1960 *Present :* **Basnayake, C.J., and Sansoni, J.**

PIYARATANA THERA and others, Appellants, *and* PEMANANDA THERA, Respondent

S. C. 60—D. C. Kurunegala, 12,263

Res judicata—*Buddhist ecclesiastical law—Is the pupil a "privy" of his tutor ?—Civil Procedure Code, s. 207—"Same parties"—Estoppel by judgment—Estoppel by verdict.*

In action No. 1 instituted by A, a Buddhist priest, against B, another priest, one of the reliefs claimed by A was that he be declared the controlling Viharadhipati of Pallegama Vihare. After trial A's action was dismissed. One of the issues raised at the trial was whether B's predecessor was the Viharadhipati of the temple. This issue was answered in the affirmative.

Subsequently, in the present action instituted by B against C, who was the senior pupil and successor of A, B prayed that he be declared the controlling Viharadhipati of Pallegama Vihare.

Held, that the judgment in action No. 1 was *res judicata* against C.

Per BASNAYAKE, C.J.—"The relationship of tutor and pupil in Buddhist Ecclesiastical Law is sufficient to make the pupil bound by a judgment against the tutor in a case in which he seeks to reagitate a decision against his tutor by virtue of being his pupil."

Per SANSONI, J.—"The decree itself is not the test of what is or is not *res judicata* . . . . The determining factor is not the decree but the decision of the matter in controversy."

APPEAL from a judgment of the District Court, Kurunegala.

H. V. Perera, Q.C., with *T. B. Dissanayake*, for 2nd to 5th Defendants-Appellants.

E. B. Wikramanayake, Q.C., with *U. B. Weerasekera*, for Plaintiff-Respondent.

Cur. adv. vult.

June 22, 1960. BASNAYAKE, C.J.—

The plaintiff Pallewela Pemananda Thera controlling Viharadhipati of Tekawa Vihare instituted this action against Karandawa Piyaratana Thera of Karandawa Temple, Hettipola, Pihimbiya Piyaratana Thera of Giratalane Temple, Hettipola, Amunuwala Saddananda Thera of Hinguregama Vihare, K. M. Dingiri Banda Vidane of Pallegama, Hettipola, P. M. William Singho of Pallegama and K. K. Sediris Appu of

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Silvathgama, Hettipola. He prayed that he be declared the controlling Viharadhipati of the Pallegama Vihare of Tekawa and that the defendants be ejected from that Vihare and its lands and that he be placed in quiet possession thereof. He also claimed damages in Rs. 500 and continuing damages at Rs. 500 per annum.

The 1st defendant Karandawa Piyaratana Thera stated in answer to the plaint that he made no claim whatsoever to the Vihare or its temporalities. So did the 4th defendant Dingiri Banda Vidane and the 5th defendant P. M. William Singho who are the President and the Secretary respectively of the Dayaka Sabhawa. Of consent the 1st defendant was discharged from the action. The 2nd and 3rd defendants maintained—

(1) that Pihimbiya Piyaratana Thera the 2nd defendant is the lawful Viharadhipati of Pallegama Vihare and is entitled to administer its temporalities,

(2) that Amunuwala Saddananda Thera the 3rd defendant is the senior pupil of the 2nd defendant,

(3) that the 6th defendant K. K. Sediris Appu is a tenant under the 2nd defendant.

At the trial the plaintiff's pleader suggested the following issues :—

"1. Was Tekawa Sumangala Thera at one time the Viharadhipati of this temple ?

2. Did he die leaving as his pupil Tekawa Ratanajoti Thera as Viharadhipati ?

3. Did Tekawa Ratanajoti Thera die leaving plaintiff his senior pupil and his successor in office ?

4. Did the defendants enter into forcible possession of this temple and the temporalities attached thereto on 15.11.54 ?

5. Are the defendants in forcible possession of this said temple and the temporalities since that day ?

6. What damages, if any, is the plaintiff entitled to ?

7. Is the decree in case 7508 of this court *res judicata* as against the defendants or any of them in regard to the subject matter of this action ? "

It is not necessary to refer to the issues suggested by counsel for the 1st defendant as he has been discharged from the action of consent. Counsel for the other defendants suggested :

"10. Has the title of the plaintiff, if any, to the said incumbency been lost by lapse of time ?

11. Has the title of the plaintiff, if any, been lost by abandonment of the said temple ?

12. Is there a misjoinder of parties and/or causes of action ?

13. If there is such a misjoinder, can the plaintiff have and maintain this action ? ''

At the outset of the trial the following admissions were recorded :—

(*a*) It is admitted that the 2nd and 3rd defendants are the pupils of Maguran Kadawela Ratanapala Thera who was the plaintiff in D. C. Kurunegala Case No. 7508. The 2nd and 3rd defendants do not claim any title except through Ratanapala Thera.

(*b*) It is also admitted that the plaintiff is the successor in office of Tekawa Ratanajoti Thera.

(*c*) It is admitted that if the judgment in D. C. Kurunegala Case No. 7508 is *res judicata*, it binds not only the 2nd and 3rd defendants but it binds 2nd to 5th defendants also.

(*d*) Damages were agreed at Rs. 400 per annum from 15.11.54.

The following agreement is also recorded :—" Defendants undertake not to press the other issues if the plaintiff succeeds on the issue of *res judicata*. ''

Shortly the facts are as follows :—Tekawa Sumangala was the Viharadhipati of both Tekawa and Pallegama Vihares. When he died his senior pupil Tekawa Ratanajoti succeeded him. The plaintiff is admittedly Ratanajoti's pupil and successor ; but at the time of Ratanajoti's death Magurankadawela Ratanapala Thera was in charge of the temple as adhikari by virtue of the following writing given to him by Tekawa Sumangala Thera :—

" In the Saka Era 1810 Month of III.

I the undersigned Tekawa Sumangala Thera Viharadhipathy of Tekawa Vihare and Pallegama Vihare in Giratalana Korale Dewamedi Hatpattu Sath Korale state as follows :—

As I do not have any of my pupils to keep at Pallegama Vihare now and as I am going to Satarakorale to reside I have entrusted my friend Magurukadawala Ratanapala Thera of Karandawa Temple in Karanda Pattu Korale to improve and to live at the said place.

Further it was agreed that I or any of my pupillary successors come and ask the place he has to hand over the same to him.

Sgd. Tekawa Sumangala Thera. ''

On 2nd May 1949 Magurukadawala Ratanapala by the following notarially attested writing purported to transfer the Adikariship to the plaintiff :—

No. 17067

Lands 6

Deed of Transferring of Adikariship or Incumbency.

To all to whom these presents shall come I Magurankadawala Ratanapala Thero Viharadhipathy of Hinguregama Vihare sends Greetings :—

Whereas Tekawe Sumangala Thero the incumbent of Tekawe Vihare in Giratalana North and Pallegama Vihare in the aforesaid Korale, about sixty years ago by ola writing dated (Saka era 1810 in the month of III) (ශක වර්ෂ 1810 ක්වූ ඉල් මස පුර අටවක් දින) transferred and assigned to me the said Magurankadawala Ratanapala Thero, the properties mentioned in the schedule annexed hereto belonging to the said Pallegama Vihare and mentioned in list No. 185 of the year 1870 and deposited in the Kandy Kachcheri (which is not before us) for the purpose of improving and possessing same.

Whereas by the said ola writing it was laid down as condition that the said premises should be retransferred and assigned to the said Donor Tekewe Sumangala Thero or any pupil of his entitled to be pupillary succession if they ask for a retransfer.

Whereas I the said Magurankadawela Ratanapala Thero am ill for a long time and in feeble health and am old and I have not been able to improve and possess the properties or render any assistance to the priesthood or for the improvement of the said Viharas.

Whereas Pallewela Pemananda Thero, Viharadhipathy of Siri Bodisiparamaya Purana Vihare, Tekawe, in Giratalana Korale aforesaid, who comes from the pupillary succession of the said Tekawe Sumangala Thero promised to look after the said properties in a better manner and requested me to hand over the adikariship of the said properties according to Sangika rights.

Therefore I the said Ratanapala Thero agree to give the adikariship of the said properties to the said Pallewela Pemananda Thero.

Know all men by these presents and I the said Magurankadawela Ratanapala Thero in consideration of the above mentioned reasons do hereby transfer my rights and privileges as adikariship to the said properties according to Sangika rights unto the said Pallewela Pemananda Thero and his pupillary succession to improve and possess the said properties.

Whereas the said Pallewela Pemananda Thero accepted the above mentioned adikariship with pleasure.

In witness whereof the said Magurankadawela Ratanapala Thero and Pallewela Pemananda Thero do set our hands hereunto and to two others of the same tenor and date as these presents on this 2nd May 1949 at Kurunegala."

(Here follows the Schedule of Lands.)

On 27th April 1951 Ratanapala instituted D. C. Kurunegala Case No. 7508 against Pallewela Pemananda Thera the plaintiff in which he prayed that deed No. 17067 be declared to be of no force or avail to vest defendant with the right to be Viharadhipati of Pallegama Temple or to the control or management of its temporalities, and that he be declared Viharadhipati of Pallegama Temple and controlling Viharadhipati as defined in the Buddhist Temporalities Ordinance.

Pallewela Pemananda Thera denied the allegations in that plaint, narrated the case now set out by him, and prayed that the plaintiff's action be dismissed, and that he be declared the controlling Viharadhipati of the temple.

After trial the plaintiff's action was dismissed. The material portion of the decree reads :

"It is ordered and decreed that the plaintiff's action to declare the deed No. 17067 dated 2nd May 1949 attested by L. M. P. Jayawardene, Notary Public, null and void and that he be declared Viharadhipati of Pallegama Temple and controlling Viharadhipati as defined in the Buddhist Temporalities Ordinance, be and the same is hereby dismissed."

The learned District Judge holds that the decree in that case binds the 2nd and 3rd defendants. He says :

"It is clear on the law that the pupils would be bound by the earlier decree against their tutor as to whether the tutor was the Viharadhipati of the temple or not. This is clear from the judgment of Gratiaen J. in *Rev. Moragolle Sumangala v. Rev. Kiribamune Piyadassi* (*56 N. L. R. 322*). The 2nd and 3rd defendants claim title through Ratanapala who was admittedly held not to be the Viharadhipati of this temple but the plaintiff was declared to be the Viharadhipati of this temple. Hence the defendants are bound by that decision."

The learned District Judge is mistaken in thinking that in that action the plaintiff was declared to be the Viharadhipati of Pallegama Vihare. There is no such declaration in the decree. Although it would appear from the plaintiff's answer in that case that he asked for such a declaration it was not granted. The 2nd defendant who is the senior pupil of Ratanapala whose action to be declared Viharadhipati of the temple in dispute

was dismissed claims that he is the lawful Viharadhipati by succession. The following admissions were recorded before the plaintiff commenced his case :—

> " It is admitted that the 2nd and 3rd defendants are pupils of Maguran Kadawala Ratanapala Thero who was the plaintiff in D. C. 7508. The 2nd and 3rd defendants do not claim any title except through Ratanapala Thero. It is also admitted that the plaintiff is the successor in office of Tekawe Ratanajoti Thero. It is admitted that if the judgment in that case is res judicata it binds not only 2nd and 3rd defendants but it binds 2nd to 5th defendants."

The plaintiff gave evidence on his behalf. The defendants neither gave evidence nor called witnesses on their behalf. The only question for decision is whether the 2nd defendant is barred by the decree against his tutor from maintaining in the present action that he is the Viharadhipati by virtue of being Ratanapala's senior pupil.

The Legislature has sought to give effect to the Roman Law maxims of *res judicata pro veritate habetur* (or *accipitur*) (Dig. 1.5.25), *nemo debet bis vexari si constat curiae quod sit pro una et eadem causa ; reipublicae interest ut sit finis litium*, and *res judicata inter alios, aliis neque nocet neque prodest* by enacting sections 34, 207 and 406 of the Civil Procedure Code, section 330 of the Criminal Procedure Code, and sections 41 and 42 of the Evidence Ordinance. Section 100 of the Evidence Ordinance may be invoked in appropriate cases for the purpose of resorting to the English rules of Estoppel by record.

The statutory provisions abovementioned must be read against the background of our common law as they are designed to give statutory effect to the basic concepts of that law, concepts which are common to all systems based on Roman Law. The enactment of the law of *res judicata* partly as a matter of procedure in the Civil Procedure Code and partly as a matter of evidence in the Evidence Ordinance is appropriate, in that *res judicata* operates both in the field of civil procedure and in the field of evidence. In our system of law the judgment which is relied on as barring the subsequent action must be both pleaded and proved in evidence. I think the same is the rule in systems which require strict pleadings before trial.

For the purpose of this judgment I shall confine my attention to section 207 of the Civil Procedure Code. That section reads :

> " All decrees passed by the court shall, subject to appeal, when an appeal is allowed, be final between the parties ; and no plaintiff shall hereafter be nonsuited.
>
> *Explanation.*—Every right of property, or to money, or to damages, or to relief of any kind which can be claimed, set up, or put in issue between the parties to an action upon the cause of action for which

the action is brought, whether it be actually so claimed, set up, or put in issue or not in the action, becomes, on the passing of the final decree in the action, a *res adjudicata*, which cannot afterwards be made the subject of action for the same cause between the same parties."

In the instant case the 2nd defendant was not named as a party to the original action which Ratanapala brought. The question then is—Does the section apply only to the parties named either as party plaintiff or defendant to an action or does the word "parties" therein extend to persons other than those named as parties to the action? If so, to what classes of persons does the expression extend? In Roman-Dutch Law the expression had an extended meaning as would appear from the following quotations from Voet and Huber. Voet (Bk XLIV—Tit. 2 s.3—Gane's translation Vol. 6 p. 558)—

"A deceased and his heir, a principal and his agent, a free town and its manager, an insane person or a soldier and his curator, a ward and his guardian and a father and the son of his household are in civil law the same person. So are a creditor and his debtor in regard to the thing pledged, if the debtor gave the thing in pledge to his creditor after he had claimed it from a third person and had lost his case, and later the creditor wishes to take steps against the winning party by the action on pledge. So are two joint (and several) debtors or creditors, if one of them has suffered a rebuff in claiming a thing or, when the thing was claimed from one of two joint (and several) debtors, he has been absolved in a judicial proceeding. So are a surety and the debtor, if judgment has been given in favour of the debtor; and a purchaser and his vendor, if the vendor has been absolved or has had judgment against him, though not also if that is the case with the purchaser."

Huber (The Jurisprudence of My Time—Gane's translation Vol. 2 p. 338)—

"Testator and heir, principal and agent, purchaser and seller, owner and successor in ownership, debtor and surety, and also the first members of a family and their successors entitled to one and the same fideicommissum, though not heirs of each other, are considered as the same persons."

It would appear that the expression *inter easdem personas* in Roman-Dutch Law which is translated by some as "between the same parties" and by others as "between the same persons" was extended by a legal fiction to certain classes of persons other than the parties actually engaged in the action. This extended meaning of the expression "same parties" has been recognised from the earliest times in our law and it must be presumed that when the Legislature enacted the Civil Procedure Code it used those words in the sense in which it was understood in our common law of *res judicata* and did not intend to make any alteration in that

law (*Murugiah v. Jainudeen*[1]), because there is no indication in the Civil Procedure Code that the Legislature intended to use the word "parties" in a sense different from that in which Voet and Huber used it in their commentaries. I find support for my opinion in the following words of Lascelles C.J. in *Samichi v. Pieris*[2]—

> "The law of *res judicata* has its foundation in the civil law, and was part of the common law of Ceylon long before Civil Procedure Codes were dreamt of. But even if these sections contain an exhaustive statement of the law on this point, I cannot see that there is anything in them which is inconsistent with the principles which have been followed in the English, Indian, and American Courts."

The interpretation I seek to give to the words "same parties" in section 207 is not inconsistent with the rules of construction of statutes as stated in such standard treatises as Craies (p. 112—5th Ed.) and Maxwell (p. 82—10th Ed.). They are to the effect that in construing the words of an Act of Parliament in the absence of a clear indication from its express language that the Legislature did intend to go against the ordinary rules of law they should be construed on the basis that it did not intend to do so.

The English Law has devised a very convenient nomenclature in the word "privy" for those persons who are in law bound by a decree though not named as parties to an action. In that system "privies" are classified as (*a*) privies in blood—ancestor and heir; (*b*) privies in law—testator and executor, intestate and administrator; and (*c*) privies in estate—testator and devisee—vendor and purchaser, lessor and lessee—successive incumbents of the same benefice—assignor and assignee of a bond. The word "privy" has been used in the judgments of this court and I shall also adopt it for the sake of convenience. No hard and fast rule as to who is a "privy" can, apart from the well-known instances cited above, be laid down. But the development of the doctrine of *res judicata* would be hampered if Voet's enumeration of persons bound by a decree is treated as exhaustive and incapable of extension to other like cases. In deciding whether a judgment is a bar to persons other than the parties named in an action reagitating the same question we should bear in mind the maxims cited earlier in this judgment.

I shall now turn to the submission of learned counsel for the appellant. He argued that as a pupil does not in Buddhist Ecclesiastical Law either derive title from his tutor or claim under him he is not his privy. It is true that a pupil does not derive title from his tutor in the sense that a purchaser derives title from his vendor or an assignee from the assignor. In the succession known as *sisyanu sisya paramparawa* pupil succeeds tutor. A Viharadhipati is not the owner of his temple or its temporalities. He is a trustee with power, subject to certain exceptions, to appoint another as trustee if he so chooses. He cannot transfer his

[1] *(1954) 56 N. L. R. 176 at 181.* [2] *(1913) 16 N. L. R. 257.*

rights in his life-time although he may appoint agents to look after or manage the temple or temples and their temporalities. He is not free to nominate a person other than a pupil as his successor. If he dies without nominating a successor his senior pupil succeeds to the office of Viharadhipati and thereby becomes entitled to exercise the management of the temples of which his predecessor was Viharadhipati. Hukm Chand in his treatise on Res Judicata (p. 193, 1894 Ed.) cites several instances similar to the relationship of Viharadhipati and successor in which the courts have held the successor to be barred from reagitating the decision given against the predecessor. In discussing the subject of Privies, Halsbury (3rd Ed. Vol. 15 p. 197) classifies successive incumbents of the same benefice as privies in estate. In my opinion the relationship of tutor and pupil in Buddhist Ecclesiastical Law is sufficient to make the pupil bound by a judgment against the tutor in a case in which he seeks to reagitate a decision against his tutor by virtue of being his pupil. The use of such expressions as "deriving title from", "claiming under" and "claiming through" have led to some of the difficulties that have arisen on the subject of "privies" in *res judicata*. The fact that those words are appropriate when speaking of certain classes of "privies" does not limit the scope of the word to those cases.

In the instant case the 2nd defendant the pupil of Ratanapala seeks to reagitate the question whether Ratanapala was Viharadhipati of Pallegama Vihare, for, without establishing that his tutor was Viharadhipati of that Vihare, he cannot succeed. Now it was decided in the previous action that Ratanapala was not the Viharadhipati. In this action by the plaintiff against the 2nd defendant and others the law does not permit the 2nd defendant to raise the question again because though not named as a party to the original litigation he cannot succeed without reagitating the question which was decided in the litigation between his tutor and the plaintiff. That a pupil is a privy of his tutor seems to have never been doubted. In the case of *Rev. Moragolle Sumangala v. Rev. Kiribamune Piyadassi* [1] it was taken for granted that the pupil of a Viharadhipati was his privy and was barred *qua* pupil from reagitating the questions decided in an action to which his tutor was named as a party.

I therefore hold that the judgment against Ratanapala in D. C. Kurunegala Case No. 7508 is *res judicata* against the second defendant.

The appeal is therefore dismissed with costs.

SANSONI, J.—

I have touched on this subject in *Podiya v. Sumangala Thero* [2], and I should like to add some observations by way of supplementing what I said on that occasion.

[1] *(1955) 56 N. L. R. 322.*

[2] *(1956) 58 N. L. R. 29.*

Mr. H. V. Perera's main argument was that the principle of *res judicata* cannot apply because (1) in the case of a tutor and his pupil, the pupil takes after and not under the tutor, and the pupil is therefore not a privy of the tutor : (2) no question of property is involved, but merely the right to an office, in a dispute regarding an incumbency.

Now although an incumbency is an office, I have tried to show in my judgment in *Podiya v. Sumangala Thero* (supra) that it is an office to which rights in property attach ; and for that reason I think the principle of *res judicata* would apply. To quote a well-known passage from Bigelow on Estoppel (5th Edn.) page 142 : " In the law of estoppel, one person becomes privy of another, (1) by succeeding to the position of that other as regards the subject of the estoppel, (2) by holding in subordination to that other . . . . But it should be noticed that the ground of privity is *property* and not personal relation." If, as was held in *Punnananda v. Weliwitiya Soratha*[1], and subsequent cases, a pupil loses his right of succession when his tutor abandons or renounces his rights to an incumbency, it can only be on the ground of privity. In my view, a pupil who claims an incumbency on the ground that his tutor was in the line of succession to that incumbency is claiming it on the ground of property : he would, moreover, for the purpose of the law relating to *res judicata*, be the privy of his tutor if he claims under the same title as that under which his tutor claimed in the earlier litigation. If, however, he claims under a different title which is independent of that put forward by his tutor, he would not be the privy of his tutor. Hukm Chand in his Treatise on the Law of Res Judicata (1894) says, at page 184, : " Privies are held bound because they have succeeded to some estate or interest which was bound in the hands of its former owner ; and the extent of the estoppel, so far as the privy is concerned, is limited to controversies affecting this estate or interest." Caspersz in his book on Estoppel and Res Judicata (1909) page 162 says that " the test is to be whether the title to the subject matter of the two litigations is the same . . . . A lawyer will probably ask himself the question, 'Is the same title involved ?' "

Mr. Perera submitted that a tutor and his pupil were in a position similar to a fiduciary and a fideicommissary, and I think the analogy is a proper one. While a fiduciary, in relation to fideicommissaries, can be regarded as representing the inheritance, a tutor in relation to his pupils in a particular line of succession can be regarded as representing the succession of that line. But it must be remembered that in certain respects the pupil's position is more precarious than that of the fideicommissary, in that the tutor enjoys the powers of abandonment and nomination which a fiduciary does not. Then the decision in *Kader v. Marrikar*[2], with which I respectfully agree, leads to the result that just as a fideicommissary is a privy of the fiduciary and is bound by a judgment against the latter, a pupil is bound by a judgment against his tutor,

[1] *(1950) 51 N. L. R. 372.* [2] *(1942) 43 N. L. R. 387.*

provided that the pupil is claiming under the same title as the tutor claimed under in the earlier action.

Mr. Perera also urged that since what was suggested in issue (7) as *res judicata* was the decree in case No. 7508, and the decree in that case did not declare the present plaintiff entitled to the incumbency, the issue must be answered against the plaintiff. I think this is too technical a view of the matter, for it overlooks the principle that " the decree itself is not the test of what is or is not *res judicata*, but that the question in each case is what did the Court really decide ? *Res judicata*, in other words, is matter of substance," see Caspersz, page 77. The determining factor is not the decree but the decision of the matter in controversy.

The point has been dealt with by Jayewardene, A.J. in *Velupillai v. Muthupillai*[1]. " Generally speaking, estoppel or *res judicata* may arise either where there is identity of cause of action or where there is identity of point in issue. Where there is identity of causes of action, the judgment in the case is a bar to all further litigation upon the same property, claim or right. In such cases, it must be shown that there is identity between the present and former causes of action. If they are identical, the plea of estoppel is good. This is the class of estoppel by *res judicata* dealt with in the explanation to section 207. In the other class of cases, identity of causes of action is immaterial, and the only question to be decided is whether the point in issue is identical in the two cases. In such cases, the judgment on the issue creates an estoppel with regard to all matters in dispute upon the decision on which the finding was based. " The two kinds of estoppel have sometimes been referred to as estoppel by judgment and estoppel by verdict. In the latter case, " an actual decision on any matter directly in issue in a suit is conclusive of that issue in every subsequent suit brought on any cause of action or for any purpose or object " : see Hukm Chand, page 7.

I find that in case No. 7508, issues (9) and (10) were as follows :—

(9) Was Thekewa Sumangala Thero at one time the viharadipathi of the temple in claim ?

(10) Is the defendant (the present plaintiff) pupil in succession of the said Thekewa Sumangala Thero ?

and both issues were answered in the affirmative. Thus we have a case of estoppel by verdict in the present plaintiff's favour against the party whose title, and no other, is relied on by the present defendants-appellants. They are conclusively barred by that verdict.

I agree that the appeal should be dismissed with costs.

Appeal dismissed.

[1] *(1923) 25 N. L. R. 264.*