1908. *Present:* The Hon. Sir Joseph T. Hutchinson, Chief Justice,
December 23. and Mr. Justice Wood Renton.

THE CEYLON LAND AND PRODUCE CO., LTD.
v. MALCOLMSON.

D. C., Kandy, 17,579.

Quia timet *action—Execution of mortgage by third party—Decree on such mortgage—"Cause of action."*

Where a person takes a mortgage of a land belonging to another from a third party and puts such mortgage in suit and obtains decree thereon, the true owner has a sufficient cause of action against such person to maintain an action *quia timet.*

APPEAL by the defendant from a judgment of the District Judge. The facts sufficiently appear in the judgment of Wood Renton J.

Bawa, for the defendant, appellant.

Van Langenberg (with him *Wadsworth*), for the plaintiffs, respondents.

Cur. adv. vult.

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The material facts in this case are as follows. Francis Mendis Seneviratne, the owner of the land in dispute, sold it to the respondents by deed No. 4,932, dated May 11, 1897. The respondents registered their title on June 7, 1897. On August 11, 1902, the land was sold under a money decree against Francis Seneviratne and purchased by Mr. Joseph Malcomson, who duly obtained his Fiscal's transfer, entered upon possession of, and improved, the land, and was in possession of it at the date of the institution of the present action. The appellant, Frederick Mendis Seneviratne, took a mortgage of the land from Francis Seneviratne, who is his brother, on July 11, 1902, registered that mortgage on the same day, subsequently put it in suit in D. C., Kandy, No. 16,074, and obtained a mortgage decree for the sale of the land as the property of his mortgagor. The appellant has taken no steps to enforce this decree. The question that we have to decide is whether, under the circumstances above stated, the appellant has committed an actionable wrong against the respondents. The learned District Judge has answered this question in the affirmative, holding that the acceptance and registration of the mortgage by the appellant is a "denial of a

right " belonging to, and " the infliction of an affirmative injury " upon, the respondents within the meaning of the definition of " cause of action " in section 5 of the Civil Procedure Code. Apart from authority, I should be of opinion that this view of the law is correct. As purchasers of the land in dispute the respondents have a legal " right " to dispose of it freely. An act on the part of the appellant by which the exercise of that right is seriously challenged or fettered is both a " denial " of it and the " infliction of an affirmative injury " upon those in whom it is vested. In the present case the appellant, in registering his mortgage from Francis Seneviratne and in obtaining a decree against Francis Seneviratne for the sale of the mortgaged property on the footing that he was its owner, placed on the respondents' registered title a real blot, which would gravely and immediately prejudice their power of dealing with the land. Unless there are decisions that constrain us to hold the contrary, I should say that the circumstances of this case clearly create, in favour of the respondents, a " cause of action " against the appellant within the meaning of section 5 of the Civil Procedure Code. The definition of " cause of action " given in that section does not appear in the Indian Code of Civil Procedure, and I have been unable to find any decisions, either local or English, bearing on the interpretation of the words " denial of a right " and " infliction of an affirmative injury " as part of a definition of " cause of action." As we are, therefore, bound by no contrary authority on the point, I would hold that the appellant has committed against the respondents in this case an actionable wrong.

It only remains to consider the question whether the respondents have had recourse to the appropriate remedy. In the absence of any allegation of special damage, I do not think that the present action could be maintained as one of slander of title. But I see no reason why it should not lie as an action *quia timet*. Mr. Bawa, in his argument for the appellant, pressed us with the decisions in the cases of *Fernando v. Silva*,[1] and, although not so strongly, *De Silva v. Ondaatje*.[2] In *Fernando v. Silva*, A, the mortgagee, not in possession, of certain property, obtained a decree against B, his mortgagor, for realization of his security, and, in execution of this decree, caused the property to be sold to a third person. C, claiming to be in possession as owner of a portion of the property sold, brought a suit against A and B for declaration of title, and asking to be quieted in possession, but failed to show that he had been in any degree molested in the enjoyment of his property. It was held by the Full Court (Phear C.J., Clarence J., and Dias J.) that A had no cause of action. This case is clearly distinguishable from the present, inasmuch as Phear C.J. states as the grounds of his decision (1) that C, the claimant, had given no evidence of title to the property in suit, and (2) that she had not attempted to show that she had

[1] *(1878) 1 S. C. C. 27.*

[2] *(1890) 1 S. C. R. 19.*

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been actually disturbed by the purchaser from A and B, on the footing of his purchase, in the enjoyment of the property that she claimed. In the present case the respondents have a registered title; it is clear law now (*cf.*, *Medankara Terunnanse v. Dias* [1] and *Raphael v. Pedro* [2]) that proof of physical ouster is not necessary to make such an action as this maintainable, and the entry by the appellant of his mortgage on the register, coupled with his subsequent proceedings, with a view to have the mortgaged land sold as the property of the mortgagor, does, in my opinion, constitute a "disturbance" of the respondents' "enjoyment" of it. In *De Silva v. Ondaatje* (*ubi supra*) the first defendant sold to the second, third, fourth, fifth, sixth, seventh, and eighth defendants land, of which they and the plaintiff were joint owners. Burnside C.J. held that an action *quia timet* by the plaintiff would not lie (1) against the first defendant, because "the mere sale by one man of the lands or goods of another, without doing any act to disturb the physical possession or title of the owner, gives the latter no cause of action," or (2) against the second to eighth defendants, because being joint owners with the plaintiff, and as such seized *per my et per tout*, they were entitled to the entire possession. "It is nowhere alleged," his lordship added, "that the defendants had ejected the plaintiff or ousted him, and their entire possession is quite consistent with the plaintiff's possession in common with them." Dias J agreed with Burnside C.J. as to the first defendant. Lawrie J. dissented, holding that a sufficient cause of action against him was disclosed by allegations that he claimed to be sole owner; that he denied the plaintiff's right; and that he executed, delivered to the purchasers, and thereby enabled them to register, a notarial deed of sale of the whole land." The *raison d'ètre* of the decision of the majority of the Judges on this point is now disposed of by the cases which we have no power, and I for one have no inclination, to over-rule, in which it has been held that where the title to, and the possession of, land are in dispute, failure to prove ouster is not failure of the cause of action. But it will be observed that it is the position of the second to eighth defendants in *De Silva v. Ondaatje* that presents the real analogy to that of the appellant here. Viewed from that standpoint, *De Silva v. Ondaatje* is to some extent an authority in favour of the respondents. For Dias J. and Lawrie J., differing from Burnside C.J., held that, as against the second to eighth defendants, the plaintiff was entitled to succeed; Dias J. on the ground that these defendants were in actual possession of the whole land, including the plaintiff's share, and were denying the plaintiff's right to any share of it; Lawrie J. on the ground of the registration by the defendants of their deed of sale. "The existence of such a deed on the register," said that learned Judge, in language that may fitly be applied to the present case, "would necessarily

[1] (*1886*) *7 S. C. C. 145.*
[2] (*1901*) *2 Tambiah 73.*

prejudice the plaintiff. It would render his share in the land unsaleable and valueless, because no one would purchase from him or would lend money to him on that security until his title on the register was cleared."

It is indisputable that an action *quia timet* is maintainable in Ceylon. Sir John Phear says so in *Fernando v. Silva*,[1] and there are many later decisions to the same effect (*cf.*, *Atchy Kannu v. Nagamma*[2] and *Soysa v. Sanmugam*[3]). In regard to the circumstances under which such actions are maintainable, the following passage occurs in the judgment of Phear C.J. in *Fernando v. Silva*[4]:—"If nothing has yet happened to prevent, or to interfere with, the plaintiff's present enjoyment of his property, where no cause has yet occurred to render it necessary for him to have actual recourse to a Court of Justice for remedy, yet it may sometimes be right that he should be afforded an opportunity of making *de bene esse* use of that evidence which he has at hand to establish title against a person who only threatens and does not yet disturb it. It is, however, only in a case of this kind..... that a suit should be entertained *quia timet*, as the old English phrase is." I cannot think that in this passage Sir John Phear could have meant to hold that under no other circumstances would an action *quia timet* lie in Ceylon. The English Courts, while defining carefully the *facta probanda* in actions of this character, have not limited the class of cases in which the remedy might be applied, for its existence has been recognized as a means of securing the delivery up of forged or fraudulent or invalid instruments, on which actions at law might be brought (*Cooper v. Joel*,[5] and *cf.*, *Dingyhamy v. Don Pedris*,[6] *Soysa v. Sanmugam*[3]), or of enabling a surety, after debt due, although not sued (*Wooldridge v. Norris*[7]), or against whom judgment has been obtained, but who has paid nothing (*Wolmershausen v. Gullick*[8]), to call in the former case on the principal debtor to discharge the debt, and in the latter on a co-surety to contribute towards the common liability, "it being unreasonable that a man should always have such a cloud hanging over him." On the same principle, a trustee, who has acquired liability as such, may, by the action *quia timet*, obtain an order of indemnity against his *cestui que trust* before being called upon to pay (*Hobbs v. Wayet*;[9] *In re Blundell*[10]).

In addition to these instances of its use, the remedy by *quia timet* action is open to persons who complain of a threatened nuisance (*A.-G. v. Manchester, Corporation of*;[11] *Fletcher v. Bealey*;[12]

[1] (*1878*) *1 S. C. C. 27.*
[2] (*1906*) *9 N. L. R. 282.*
[3] (*1907*) *10 N. L. R. 355.*
[4] (*1878*) *1 S. C. C. 28.*
[5] (*1859*) *27 Beav. 313.*
[6] (*1882*) *5 S. C. C. 32.*
[7] (*1868*) *L. R. 6 Eq. 410.*
[8] (*1893*) *2 Ch. 514.*
[9] (*1887*) *36 Ch. D. 256.*
[10] (*1888*) *40 Ch. D. 377.*
[11] (*1893*) *2. Ch. 87.*
[12] (*1884*) *28 Ch. D. 688.*

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A.-G. v. Nottingham, Corporation of [1]). So far is the class of case indicated by Phear C.J. in *Fernando v. Silva* from being exhaustive of the scope of *quia timet* actions that in *Brooking v. Maudslay, Son, and Field* [2] it was held that the possibility of legal proceedings being taken on an instrument, after evidence which would show a defence to them was lost, was not a ground for an action for cancellation of the instrument *quia timet*, but for an action to perpetuate testimony. In the case last cited, Sir Richard Webster, A.-G., in his argument for the defendants, included, among the grounds on which a *quia timet* action would lie, the placing of "a blot on the plaintiff's title to property, which it was necessary to clear away." I have been unable to obtain access here to some of the older English text books of practice, which might have supplied illustrations of this head of relief. But enough has been said to show the scope of the remedy in England; and, while insisting as firmly as the English Courts do on proof of the necessary ingredients of an action *quia timet*, we ought not, I think, to assign to it a more restricted sphere in Ceylon. The necessary ingredients in an action *quia timet* are (*a*) actual or imminent injury; (*b*) prospective damage of a substantial, if not, irreparable kind (*Fletcher v. Bealey*,[3] *A.-G. v. Manchester, Corporation of*,[4] *A.-G. v. Nottingham, Corporation of* [5]). In the present case both conditions are, in my opinion, fulfilled. The blot placed on the respondents' registered title is, I think, an actual, and it is certainly an imminent, injury to them, and the prospective damage that will result from it is, in any event, substantial. The reality of the respondents' apprehensions on this point is demonstrated by the fact that the appellant, when his registration of Francis Seneviratne's mortgage to him was challenged in the respondents' plaint, promptly denied their title in his answer, and alleged that the land in dispute was liable to be sold in execution as the property of the mortgagor. Mr. Bawa argued that we ought not, in deciding whether or not the action will lie, to consider the attitude adopted by the appellant in his answer, or defences that were made the subject of distinct issues but withdrawn by the appellant's counsel at the trial. I agree. The question of law as to whether the plaint discloses a cause of action must be dealt with by itself. But in deciding on the substantiality of the prospective damage apprehended by the respondents, the ease with which the appellant utilized the registration of his mortgage as a starting point for a denial of their title is a circumstance of which we have, I think, a right to take account. If the owners of property had no immediate remedy in a case of this description, they would suffer substantial damage in a double sense, in the depreciation of the value of their property in the market and in the imminent risk of the manufacture

[1] (*1904*) *1 Ch. 673.*
[2] (*1888*) *38 Ch. D. 636.*
[3] (*1884*) *28 Ch. D. 688.*
[4] (*1893*) *2 Ch. 87.*
[5] (*1904*) *1 Ch. 673.*

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of claims of counter title, which, with the lapse of time, it would be very difficult, if not impossible, to meet.

I think that the decision of the learned District Judge is perfectly right, and I would dismiss this appeal with costs.

HUTCHINSON C.J.—

The plaintiffs have a good cause of action against the appellant. The appellant's conduct has been a "denial" of the right which they claim, and has also inflicted on them an affirmative injury. I think the appeal should be dismissed with costs.

Appeal dismissed.