the translation was produced. This tallied with the one produced by the defendants. Since the original and the translation formed one document, the translation is in the same position as the original. See *Lachman Singh v. Mussumat Puna* [3]. In *Silva v. Kindersley* [4], it was held that when a document was tendered by a party and was accepted without objection, it would be deemed to be legally admissible. A certified copy of a certified copy of an old deed was accepted in *Sartasang v. Narasingji* [5]. If this view is not accepted it would be difficult to prove an old Dutch deed when it is destroyed.

It was held in *Babun v. Dingihamy* [6] that where a party went to Court on a certain footing and the Court decided, it would operate as *res judicata* in future proceedings. The only exception to this rule is section 44 of the Evidnce Ordinance. See *Endris v. Adrian Appu* [7], *Hukumchand on Res Judicata p. 89, Dingiri Menika v. Punchi Mahatmaya* [8], *Canapathipillai v. Arumugam* [9], *Bissorup Gossamy v. Gorachand Gossamy* [10], *Spencer Bower on Res Judicata 126, Saravanamuttu v. Solamuttu* [11].

The manner in which the generations are to be reckoned is given in *Siri Kantha v. Thiagarajah* [12].

A Court can partition land subject to a *fidei commissum*—See *Sathianaden v. Mathes Pulle* [13], *Baby Nona v. Silva* [14], *Abeysundera v. Abeysundere* [15] and *Jayawardene on Partition, p. 38.*

F. A. Hayley, K.C., in reply.—Under section 207 of the Civil Procedure Code all decrees are made subject to the appeal. When an appeal is filed it is no longer *res judicata* but *res sub judice.* See *Annamalay Chetty v. Thornhill* [16]. Then there must be a further judgment of the Court of Appeal to operate as *res judicata.* Further the question of *res judicata* had never been raised. The various judgments were filed not for the purpose of *res judicata* but to prove the document by secondary evidence.

Now secondary evidence can be led under certain circumstances only as for instance the loss of a document. There must be the proof of the loss. See *Amir Ali on Evidence, s. 63, clause 3.* It was held in *Jaganatha Naidu v. The Secretary of State for India* [17] that a translation was not secondary evidence of the original.

Under section 547 of the Civil Procedure Code a will can be admitted only after probate is taken out. It applies retrospectively. See *Ponnamma v. Arumugam* [18], *Gunaratne v. Hamine* [19], *and Gunaratne v.*

[1] (1869) *Vand. 32.*
[2] (1910) *2 Cur. L. Rep. 217.*
[3] *L. R. 16 I. A. (1888-1889), 125.*
[4] (1914) *18 N. L. R. 85.*
[5] (1922) *A. I. R. Bom. 177.*
[6] (1899) *2 Matara 80.*
[7] (1905) *11 N. L. R. 62.*
[8] (1910) *13 N. L. R. 59.*
[9] (1917) *5 C. W. R. 23 at 24.*
[10] (1882) *I. L. R. 9 Calc. 120.*
[11] (1924) *26 N. L. R. 385, at 392.*
[12] (1935) *37 N. L. R. 270, at 271.*
[13] (1897) *3 N. L. R. 200.*
[14] (1906) *9 N. L. R. 251.*
[15] (1909) *12 N. L. R. 373.*
[16] (1931) *33 N. L. R. 41.*
[17] (1922) *A. I. R. Madras 334.*
[18] (1905) *8 N. L. R. 223.*
[19] (1903) *7 N. L. R. 299.*

Appuhami [1]. In *Charles Hamy v. Jane Nona* [2], it was held that a will could not be proved incidentally. Section 547 of the Civil Procedure Code is imperative.

Cur. adv. vult.

July 8, 1938. MAARTENSZ J.—

This is an action for the partition of a land called Pokunabodawatta *alias* Pokune Walauwa which belonged to Nicholas Dias Abeysinghe Amerasekera, Maha Mudaliyar.

The plaintiffs brought this action on the footing that Nicholas Dias by his last will dated May 21, 1793, devised the property to his children Ana Gertrude, Johannes Wilhelminus, and Don Abraham subject to a *fidei commissum* in favour of their descendants.

Don Abraham left six children one of whom was William Alexander. He had five children one of whom was Abraham Nicholas whose children are the 133rd to the 140th defendants. The 139th and 140th defendants filed answer in which they pleaded *inter alia* that Nicholas Dias did not leave a last will and that he did not subject the property to a *fidei commissum.*

At the trial the 137th defendant associated himself with the contests raised by the 139th and 140th defendants (see page 142 of the record).

The fourth plaintiff produced the document P 1 as evidence that Nicholas Dias left a will executed in 1793. Counsel for the 139th and 140th defendants submitted that it was inadmissible and moved that this question and certain other legal questions should be tried first.

The District Judge acceded to this request and adjudicated on the following legal points regarding the will.

(*a*) Did it create a *fidei commissum* binding to the 4th degree of succession?
(*b*) Are plaintiffs only the 3rd and 4th degrees of succession?
(*c*) If so, is this action maintainable?
(*d*) Is the document P 1 admissible in evidence?

The 139th and 10th defendants appeal from the District Judge's rulings on these points—

The questions which have to be decided in this appeal are:—

(1) Whether P 1 is secondary evidence of the will?
(2) Whether the plaintiffs have led other evidence which amount to secondary evidence of the will?
(3) Whether the 139th and 140th defendants are bound by the judgment and decree in case No. 33,087 of the D. C. of Galle?

I have had the advantage of reading the judgment of my brother Keuneman and I agree, for the reasons given by him, that the decree in case No. 33,087 does not bind the appellants. I also agree that P 1 is not secondary evidence of the will as it is a translation of the will which is in Dutch and therefore does not come within the categories of secondary evidence prescribed by section 63 of the Evidence Ordinance and that the plaintiffs have not led any other evidence which amounts to secondary evidence of the will.

[1] *(1906) 9 N. L. R 90.*

[2] *(1912) 15 N. L. R. 481.*

The question arises whether the District Judge's order should be set aside *in toto* or only so far as it affects the appellants.

In this case there can be no doubt that Nicholas Dias was the owner of the property in question nor in my opinion can there be any doubt that he left a will dated May 21, 1793. The authenticity of the will is also beyond doubt. It has been acted upon and interpreted by this Court and the D. C. of Galle in a series of cases of which the first was case No. 23,376 of the District Court of Galle which was decided in 1868 and affirmed in the Supreme Court in 1869.

The 140th defendant filed a copy of the will or a translation of it in case No. 3,170, D. C. Galle (Land Acquisition) and it was returned to him (see journal entries P 6). The 140th defendant in that case, in support of his application to draw a share of the compensation, filed an affidavit dated October 25, 1920, in which he swore that Nicholas Dias Abeysinghe by his will dated May 21, 1793, created a *fidei commissum* in favour of his heirs and died leaving as heir a son, one of whose descendants was the deponent. The 139th defendant addressed a petition to the Attorney-General claiming his share of the interest earned by the compensation deposited in that case (P 6).

The 139th and 140th defendants for purposes of their own now put the parties to the partition action to the proof of the contents of the will. The objection though highly technical one must be upheld but I am not prepared in the circumstances of this case to exercise the powers vested in this Court by section 760 of the Civil Procedure Code even if it was applicable and reverse or modify the decree in favour of all the defendants.

I accordingly make the following order. The order of the District Judge is varied and the shares or interests if any of the 139th and 140th defendants are declared free from the burden of a *fidei commissum*. This exception will not extend to the interests, if any, of which the 139th and 140th defendants have divested themselves and the owners of which are parties to the suit and have not appealed.

It is now settled law that a partition suit can be brought by one of two or more fideicommissaries as fideicommissaries and the objection that the action is not maintainable fails.

Subject to the above variation the order of the District Judge is affirmed. The 139th and 140th defendants will be entitled to the costs of appeal and the costs of contest in the Court below payable by the plaintiffs.

KEUNEMAN J.—

The five plaintiffs brought this action under the Partition Ordinance against 203 defendants for the sale of the land Pokunebodawatta *alias* Pokune Walauwa. There were many points of contest, but a certain number of these points were taken up by way of preliminary inquiry, viz., the points numbered, 4, 5, and 6, which are set out as follows in the judgment appealed from:—

The legal points are—

(4 and 5) 139th and 140th defendants deny that Nicholas Dias Abeysinghe left a last will dated May 21, 1793. If the Court holds that there was such a will,

(*a*) Did it create a *fidei commissum* binding to the 4th degree of succession? and

(*b*) Are the plaintiffs only the 3rd and 4th degree of succession?

(*c*) If so, is this action maintainable?

(6) Is the document P 1 admissible in evidence?

The contention of the plaintiffs was that the original owner of the land in question was Nicholas Dias Abeysinghe Ameresekera, Chief Mudaliyar, who left a last will dated May 21, 1793, whereby he devised the land in question to his heirs, subject to a *fidei commissum* which was binding to the full extent allowed by law, viz., for four generations. This was denied by the 139th and 140th defendants.

In proof of the said will, the plaintiffs produced document P 1, which was objected to by the appellants, and the question arose whether that document was admissible.

The learned District Judge held on these points in favour of the plaintiff. The learned District Judge further held that the *fidei commissum* attached to the donees and three generations following.

The appellants appeal from this judgment.

The first question to be decided is whether the document P 1 is admissible in evidence. P 1 is not the original will, nor a certified copy of that will. P 1 purports to be an English translation of a document in Dutch which had been deposited in the office of the Secretary of Police on May 21, 1793, during the time of the Dutch Government of Ceylon. A copy of this document had been granted to Mudaliyar Don Bastian Dias Abeysinghe Siriwardene on May 4, 1793. P 1 may be a translation of the original document deposited or of the copy granted as shown above. There is an endorsement that the copy agrees with the original, so probably the translation was of the copy. Now the terms of P 1 show that Nicholas Dias Abeysinghe Ameresekera appeared at the office of the Secretary of Police and made certain declarations, but P 1 purports to bear the signature of G. C. Dias as executant. No explanation has been given for this difference in initials. In an old action D. C. Galle, 23,376, about the year 1865 one Nicholas Dias Mudaliyar, a grandson of the original owner, produced what he described as the "old Dutch deed of 1793". A translation was also filed in the case. In April, 1872, one Petrus Dias, a member of the same family moved for permission to withdraw the will, leaving the translation behind in the case. The reason given was that there was no person procurable who was competent to make a copy of the will. The will was accordingly handed to Petrus Dias, who signed as having received the same.

In D. C. Galle, 38,454, about the year 1880, Fred Dias the son of Petrus Dias produced this "will" for the purposes of the case, and was allowed to withdraw it again. (*Vide* document P 1.)

The fourth plaintiff stated in evidence that on the death of Fred Dias, "the contesting defendants, *i.e.*, Abraham Dias' family, got the will. In D. C. Galle, 3,170, land acquisition, 140th defendant produced a copy of this will and withdrew it later . . . . The will cannot now be found". No explanation in this connection has been offered by the present appellants.

The document P 6—the journal entries in case D. C. Galle, 3,170—shows that the 140th defendant moved to withdraw the last will No. 1,543 filed by him and was allowed to do so on July 18, 1930. This is the number appearing in P 1. Apart from the evidence of the fourth plaintiff there is nothing to show definitely whether the document withdrawn was a certified copy of the Dutch will, or a translation. The appellants produced document 139 D 1, which is an English translation, in similar terms to P 1 except for the fact that the first page is missing. 139 D 1 contains an endorsement at the back of the last page under date July 18, 1930— "Doct. filed in D. C. Galle, case No. 3,170 returned to B. P. Dias Abeysinghe defendant", *i.e.*, to the present 140th defendant.

The contention for the plaintiff is two-fold, (1) that the Dutch last will is in the possession of the 140th defendant, and (2) in the alternative that it is lost. It is urged that secondary evidence can be given of the contents of the will under section 65 (1) and (3) of the Evidence Ordinance.

As regards the first contention, it is only necessary to state that the notice to produce the document required by section 66 has not been given to the 139th and 140th defendants, and that no circumstances have been established which dispense with the necessity of notice. But there is another and more serious objection which is applicable to both the contentions, viz., that P 1 is not secondary evidence of the document within the meaning of section 63 of the Evidence Ordinance. P 1 purports to be a translation of the Dutch original or of the copy supplied by the office of the Secretary of Police. In *Abdul Rahiman v. Kani Umma*[1] Lascelles C. J. stated, "The different kinds of secondary evidence that are admissible to prove the contents of a document are enumerated in section 63 of the Evidence Ordinance, and the enumeration does not include translations. That section 63 is intended to be exhaustive is clear from the language of the section, and in India the section has been so construed. (*Ram Prasad v. Raghunadan Prasad*[2]) ".

It has also been held in India that a translation is not secondary evidence of the contents of the original, *vide Jaganatha Naidu v. Secretary of State for India*[3]. In this case what was sought to be put in was a translation contained in a judgment in a suit not between the same parties or their representatives in interest. In this case however mention is made of two other Indian cases not obtainable here in which it was held that a translation is not secondary evidence.

I am in agreement with these findings and hold that an English translation cannot under section 63 be regarded as secondary evidence of an original document in some other language. Accordingly P 1 cannot be admitted in evidence. In addition to the fact that strict interpretation must be given to section 63 it does not appear to me that any probative value is to be found in the translation P 1. We do not know who made the translation, and there is no certificate that it is a correct translation from the Dutch.

Counsel for the respondents further argued that there was proof of other secondary evidence of the existence and the contents of the old Dutch will of 1793.

[1] *14 N. L. R. 279.*

[2] *I. L. R. 7 All. 739, at 743.*

[3] *A. I. R. Madras (1922) p. 334.*

The first line of proof offered is the evidence of Nicholas Dias Mudaliyar in D. C. Galle, 23,376 (P 1). The evidence of this witness who was fifth defendant in that case and gave evidence in 1865 was produced. Witness himself was the son of Abraham Dias and grandson of the original owner. He stated, "The land was the property of my grandfather. He left an old Dutch deed of 1793 which I produce". It is sought to bring this evidence under section 63 (5) of the Evidence Ordinance, viz., "Oral accounts of the contents of a document given by some person who has seen it".

The difficulty in the respondent's case is that, while this evidence does tend to prove the existence of the will of 1793, it is silent as to the contents of the will.

A similar difficulty applies to the recorded evidence of Fred Dias in D. C. Galle, 38,454 (P 5). Here also the existence of the will is spoken to, but not the contents of the will.

Reference has also been made to P 10, the last will of Abraham Dias, made on December 13, 1830. Here there is undoubtedly a reference to the terms of the old Dutch will of 1793 as far as it relates to the property in question. The anthenticity of this document however has not been established. The notary's attestation is to the effect that P 10 is a correct translation from the Dutch of a paper writing purporting to be the last will of Abraham Dias, but produced by Nicholas Dias on December 30, 1830. There is no production of the original Dutch will of Abraham Dias. But apart from this infirmity, it is not possible to regard this as an "oral account" of the contents of the old will of 1793, and it cannot be regarded as a copy made admissible under section 63.

Further, it has been contended that the contents of the old Dutch will of 1793 have been admitted by the appellants. The present case is an action under the Partition Ordinance, and I do not think that admissions of this nature can be regarded as establishing the high degree of proof which is required in such cases.

Counsel for the respondent relied in this connection on an affidavit marked P 6 sworn by the 140th defendant and filed in the land acquisition case D. C. Galle, 3,170. Here the appellant stated that the land originally belonged to Nicholas Dias Abeysinghe "who by his will dated May 21, 1793, created a *fidei commissum* in favour of his heirs and died leaving three children who became entitled to the same". In a later paragraph he added that "so far as myself and my brothers and sisters are concerned the said restriction is at an end". I do not think that we can find here an admission that a *fidei commissum* was created which had the effect of binding the 139th and 140th defendants, or in fact any admission that there was a *fidei commissum* binding on four generations. Further, the admission if any related to the land Poloyamoderawatta and not to the land at present in question.

Counsel for respondent also relied on a petition filed by the 139th defendant in the same case D. C. Galle, 3,170, also marked P 6, but I am not able to find any admission of the contents of the old Dutch will in this document.

Counsel for the respondents also argued that the production by the appellants of the document 139 D 1 must be construed as an admission of the contents of the old Dutch will of 1793. This document again is an English translation—the first page is missing. Apparently this translation was produced by the 140th defendant in the land acquisition case D. C. Galle, 3,170, either with or without a Dutch copy of the original, and was subsequently withdrawn from the case by th 140th defendant. Now it appears clear that this document was not produced to prove the contents of the will, and that there was no consent by the appellants that it should be treated as proving the contents of the will. The apparent reason for producing it was to show what document had actually been filed in D. C. Galle, 3,170 by the 140th defendant and removed by him. The same objection applies to 139 D 1 under the Evidence Ordinance which applies to P 1. Under these circumstances the language of Reilly J. in *Marri Narasayya v. Peruri Krishnamurthi*[1] becomes relevant. "Even if a document is admitted to the record by consent, that alone will not enable either party to prove by that document anything which under the Evidence Ordinance cannot be proved. But if the parties consent that for the purposes of the case it shall be treated as showing the contents of some other document, then although the contents of that other document could not be proved under the act by the document proved, that is of no consequence". With respect, I think this is a salutary rule and I do not think there is any admission in this case of the contents of the original Dutch will, even supposing that in an action under the Partition Ordinance such admission can have any defect.

A further point raised by Counsel for the respondents is that the 139th and 140th defendants are barred from denying the existence and contents of the old will of 1793 in consequence of the decree in D. C. Galle, 33,087, which it is claimed is *res judicata* on this point. The question of *res-judicata* was not one of the points originally reserved for preliminary determination, but the learned District Judge was of opinion that *res judicata* was established, and I think it is possible to decide this matter in appeal. It is clear that all the parties to the present action including the plaintiffs and the 139th and 140th defendants were parties to D. C. Galle, 33,087, and that in the District Court the identical questions arising in this case were in question in respect of the land Poloyamoderawatta, and the same or similar documents were produced and similar evidence was given. In that case the document P 1 was admitted in evidence in proof of the contents of the will of 1793, and the learned District Judge held that the existence and contents of the will were proved, and that the terms of the will were as contained in the translation P 1, and created a *fidei commissum* binding on the heirs of the original owner, and three generations next succeeding them. Had the matter stood there, a strong case might perhaps have been made out in favour of *res judicata*. Thereafter the 139th and 140th defendants appealed against the judgment. In appeal the Supreme Court gave no decision on the merits of the appeal, but dismissed the appeal on the ground that the appellants had transferred all their interests in the land in question and accordingly had no interest in the decree.

[1] *A. I. R. (1928) Madras 1255.*

It has been held in the Privy Council in *Annamalay Chetty v. Thronhill* [1] that no decree from which an appeal lies and has in fact been taken is final between the parties so as to be *res judicata.* This effect arises from section 207 of the Civil Procedure Code. In India it has been held that "where the decision of a lower Court is appealed to a superior tribunal which for any reason does not think fit to decide the matter, the question is left open and is not *res judicata.*" See *Caspersz on Modern Estoppel and res judicata, vol. III, p. 156.* So where a lower Court had decided issues as to title and possession, but on special appeal the question of possession alone was adjudicated upon, it was held that the question of title was still open to the parties (*Gungabishen Bhugust v. Raghoonath Oftha* [2]). In a later case *Nilvaru v. Nilvaru* [3] the reason for the rule was laid down as follows: "When the judgment of a Court of first instance upon a particular issue is appealed against, the judgment ceases to be *res judicata* and becomes *res sub-judice,* and if the appellate Courts, declines to decide that issue and disposes of the case on other grounds, the judgment of the first Court upon that issue is no more a bar to a future suit than if that judgment had been reversed by the Court of appeal." This rule was based upon the interpretation of section 13 of the Civil Procedure Code of 1877 which said that no Court shall try any suit or issue in which the matter directly and substantially in issue has been heard and finally decided by a Court of competent jurisdiction in a former suit.

The section in our Civil Procedure Code is section 207 which runs as follows:—"All decrees passed by the Court shall, subject to appeal, when an appeal is allowed, be final between the parties, and no plaintiff shall be non-suited." I think the word 'allowed' in this section must mean 'permitted'. In the case of *Annamalay Chetty v. Thornhill* (*supra*), their Lordships of the Privy Council said, "where an appeal lies, the finality of the decree, on such appeal being taken, is qualified by the appeal, and the decree is not final in the sense that it will form *res adjudicata* as between the parties." I think the words "subject to appeal" contained in section 207 brings into force a similar rule to that explained in *Nilvaru v. Nilvaru* (*supra*), and that on appeal the matter once more becomes *sub-judice.* Since the Appeal Court declined to decide the issues raised in D. C. Galle, 33,087, and disposed of the case on other grounds, the decree in that case is not *res judicata.*

I accordingly hold that the judgment and decree in D. C. Galle, 33,087, is not *res judicata* of the issues raised in the present action.

In view of these findings the further questions of law specially reserved for consideration as preliminary issues do not arise.

It is with considerable reluctance that I have arrived at these conclusions. As the existence, contents and the effect of the old Dutch will of 1793 have been considered and established in several previous cases, the oldest judgment available in respect of this matter is in the year 1869, and is reported in *van der Straaten at page 32.* This is a judgment of this

[1] *33 N. L. R. 41.*

[2] *I. L. R. 7 Calc. 381.*

[3] *I. L. R. 6 Bom. 110.*

Court and there have been other judgments of this Court. I do not, however, think that I can escape from the conclusions at which I have arrived.

The pedigree in this case has been proved and I can see no valid objection to the plaintiff bringing the present action.

The matter was set down for further hearing as to what order should be made in this appeal. I agree with my brother Maartensz that we should not exercise our powers under section 760 of the Civil Procedure Code in this case. I also agree to the order my brother has made in this appeal.

Judgment varied.