April 4, 1910 *Present:* Mr. Justice Wood Renton and Mr. Justice Grenier.

COREA *v.* PIERIS *et al.*

337A and 337B, D. C., Chilaw, 3,308.

Liability of principal for defamation by agent—Action for defamation by agent—Principal added as party defendant after two years from date of defamation—Prescription—Civil Procedure Code, s. 18.

A, who was in charge of B's estate, defamed C in 1904 by doing an act within the scope of his authority and in the course of his employment. In 1905 C brought an action for defamation against A for damages, and in 1907 moved and got A's principal, B, made a party defendant to the action.

Held, (1) that B was liable in damages for the act of his agent A; (2) but that C's cause of action against B was prescribed.

Obiter, (3) that the Court had no power under section 18 of the Civil Procedure Code to make B a party to the action.

THE facts are briefly stated in the headnote.

Sampayo, K.C. (with him *Wadsworth* and *Vernon Grenier*), for the added defendant (appellant in 337A and respondent in 337B).—The added defendant must not be held liable for the acts of his servant which were not done in the course of his employment. The defendant acted outside the scope of his employment in sending the telegram. Counsel referred to *Bousted on Agency, pp. 344 and 345;* and *Citizens' Life Assurance Co. v. Brown.*[1]

The action against the added defendant is clearly barred by the Prescription Ordinance. Counsel commented on *Adriana v. Loku Acharige Prolishamy,*[2] *Carne v. Malins,*[3] *Chinnatamby v. Chanmugam.*[4]

[Their Lordships called upon the respondent to reply on the question of prescription only.]

H. J. C. Pereira (with him *H. A. Jayewardene* and *Chitty*), for the plaintiff (respondent in 337A and appellant in 337B).—The cause of action against the first defendant and the second defendant is the same; the second defendant's liability arises from the very act which gives a cause of action against first defendant. Under section 18 of the Civil Procedure Code the Court had the power to join the second defendant as a party to this case. If the Legislature intended that an added party should have the benefit of the Prescription Ordinance, it would have made special provision

[1] *(1904) A. C. 428.*
[2] *(1884) 6. S. C. C. 93.*
[3] *(1851) 20 L. J. Exc. 434.*
[4] *(1909) 1 Cur. L. R. 134.*

to conserve his right. The Legislature has expressly conserved such rights in certain other cases (see Civil Procedure Code, sections 19 and 406).

Where the cause of action is identical, and where the agent is sued within the prescribed time, the principal may be joined as a party defendant, even after the prescribed time.

As between principal and agent there is a privity, and action against one is action against the other. Counsel referred to *Oriental Bank Corporation v. Charriol*,[1] *Swaminathan Chetty v. Silva*,[2] and *Hukum Chand, p. 218.*

[Wood Renton J. referred counsel to *Doyle v. Kaufman*,[3] *Steward v. The North Metropolitan Tramway Co.*,[4] *Weldon v. Neal.*[5]]

Weldon v. Neal is an authority in favour of respondent; there the Court refused to allow a party to be added, on the ground that if the party were added he would lose the benefit of the Statute of Limitations.

Sampayo, K.C., in reply.—*Imam-ud-din v. Liladhar* [6] explains *Oriental Bank Corporation v. Charriol;* this latter case is no authority for the proposition that a party added under section 18 cannot set up a plea of prescription under the circumstances of this case.

Cur. adv. vult.

April 4, 1910. Wood Renton J.—

The plaintiff, who is the respondent in the first of these appeals and the appellant in the second, used one Joseph Pieris, since deceased, and now represented by the substituted defendant, who is the Secretary of the District Court of Chilaw, in that Court, to recover damages for libel. The alleged libel consisted of a telegram sent by Joseph Pieris to the Government Agent of the North-Western Province at Kurunegala and the Assistant Government Agent of Chilaw in the following terms:—

"Advocate Corea (meaning the plaintiff) brought two hundred men to Madugasagare estate belonging to H. J. Pieris, broke bungalow doors, assaulted men, forcibly removed furniture, goats, men injured, intend coming again."

The action against Joseph was instituted in January, 1905. In his answer Joseph Pieris, while admitting the despatch of the telegram in question, denied that he had been prompted by malicious motives in sending it, and alleged that he had been acting throughout as the agent and for the benefit of the estate of H. J. Pieris, the added defendant. No steps were taken at that time by the plaintiff to bring H. J. Pieris as an added defendant into the case.

[1] *(1886) I. L. R. 12 Cal. 642.*
[2] *(1904) 7 N. L. R. 279.*
[3] *(1887) 3 Q. B. D. 7.*
[4] *(1885) 16 Q. B. D. 178. (and page 556 in appeal).*
[5] *(1887) 19 Q. B. D. 394.*
[6] *(1892) I. L. R. 14 All. 524.*

April 4, 1910

WOOD RENTON J.

Corea v. Pieris

He was in fact suing H. J. Pieris, in independent proceedings, for a prosecution instituted against him by H. J. Pieris, on the strength of information supplied to him by his agent Joseph. The plaintiff recovered damages in that action against H. J. Pieris in the District Court, but the judgment of the District Court was set aside by the Supreme Court in appeal, and the decision of the Supreme Court in appeal was affirmed in review, and ultimately by the Privy Council. On October 31, 1907, the plaintiff applied in the District Court that H. J. Pieris should be added as a defendant in the libel action, and an order so adding him was made on October 29, 1908, and affirmed by the Supreme Court in appeal on February 18, 1909. It appears from the original record of the proceedings (see Record, p. 148), that on the hearing of the application to join him as a defendant in the action no objection was taken by or on behalf of H. J. Pieris, either that he could not properly be made a party under section 18 of the Civil Procedure Code, or that the plaintiff's cause of action was, as against him, prescribed. Apart altogether from the plea of prescription, with which I will deal later on, H. J. Pieris might, in my opinion, have contended with great force that, under section 18 of the Civil Procedure Code, the Court had no power to make him a party to the action at all. Under that section the Court has power to add those parties only whose presence may be necessary in order to enable it effectually and completely to adjudicate upon and settle all the questions involved in the action. The presence of H. J. Pieris was not necessary for that purpose. If Joseph Pieris had published a libel falsely and maliciously in regard to the plaintiff, it was no excuse for him that he was acting as an agent or servant on behalf and for the benefit of H. J. Pieris (see *Cullen v. Thomson's Trustees*[1]), and the question of his liability, which was the only question involved in the action, could have been effectually and completely adjudicated upon and settled without the addition of H. J. Pieris at all. That point, however, was not taken; H. J. Pieris filed answer, pleading that whatever wrong Joseph Pieris might have done was not committed within the scope of the authority given to him by his principal, and also that in any case the action against him was prescribed. The learned District Judge has over-ruled both pleas, and given judgment against Joseph Pieris and H. J. Pieris jointly and severally for a sum of Rs. 1,500. There is no appeal against that decision in so far as Joseph Pieris' estate is concerned. H. J. Pieris, however, appeals against it on both the grounds urged in his answer, and the plaintiff on his side appeals for enhanced damages as against both the estate of Joseph Pieris and the added defendant H. J. Pieris.

I will deal with the three issues involved in these appeals, namely, scope of authority, prescription, and damages, in turn. I think that the learned District Judge is clearly right in his finding that

[1] *4 Macq. 424, 432.*

Joseph Pieris was acting within the scope of his authority from his principal in sending the telegram which forms the subject of the present action. The rule of law applicable to cases of this kind has thus been stated by the Privy Council in the case of *Citizens' Life Assurance Co. v. Brown*[1]:—

"Although the particular act which gives the cause of action may not be authorized, still, if the act is done in the course of employment which is authorized, then the master is liable for the act of his servant."

In the present case Joseph Pieris' telegram was despatched for the protection of his principal's estate. If the allegations made in that telegram were true, he was only discharging his duty as H. J. Pieris' agent, appointed under the comprehensive power of attorney which has been filed in the case (P 1), in communicating the facts contained in it both to the Government Agent and to the Assistant Government Agent. I need not refer in detail to the terms of the power of attorney itself. I entirely agree with all that the learned District Judge has said on the subject.

I come now to the question of prescription. The action is one for damages, and, in virtue of the provisions of section 10 of Ordinance No. 22 of 1871, it must be brought within two years from the time when the cause of action arose, that is to say, from the date of the publication of the libel. The libel was published on February 6, 1904. H. J. Pieris was made an added party on October 29, 1908. It is obvious, therefore, that, if at that date the plaintiff had filed a fresh plaint against him in respect of the publication of the libel by Joseph Peiris on February 6, 1904, there would have been no answer to his plea of prescription. It has been argued, however, by the plaintiff's counsel, Mr. H. J. C. Pereira, here in appeal, and the learned District Judge, contrary to what would have been his own opinion, has held on the assumed authority of the English case of *Carne v. Malins*,[2] and of language used by Burnside C.J. in *Adriana v. Loku Acharige Prolishamy*,[3] that in such a case as the present the point when the Statute of Limitations takes effect is the date of the first institution of the action, and not that of the addition of the new party. Mr. Pereira further argued that the addition of a party under section 18 of the Civil Procedure Code by the order of the Court precluded the party so added from setting up any plea of prescription in his answer. I am unable to accept any one of these contentions.

Carne v. Malins was an action of assumpsit for a balance of account claimed to be due from the defendants to the plaintiffs, who were carrying on business in partnership. It was discovered just before the trial that there were eight persons beneficially

[1] *(1904) A. C. 428.*
[2] *(1851) 20. L. J. Exc. 434.*
[3] *(1884) 6 S. C. C. 93.*

April 4, 1910

WOOD RENTON J.

Corea v. Pieris

interested in the firm at the time of the debt being contracted. The Court of Exchequer allowed them to be added as co-plaintiffs, apparently on the ground that otherwise the Statute of Limitations would be a bar to a fresh action. Baron Parke, who delivered the judgment of the Court of Exchequer, said that the amendment would be allowed in view of the serious consequences which would follow to the plaintiffs if their application were refused. I do not think that there is any real analogy between the position of partners suing for a firm debt and that of a master and his servant sued upon entirely different grounds of liability for the publication of a libel. It will be observed that the case of *Carne v. Malins* is prior to the Common Law Procedure Act, 1854. I have not been able to find any reference to it in any text book of practice available to us here, and, as I shall show presently, the recent decisions of the English Courts of law do not support the view that a party should be allowed to be added to an action where the effect of the addition will be to deprive him of a plea of prescription which would bar the institution of a fresh action against him. The case of *Adriana v. Loku Acharige Prolishamy* is also not in point. It was an action brought by the plaintiffs as the heirs-at-law of the obligee of a bond against the obligors. The first plaintiff had filed her libel in time. The obligors answered pleading (1) never indebted, and (2) non-joinder of other co-heirs as plaintiffs. The other co-heirs were joined as plaintiffs after the expiry of the presoriptive period, and the defendants thereupon added a fresh plea, namely, of prescription, to their previous answer. The Court held that the plaintiffs were not entitled to judgment: Burnside C.J., on the ground that as they had neither averred nor proved that the deceased obligee had died intestate, they had failed to disclose any right in themselves to sue on the bond in question; Lawrie J., on the ground that the commencement of an action for the purpose of preventing prescription from running out is the issue of the summons and not the filing of the libel, and that as the action had not been commenced within ten years prior to the former date, the defendant's plea of prescription must be sustained. Burnside C.J. took occasion to observe *obiter* that he should have felt bound to follow the decision in *Carne v. Malins* if it had been necessary to decide the point. The learned District Judge is, I think, in error when he associates the name or Lawrie J. with this *obiter dictum*. I cannot see that Lawrie J. expressed any opinion upon the point, and the ground of his decision was entirely different. Even if, however, there had been a definite ruling in this sense in the case, it would not, in my opinion, have applied to the circumstances that we have to deal with here. There seems to me to be no real analogy between the position of parties suing in a representative character and that of an agent and a principal who are sued, as I have already said, on entirely different grounds of liability in an action of tort.

The same observation applies to the decision of Wendt J. and Sampayo A.J. in *Swaminathan Chetty v. Silva.*[1] The decisions under the modern English Rules of Court seem to me to show that a party will not be added where the effect of the addition is to deprive him of a defence which he would otherwise have under the Statute of Limitations (see *Weldon v. Neal,*[2] and compare *Doyle v. Kaufman*[3] *and Steward v. The North Metropolitan Tramway Co.*[4]). The case of *Oriental Bank Corporation v. Charriol*[5] merely decided (see *Imam-ud-din v. Liladhar*[6]) that limitation does not preclude a Court from acting under section 2 of the old Indian Code of Civil Procedure by adding a person as a necessary party to the suit. It does not decide that a party so added is not entitled to set up a plea of limitation, and to claim a dismissal of the suit as against him on that ground, in spite of the order of the Court which has brought him into the proceedings. As a matter of construction, I think that Mr. H. J. C. Pereira's contention that section 18 of our own Code of Civil Procedure over-rides the right of an added party to plead prescription is untenable. At the point of time at which the order is made under that section no question of pleading is before the Court, and I hold without any hesitation that in spite of an order made by the District Court, or, for that matter, by the Supreme Court on appeal, adding a party under section 18, a party so added has the right to plead the provisions of Ordinance No. 22 of 1871. I doubt very much whether H. J. Pieris would ever have been made a party to this case, either by the District Court or by the Supreme Court in appeal, if the point had been taken on his behalf that he was not a necessary party to the decision of the original action. As I have already said, the grounds on which the suit is instituted against Joseph Pieris and H. J. Pieris respectively are different. Joseph Pieris was sued as the actual author of the libel. On the findings of the learned District Judge H. J. Pieris was not personally responsible for the publication of the libel. He is responsible only as Joseph Pieris' principal, that is to say, he is liable in law for having invested Joseph Pieris with powers which enable him to libel the plaintiff in his principal's name. I am disposed to think that, even under section 5 of the Code of Civil Procedure, the causes of action against Joseph and H. J. Pieris are different. No doubt the publication of the libel is the fact on which the cause of action as regards both of them is founded, but, as I have endeavoured to show, the ground of the liability of each of them is different.

I have only a few words to add as to damages. The assessment of damages is primarily a question for a jury, or, as here, for the Judge who is acting as a jury. I think that the learned District

[1] *(1904) 7 N. L. R. 279.*
[2] *(1887) 19 Q. B. D. 394.*
[3] *(1887) 3 Q. B. D. 7.*
[4] *(1885) 16 Q. B. D. 178.*
[5] *(1886) I. L. R. 12. Cal. 642.*
[6] *(1892) I. L. R. 14. All. 524.*

April 4, 1910

WOOD RENTON J.

Corea v. Pieris

Judge, in arriving at his conclusion on that point, has taken fair account of all the circumstances that have to be considered. Even as regards Joseph Pieris, the libel did not impute any charge of robbery or theft in the ordinary sense of the term. It disclosed merely, if true, the kind of raid which is not uncommon in land disputes in this country. The plaintiff's moral character has been cleared by the proceedings. The Judge finds, moreover, that he has been involved in a large number of cases, criminal and civil, in consequence of an unfortunate proclivity, " to wit, a habit of purchase of disputed titles to land." As regards H. J. Pieris, in addition to all these considerations, there is the circumstance that he had nothing to do personally with the publication of the libel. Although every case has to be dealt with on its own merits, I think that there was nothing to prevent the learned District Judge from taking account of the quantum of damages awarded by the Courts of this Colony in other actions for libel where the imputations complained of were more serious in character and had received a far more widely extended publication.

In 337A, D. C., Chilaw, No. 3,308, I would set aside the decree under appeal in so far as it affects H. J. Pieris, who is entitled to the costs of the action and the appeal. As regards the estate of the late Joseph Pieris, the appeal will be dismissed with costs, if any. In 337B, D. C., Chilaw, No. 3,308, I would dismiss the appeal. The appellant must pay the costs of appeal in 337B of H. J. Pieris, and the costs of the appeal, if any, to the estate of the late Joseph Pieris.

GRENIER J.—

I have had the advantage of reading the judgment of my brother Wood Renton, and as I am in accord with him on all the points discussed and decided in it, it is unnecessary for me to go over the ground already covered by him. The question of prescription was the only one that presented any difficulty, but I formed a strong opinion on it against the plaintiff at the argument of the appeal on the authorities cited to us, to which full reference is made in the judgment of my brother, and my opinion is unchanged. I agree to the order proposed.

Appeal No. 337A allowed; appeal No. 337B dismissed.