The last ground of appeal must also be upheld. In the result all except the first ground of appeal urged by learned counsel must be upheld and the convictions of the appellants quashed.

The only question that remains for consideration is whether a retrial should be ordered or not. We are of opinion that after such a long lapse of time—it is now 2 years and 6 months from the date of the commission of the offence—and in a case of this nature where there are several infirmities in the evidence for the prosecution, no useful purpose will be served by a retrial. We therefore quash the conviction and direct that an order of acquittal be entered in respect of both appellants.

Appellants acquitted.

1957 *Present :* **Basnayake, C.J., and Pulle, J.**

V. ARUMUGAM *et al.*, Appellants, *and* S. SOMASUNDERAM *et. al.* Respondents

S. C. 351—D. C. Jaffna, 6,056/M.

Thesavalamai—Action for pre-emption—Decree entered in plaintiff's favour—Subsequent execution of conveyance by District Court Secretary—Date of vesting of title in pre-emptor—Prescription Ordinance, s. 6—Civil Procedure Code, ss. 200, 333.

Where, in an action for pre-emption, the Secretary of the District Court is ordered by Court to execute a conveyance in favour of the pre-emptor on account of the wilful failure of the defendants to do so, title vests in the pre-emptor from the date of the Secretary's conveyance and not from the date of the decree.

In an action for pre-emption, the plaintiff obtained decree and District Court Secretary's conveyance in his favour but subsequently suffered damages by reason of an obligation to pay off a mortgage created by the 1st defendant (co-owner) in respect of the property in question during the pendency of the action and after the 1st defendant had obtained a re-transfer from the 2nd defendant (the vendee)—

Held, that the plaintiff was entitled to bring a second action to recover the damages suffered by him and that the period of prescription in respect of his claim for damages commenced from the date of the conveyance executed by the Secretary of the District Court.

APPEAL from a judgment of the District Court, Jaffna.

H. V. Perera, Q.C., with *A. Nagendra*, for Plaintiffs-Appellants.

S. Nadesan, Q.C., with *C. Chellappah*, for 1st Defendant-Respondent.

N. E. Weerasooria, Q.C., with *H. W. Tambiah* and *C. Renganathan*, for 2nd Defendant-Respondent.

Cur. adv. vult.

January 23, 1957. PULLE, J.—

The action out of which this appeal arises was instituted on the 31st October, 1949, by the 2nd plaintiff along with her husband, the 1st plaintiff, for the recovery of Rs. 3,000 as damages against two defendants. The cause of action has its origin in D. C. Jaffna case No. 326 filed on 24th November, 1942, in which the 2nd plaintiff as the owner of a 2/9th share of a land called Pallanthoddam claimed the right under the Thesawalamai to pre-empt the balance 7/9th share conveyed by the 1st defendant, her step brother, to the 2nd defendant by a deed, No. 1591, of the 23rd March 1942. The 2nd plaintiff was successful in case No. 326 but, besides depositing in court the market value of the 7/9th share, she was obliged to pay off a mortgage created by the 1st defendant on the 8th March, 1945, after he had obtained a re-transfer from the 2nd defendant. The sum claimed in the present case represents in effect the extra outlay of money for clothing herself with an unencumbered title to the 7/9th share. The learned trial Judge held that the 2nd plaintiff suffered damages but dismissed the action on the ground that her claim was prescribed.

Before dealing with the questions raised on this appeal it is necessary to set out in greater detail some other events in case No. 326. The decree in this case was entered on the 23rd March, 1945, but a few days earlier, namely, on the 8th March, 1945, the 2nd defendant by deed No. 9951 marked P6 conveyed the land back to the 1st defendant and immediately after by deed No. 9952 marked P7 the latter mortgaged this land and two others as security for a loan of Rs. 3,000. The relevant portion of the decree of the District Court dated 23rd March, 1945, reads as follows :

> " . . . . it is ordered and decreed that the 2nd plaintiff be and she is hereby declared entitled to pre-empt the 7/9 share of the land mentioned in the schedule and belonging to the 1st defendant and the *defendants* do execute a transfer deed in favour of the 2nd plaintiff for the 7/9 share of the said land free from all encumbrances created by the defendants in respect of the said land. "

Each of the defendants appealed separately and both appeals were dismissed on 4th April, 1946. Thereafter the defendants wilfully defaulted in executing the conveyance ordered by Court and on the 25th October, 1946, the Secretary of the District Court on an order made by the Judge executed the conveyance P5 in favour of the 2nd plaintiff of 7/9th share of the land " in pursuance of the decree of the District Court of Jaffna dated 23rd March, 1945, and the Supreme Court decrees dated 4th April, 1946, entered in the said case No. 326. "

On the 12th March, 1947, the mortgagee on deed No. 9952 filed D. C. Jaffna case No. 3431—vide 3 D1—to enforce the mortgage against the 1st defendant and the two plaintiffs in the present case and a brother of the 2nd plaintiff. It may here be mentioned that for the purpose of the present case we are not concerned with the 2nd plaintiff's brother or with the plaintiff mortgagee who was the 3rd defendant in the present case and against whom the action has been dismissed. A mortgage decree in

case No. 3431 was entered on the 22nd November, 1948. An appeal from this decree taken by the 1st plaintiff, the 2nd plaintiff and her brother was dismissed on the 7th October, 1949, and on the 10th July, 1950, a sum of money sufficient to satisfy the decree was deposited in Court towards which the two plaintiffs contributed Rs. 3,000 which is the sum claimed as damages. The sum deposited by them in case No. 326 to pre-empt 7/9th share was Rs. 1,166·67.

In holding against the plaintiff on the issue of prescription the learned District Judge held that the cause of action was the failure of the 1st and 2nd defendants to execute in terms of the decree in case No. 326 a conveyance of the property free from encumbrances. He stated, "whether the obligation arose on the date of the District Court decree 23rd March, 1945, or the Supreme Court decree 4th April, 1946, the claim is prescribed as this action was instituted on the 31st October, 1949." He rejected the submission that the cause of action arose on the execution of the conveyance P5 dated 25th October, 1946, by the Secretary of the District Court. Even if it did, he thought, that as more than three years had elapsed before the present action was filed, the plea of prescription ought to succeed.

In the chain of events leading up to the institution of the present case, the decree of 23rd March, 1945, in case No. 326 has its proper place but in my opinion it would be wrong to state that the cause of action giving rise to the claim for damages is the decree referred to. The immediate right of the plantiffs, on the decree being entered up, was to get it executed. The execution proceedings terminated with the signing by the Secretary of the Court of the conveyance P5 of 25th October, 1946, with the result that the plaintiffs had thereafter to look to the conveyance and not to the decree for the assertion of any rights, relating to 7/9th share, against the defendants. In my view the contention on behalf of the plaintiffs that their rights must be determined in relation to P5 and not to the decree is sound. It has been argued that having regard to section 200 of the Civil Procedure Code and the judgment of Wijeyewardene, J., in *Karthigesu et al. v. Parupathy et al* [1] a conveyance is not necessary to vest title in a pre-emptor who is successful in his suit. It has also been submitted on behalf of the 2nd defendant that she did not create any encumbrance and that she did no more than re-transfer what she bought on deed No. 1591 of the 23rd March, 1942, and that, therefore, she was not liable to the plaintiffs in damages for an act for which the 1st defendant was solely responsible. In my opinion, it is not necessary to enter into the merits of these arguments as long as the Secretary's conveyance P5 and the decree on which it is based are not open to challenge.

It is, however, interesting to note that unlike in our section 200 the corresponding provision in O.20 R.14 of the Indian Code reads,

> "Where the Court decrees a claim to pre-emption in respect of a particular sale of property and the purchase money has not been paid into Court, the decree shall—
>
> "(*a*) specify a day on or before which the purchase money shall be so paid, and

[1] *(1945) 46 N. L. R. 162.*

(*b*) direct that on payment into Court of such purchase-money, together with costs (if any) decreed against the plaintiff, on or before the day referred to in clause (*a*), the defendant shall deliver possession of the property to the plaintiff, *whose title thereto shall be deemed to have accrued from the date of such payment*, but if the purchase money and the costs (if any) are not so paid the suit shall be dismissed with costs. "

The sentence underlined does not occur in section 200 of the Ceylon Code and was added to the Indian Code of 1882.

By P5 read with section 333 of the Code the two defendants must be deemed to have warranted that the 7/9th share conveyed by them was free from encumbrances. In fact it was subject to a mortgage at the date of P5 and any rights of the plaintiffs to be reimbursed to the extent of the money paid to clear the encumbrance is one which flows from P5. The earliest date on which the defendants could be said to be in breach of their obligation is the date of P5, namely, 25th October, 1946, and if one reckons six years from that date, applying section 6 of the Prescription Ordinance, the claim of the plaintiffs is not prescribed.

In my opinion the appeal succeeds and should be allowed with costs, both here and below.

BASNAYAKE, C.J.—I agree.

Appeal allowed.