1948 *Present :* **Howard C.J. and Dias J.**

SETHA, Appellant, *and* **WEERAKOON**, Respondent.

S. C. 188—D. C. Kandy, 895.

Appeal —New point raised for first time—When it can be argued.

Lis pendens—*Testamentary suit—When does* litis contestatio *arise ?—Question of fact.*

A new point which was not raised in the issues or in the course of the trial cannot be raised for the first time in appeal, unless such point might have been raised at the trial under one of the issues framed, and the Court of Appeal has before it all the requisite material for deciding the point, or the question is one of law and nothing more.

Where during the pendency of a testamentary suit the heirs transferred their shares in a land belonging to the estate to a stranger—

Held, that the doctrine of *lis pendens* was not applicable, and that the doctrine could become applicable only when a dispute or an issue arose between the parties to the testamentary suit.

Velupillai v. Muthupillai (1923) 25 N. L. R. 261, considered.

Held, further, that *litis contestatio* in such a case arises only when the opposite side has been served with summons or notice of the claim. As to when *litis contestatio* arises, it is a question of fact.

[1] *(1940) 41 N. L. R. 457.*

APPEAL from a judgment of the District Judge of Kandy.

F. A. Hayley, K.C., with *N. K. Choksy, K.C.*, and *S. W. Jayasuriya*, for the plaintiff, appellant.

N. E. Weerasooria, K.C., with *E. F. N. Gratiaen, K.C.*, *C. E. S. Perera*, *H. W. Jayewardene* and *Sam. Wijesinha*, for the defendant, respondent.

Cur. adv. vult.

February 3, 1948. DIAS J.—

Kuda Ridee, a Kandyan woman, was married in *diga* to the plaintiff. She died in March, 1935, intestate and issueless leaving surviving her the plaintiff, her brothers, Muttuwa and Kira, and a sister, Ukku Ridee. The land in dispute was her " acquired property " to which she obtained title previous to her marriage to the plaintiff.

In D. C. Kandy Testamentary Case No. 5,299 the plaintiff applied for letters of administration in regard to the estate of his deceased wife. The respondents to that application were the brothers and sister of the deceased whom the plaintiff described as " her heirs at law " —see D 4. They did not oppose the plaintiff's application for letters. Thus no contest arose in the testamentary case.

Under a writ issued against Muttuwa in D. C. Kandy 44,816 his undivided one-third share which he inherited from the deceased Kuda Ridee, and which the plaintiff admitted he had inherited from Kuda Ridee, was sold in execution and purchased by one Punchirala on September 27, 1935, during the pendency of the testamentary case. The sale, however, was not confirmed by the Court until February, 1941. Punchirala did not obtain his Fiscal's transfer D 13 for the land until September 24, 1942—see the recitals in D 13, and the copy of the order confirming the sale annexed to D 13.

Muttuwa and Punchirala together by deed D 12 dated July 30, 1938, sold Muttuwa's one-third share to the defendant. Ukku Ridee on August 29, 1938, by deed D 20 sold her one-third to the defendant. Kira by deed D 21, dated September 17, 1938, conveyed his one-third share to the defendant. Therefore, by September 17, 1938, the defendant, who was already in possession of the whole land under a lease granted to him by the plaintiff, had obtained paper title to the whole land. The testamentary case was then pending. The defendant was in possession under a lease, P 1, given by the plaintiff.

There was, however, a blot on defendant's title in regard to Muttuwa's one-third share, because Punchirala, one of the vendors to the defendant, had not at the date of D 12 obtained a Fiscal's transfer in his favour. This was sought to be rectified by the order confirming the sale dated February 19, 1941, and the Fiscal's conveyance D 13 dated September 24, 1942. Punchirala by deed D 14, dated November 24, 1942, again transferred his rights to the defendant.

Assuming that Muttuwa had legal title to one-third, in my opinion on the execution of the Fiscal's transfer D 13, by virtue of the provisions of section 289 of the Civil Procedure Code, Punchirala must be deemed

to have been vested with the legal estate from the time of the sale, *i.e.*, from September 27, 1935—see *Wijeywardene v. Podisingho*[1]. I am also of the view that the effect of the deed D 14 was " to feed " the title of the defendant under deed D 12 in regard to Muttuwa's undivided one-third share—see *Rajapakse v. Fernando*[2] and *Gunatileke v. Fernando*[3].

At some point of time in the testamentary case, *which has not been precisely ascertained*, a contest arose in the testamentary case between the plaintiff-administrator and the brothers and sister of Kuda Ridee as to whether the plaintiff was an heir of the deceased lady. In view of what follows this was a material and important fact. The issue must have been raised and notice served on the opposite parties. An inquiry was held and an appeal taken to the Supreme Court which held in the case of *Dunuweera v. Muttuwa*[4], reversing the judgment of the trial Court, that the plaintiff succeeded to the acquired property of the deceased lady in preference to her brothers and sister. The decision of the Supreme Court is dated September 9, 1942, that is to say, after the order confirming the sale in execution to Punchirala, but prior to the issue of the Fiscal's transfer, D 13, in Punchirala's favour, and the deed D 14.

An attempt to appeal to the Privy Council against this decision on the ground that the question involved was one of great general importance having failed[5], the Legislature intervened. By Ordinance No. 25 of 1944, a new section was added to the Kandyan Law Declaration and Amendment Ordinance, No. 39 of 1938. The new section 18A provides as follows :—

> " On the death intestate of a woman married in *diga*, leaving a surviving spouse but no child or descendant of a child, such surviving spouse shall not be entitled, and shall not be deemed to have been at any time entitled, to any part of the immovable property of the deceased other than the part consisting of the acquired property to which the deceased became entitled subsequent to and during the subsistence of such marriage in *diga* ".

Ordinance No. 25 of 1944, however, did not overrule the decision in *43 N. L. R. 512*. Section 3 provides as follows :—

> " Nothing in the new Section 18A, inserted in the principal Ordinance by section 2 of this Ordinance shall affect or be deemed or construed to affect—
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> (*a*) the specific rights of property determined by—
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> (i) the decision of the Supreme Court in the case of *Dunuweera v. Muttuwa et al.* (D. C. Kandy 5,299 Testamentary)—(43 New Law Reports, page 512) ; or
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> (ii) the decision of any competent court in any other case in which that decision of the Supreme Court was followed at any time prior to the date on which this Ordinance comes into operation ; or

[1] *(1939) 40 N. L. R. at p. 223.* [3] *(1921) 22 N. L. R. 385 Privy Council.*
[2] *(1920) 21 N. L. R. 495 Privy Council.* [4] *(1942) 43 N. L. R. 512.*
[5] *See (1942) 44 N. L. R. 49.*

(*b*) the operation, in accordance with the law relating to *res adjudicata* of the decision in any of the aforesaid cases as a bar to any action or proceeding in which any right of property determined by that decision is intended or is likely to be put in issue between persons who were parties to that case, or persons claiming through or under those parties on any title acquired subsequent to the date of that decision ".

In the present action the plaintiff-appellant (who was a party to the Testamentary case) sued the defendant-respondent, who was not a party to that case and whose paper title to the land had accrued to him in September, 1938, under the lease P 1 for overholding, ejectment and damages for causing waste. The defendant claimed title, and in reconvention claimed the sum of Rs. 25,000 as compensation for improvements in the event of the plaintiff's claim being successful.

At the trial no less than 24 issues were framed. The learned District Judge in an able and exhaustive judgment examined the various submissions of the parties and held that no estoppel arose against the defendant, and that the title to the land in dispute was now vested in the defendant by reason of the deeds from the brothers and sister of Kuda Ridee. He rejected the plaintiff's claim and dismissed his action with costs.

Mr. Hayley for the plaintiff-appellant, while generally accepting the findings of the trial Judge, sought to raise a new point which is neither covered by the issues framed at the trial, nor raised or argued at the trial. Mr. Weerasooria for the defendant-respondent objects either to this new contention being raised or argued at this stage.

The law on this question is well settled by a decision of the House of Lords and a series of decisions of the Supreme Court. In the case of *The Tasmania*[1] Lord Herschell said " It appears to me that under these circumstances, a Court of Appeal ought only to decide in favour of an appellant on a ground there put forward for the first time, if it is satisfied beyond doubt, first, that it has before it all the facts bearing upon the new contention, as completely as would have been the case if the controversy had arisen at the trial ; and, next, that no satisfactory explanation could have been offered by those whose conduct is impugned, if an opportunity for explanation had been afforded them when in the witness box ". In *Appuhamy v. Nona*[2] it was laid down, following the decision in the *Tasmania* case (*supra*), that in a civil action all contentious matter becomes focussed in the issues of law and of fact which are framed. Whatever is not involved in those issues is to be taken as admitted by one party or the other. Therefore, it is not open to a party to put forward a ground for the first time in appeal, unless it might have been put forward in the Court below under some one or other of the issues framed ; and when such a ground, that is to say, a ground that might have been put forward in the Court below, is put forward for the first time in appeal, the cautions indicated in the case of *The Tasmania* (*supra*) may well be observed. In *Manian v. Sanmugam*[3] Bertram C.J. said : " For the first time on appeal, Mr. H. J. C. Pereira in scrutinizing the record found that the

[1] *(1890) 15 App. Cases 223.* [2] *(1912) 15 N. L. R. 311.*
[3] *(1920) 22 N. L. R. at p. 251.*

evidence is formally insufficient to justify the learned Judge's findings of fact on this item . . . The point is, in effect, a point of law. It is not that in a conflict of testimony the learned Judge's findings is wrong; but that there is no evidence on record to justify the finding. It is, in fact, a point which might be taken in a case in which, under the law, no appeal lay on a question of fact. The case seems to me to come within the principles enunciated in the case of *The Tasmania* . . . . I think we should be acting in accordance with the principles laid down by the House of Lords in *The Tasmania*, and often followed by this Court, if we declared that this point cannot be taken on the present appeal". In *Fernando v. Abeygoonesekera*[1] it was laid down that a point of law, which is a point of law and nothing more, can be raised for the first time in the Court of Appeal—see also *Talagala v. Gangodawila Co-operative Stores Society Ltd*[2]. In *Arulanantikai v. Thambu*[3] it was held that the Supreme Court may decide a point raised for the first time in appeal, where that point might have been put forward in the Court below under one of the issues raised, and where the Court of Appeal had before it all the material upon which the question could be decided.

The submission made by Mr. Hayley may be summarised thus: Although section 3 (*d*) of Ordinance No. 25 of 1944 makes no reference to the doctrine of *lis pendens*, that doctrine, nevertheless, applies to this case. At the date of the deeds D 12, D 20 and D 21 transferring the shares of this land were executed, the testamentary case was pending. In accordance with the decision in *Velupillai v. Muthupillai*[4] it is submitted that the doctrine of *lis pendens* applies, and the defendant is, therefore, bound by the decision in *43 N. L. R. 512*. In other words, his vendors had no title. It is further submitted that inasmuch as the deeds D 13 and D 14 were executed after the date of the decision in *43 N. L. R. 512*, it is also subject to that decision. Mr. Hayley argues that his contention raises a pure question of law which may be raised for the first time in appeal.

Mr. Weerasooria, on the other hand, urges that the question now raised is not a pure question of law, but a mixed question of law and fact; and that had the contention been raised as an issue or advanced at the trial, he would have several defences open to him which he is now debarred from setting up. For example, he says that he could have proved by evidence that the conveyances to the defendant were made with the approval of the plaintiff, and for the purpose of discharging the debts of the deceased lady. If so, the question arises whether the plaintiff having permitted Muttuwa, Kira and Ukku Ridee to alienate the lands, he can be now permitted to raise this plea at this stage? He further submits that there were other questions and issues which may arise had he been able adequately to meet the contention which has been sprung on him in appeal for the first time. He points out that the point now taken is uncovered by any of the issues framed in the case, and that counsel for the plaintiff at no time took the point that the pendency of the testamentary case affected the title of the defendant to the land. He further urges that the language of Sec. 3 (*b*) of Ordinance No. 25 of

[1] *(1931) 34 N. L. R. at p. 164.*
[2] *(1947) 48 N. L. R. 472.*
[3] *(1944) 45 N. L. R. 457.*
[4] *(1923) 25 N. L. R. 261.*

1944 is clear, and that the submission that the draftsman by mistake omitted to include the doctrine of *lis pendens* cannot be accepted. He submits that no *lis* arises by the mere institution of a testamentary case which is concerned with the administration of the estate of a deceased person. A testamentary case may go on for many years and may never reach finality through a judicial settlement. This testamentary case was instituted in March, 1935—see D 7. There was no dispute between the parties and no opposition to the application of the plaintiff for letters. Letters were issued to the plaintiff on March 19, 1936. The plaintiff filed his final account on November 29, 1937. It was at the judicial settlement of the testamentary case that the dispute first arose and it was on September 9, 1942, that the Supreme Court in *43 N. L. R. 512* held that the plaintiff was the heir.

The learned District Judge held that the decision as to the status of the plaintiff to inherit from his deceased wife is not a judgment *in rem* binding on the whole world, and, therefore, that decision is not binding on the defendant who was no party to the testamentary case. The appellant does not canvass that finding. An action *in personam* does not become litigious until *litis contestatio*[1]. In *Muheeth v. Nadarajapillai*[2] a Divisional Court held that *litis contestatio* in such an action arises only upon the service of summons. When did *litis contestatio* arise in the testamentary case between the plaintiff-administrator and the brothers and sister of Kuda Ridee ? *Litis contestatio* would arise when summons or a notice of the dispute raised was served on the opposite party or parties. On that vital point there is no satisfactory evidence. We do not know on what date summons or notice was served. It was a question of fact which had to be proved by the plaintiff at the trial if he was relying on the contention which has now been raised. It is clear that the testamentary case had proceeded normally without dispute for some time. It would seem that the deeds D 12, D 20 and D 21 were all executed long before this dispute as to heirship arose. We know that the plaintiff-administrator when applying for letters admitted that the brothers and sister of his deceased wife were her heirs-at-law, for it was on that footing that they were made respondents. Therefore, in addition to the reasons urged by Mr. Weerasooria as to why the contention raised by Mr. Hayley cannot be entertained at this stage, there is the further ground that a vitally important fact necessary for the success of the appellant's contention has been left in doubt.

The case of *Velupillai v. Muthupillai*[3] lays down nothing more than that in a testamentary suit, once an issue has arisen between the parties and is pending as to whether X or Y is the heir of Z, a mortgage given by X during the pendency of the dispute to a stranger is subject to the result of the action. The term " action " is defined by section 6 of the Civil Procedure Code as " Every application to a Court for relief or remedy obtainable through the exercise of the Court's power or authority, or otherwise to invite its interference ". Thus, in the course of a testamentary suit there may arise at various stages of the proceedings

[1] *See Sande Cession of Action p. 66.*
[2] *(1917) 19 N. L. R. at p. 462, Divisional Court.*
[3] *(1923) 25 N. L. R. 261.*

subsidiary "actions" in which the parties may be at issue. It is a question of fact in each case as to when *litis contestatio* arose so as to give rise to the doctrine of *lis pendens*. That fact has not been proved here.

I am of opinion that the point sought to be raised on appeal for the first time is not a pure question of law but is a mixed question of law and fact. It is uncovered by any of the issues framed, and the defendant-respondent has no opportunity of adequately meeting this contention in appeal. I am, therefore, of opinion that this is not a matter which can be raised for the first time in appeal. This being the only substantial question raised, the appeal fails and must be dismissed with costs.

HOWARD C.J.—I agree.

Appeal dismissed.