1968 *Present :* Sirimane, J., and de Kretser, J.

Mrs. J. M. A. MORAIS, Appellant, and Mrs. F. VICTORIA, Respondent

S. C. 167/65—D.C. Colombo, 1027/L

Rei vindicatio *action—Cause of action in such a case—Claims to different lands in two separate actions on same title—Maintainability—Civil Procedure Code, ss. 14, 34, 36, 207—Trust—Creation of a fideicommissum therein—Validity.*

(i) A *rei vindicatio* action in respect of a land cannot be maintained unless the defendant was in possession of the land at the time when the cause of action accrued.

In a *rei vindicatio* action instituted against the same defendant in respect of different lands claimed on one title from the same source, the cause of action in respect of each land is different. There is, however, no objection to the plaintiff uniting in one action several different causes of action against the same defendant in accordance with section 36 of the Civil Procedure Code.

Plaintiff claimed a declaration of title to thirteen lands, damages and ejectment of the defendant who was in possession. Some months earlier he had filed action No. 9929 against the same defendant claiming three other lands on the same title. The two cases came up for trial together, and action No. 9929 was laid by until the present action was decided.

Held, that the filing of the earlier action for three different lands did not constitute a bar to the present action. Neither section 34 nor section 207 of the Civil Procedure Code could affect the maintainability of the present action.

(ii) The "executors and trustees" under a Will were directed by the Will to convey certain immovable property belonging to the "trust estate" to the testator's son on his reaching the age of thirty-five years, subject to the condition that he should not sell, mortgage, alienate or encumber those properties and that on his death those properties should devolve on his son or sons, and if there were none such on his daughter or daughters.

Held, that the Will created a valid trust. There can be no objection to a testator creating a trust and directing that the beneficiary, when he becomes the owner, should take the properties subject to a fideicommissum in accordance with the testator's directions.

APPEAL from a judgment of the District Court, Colombo.

C. Thiagalingam, Q.C., with *V. Arulambalam* and *T. Jothilingam*, for the defendant-appellant.

H. V. Perera, Q.C., with *H. W. Jayewardene, Q.C.*, *C. Ranganathan, Q.C.*, and *H. E. Cooray*, for the plaintiff-respondent.

Cur. adv. vult.

1*—J 19073—2,255 (12/70)

July 11, 1968. SIRIMANE, J.—

By his Last Will dated 8.9.1917 one Marianu Morais appointed his three sons-in-law Carvallo, Miranda and Corera as "executors and trustees" under his Will. After making certain dispositions, he devised and bequeathed the rest and residue of his estate to the three persons named above as trustees, with certain directions which they were enjoined to carry out. For the purposes of this case, it is only necessary to note that these persons were directed to convey the immovable property belonging to the "trust estate" to the testator's son Lewis Anthony on his reaching the age of thirty-five years subject to the condition that he should not sell, mortgage, alienate or encumber those properties and that on his death those properties should devolve on his son or sons, and if there were none such on his daughter or daughters.

The Will also empowered the trustees to sell such immovable properties which did not yield a fair income and to buy other properties with the proceeds of such sales.

This action relates to thirteen lands ten of which belonged to the testator at the time of his death, and three of which had been purchased by the trustees in accordance with the terms of the Will as set out above.

By deed P6 of 21.9.1933 the trustees conveyed these lands to Lewis Anthony subject to the conditions stipulated in the Last Will.

Lewis Anthony first married Mary Carvallo who died leaving two children, the plaintiff and one Xavier who also died without issue. After the death of his first wife, Lewis Anthony married the defendant. He had no children by her and died on 2.9.1958 leaving the plaintiff as his only child.

In this action, the plaintiff claims a declaration of title to the thirteen lands, damages and ejectment of the defendant who is in possession.

The defendant claims the lands by virtue of a joint Last Will executed by her and her husband by which they left their properties to the survivor.

The learned District Judge gave judgment for the plaintiff and the defendant has appealed.

The appeal was pressed on two grounds, firstly, that the present action was barred as the plaintiff had filed a prior action (which has not yet been concluded) for three other lands on the same title ; and, secondly, that the Last Will has failed to create a fideicommissum under which the plaintiff could make a claim.

In regard to the first of these grounds—the argument was based on the provisions of section 34 of the Civil Procedure Code. The relevant part of that section reads as follows :—

> "(1) every action shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action ; but a plaintiff may relinquish any portion of his claim in order to bring the action within the jurisdiction of any Court.

(2) If a plaintiff omits to sue in respect of, or intentionally relinquishes any portion of his claim he shall not afterwards sue in respect of the portion so omitted or relinquished. A person entitled to more than one remedy in respect of the same cause of action may sue for all or any of his remedies ; but if he omits (except with the leave of the Court obtained before the hearing) to sue for any of such remedies, he shall not afterwards sue for the remedy so omitted. "

Admittedly the plaintiff had filed D. C. Colombo 9929/L some months before this action, against the defendant claiming three other lands on the same title. The cases had come up for trial together, and that case had been laid by until this case is decided.

The argument for the appellant on this point was based mainly on the decision in the Indian Case of *M. Khalil Kahn and others v. Mahbub Ali Mian and others* [1]. The facts in that case were briefly as follows : One R.B., a Mohammedan lady, died leaving two properties referred to as the Shajahanpur property and the Oudh property. There were three sets of persons who claimed to be her heirs, who may be referred to as K, M and A. In mutation proceedings (unknown to our law) the Oudh property was registered in the name of A for the purposes of those proceedings. Such registration does not affect title but apparently enables the person registered to possess the property. M then filed suit No. 5 against K and A in respect of that property. K also filed suit No. 8 in respect of the same property against M and A. Both suits were heard together and K's claim to be the heir was upheld. K than filed another suit against M in respect of Shajahanpur property. It was held by the Privy Council that the second suit was barred by Order 2, Rule 2 of the Indian Code, as this property was not included by K in suit 8 referred to above. Order 2, Rule 2, is identical with section 34 of our Civil Procedure Code except for the word " suit " being used in India for the word " action ". This decision undoubtedly supports the contention of the defendant.

But it has to be observed that the Indian Code is different from ours in certain respects. For instance, actions such as suit 5 and suit 8 referred to above could not have been filed under our law, for there would be a misjoinder of defendants and causes of action, unless it could be shown that the defendants were acting in concert to keep the plaintiffs out of possession—which is not the case in these two suits as the different sets of defendants were claiming against each other. The terms of Order 1, Rule 3, of the Indian Code (to which I shall presently refer) are wide enough to maintain such actions. Under section 14 of our Code all persons may be joined as defendants against whom the right to any relief is alleged to exist in respect of *the same cause of action.* Our Courts have consistently held that when a plaintiff claims a declaration of title to a land on one title, and alleges that the defendants, denying his title, are in possession of separate and defined portions of that land, it would be a misjoinder of defendants and causes of action to institute one action,

[1] *(1919) A. I. R. (Privy Council) 78.*

unless it can be shown that the defendants were acting in concert to deprive the plaintiff of possession of the entire land (see, for example, *Lowe v. Fernando*)[1]. Further, in regard to actions for declaration of title, under section 35 of our Code no other cause of action can be joined except claims in respect of mesne profits or arrears of rent, damages for breach of contract under which the property is held, or *consequential on the trespass which constitutes the cause of action* or claims by a mortgagee to enforce remedies under the mortgage. It is perhaps significant that in the corresponding section of the Indian Code the words "damages consequential on the trespass which constitutes the cause of action" have been omitted.

Order 1, Rule 3 of the Indian Code is in the following terms: "All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise." It was against this background that Their Lordships, in the Indian case had to examine the meaning of the term "cause of action" (in Order 2, Rule 2) which, they pointed out was not defined. Having stated that the cause of action means every fact which will be necessary for the plaintiff to prove if traversed in order to support his right to the judgment, they said at page 86, "having regard to the conduct of the parties Their Lordships take the view that the course of dealing by the parties in respect of both properties was the same and the denial of the plaintiff's title to the Oudh property and the possession of the Shajahanpur property by the defendants obtained as a result of that denial *formed part of the same transaction.*" Our Code defines "cause of action" as "the wrong for the prevention or redress of which an action may be brought, and includes the denial of a right, the refusal to fulfil an obligation, the neglect to perform a duty and the infliction of an affirmative injury."

The "cause of action" in a suit for declaration of title to land flows from the right of ownership. This right applies to a particular *thing*. Lee (Roman Dutch Law, 5th Edition) says at page 121, "Dominion or ownership is the relation protected by law in which a man stands to a thing which he may (*a*) possess, (*b*) use and enjoy, (*c*) alienate. The right to possess implies the right to vindicate, that is to recover possession from a person who possesses without title to possess derived from the owner." "The cause of action" in an action for declaration of title to a piece of land flows from the right of *ownership of that particular piece of land*. It consists of the denial of the title of the owner to that land, and his being prevented from possessing that land. The two acts together constitute the wrong for which redress may be sought. In respect of each different land, therefore, there is a separate cause of action.

[1] (1913) 16 N. L. R. 398.

The *rei vindicatio* action, as known to our law, must be brought against the person in possession. Maasdorp says (Volume II, 5th Edition) at page 101, "The fact that the property in question was in the possession of the defendant at the time when the cause of action accrued is of the very essence of the action, and it is therefore necessary for the plaintiff to allege such possession in his declaration and to establish it by evidence ....." Unlike in India, the mere denial of the basis on which the plaintiff claims title does not give rise to a cause of action unless the plaintiff is also kept out of possession,—and, the act of keeping the plaintiff out of possession is different in the case of different lands. Section 34 enacts that the plaintiff must make his whole claim in respect of a cause of action, e.g., where a defendant denying his title, keeps the plaintiff out of possession of a whole land, if the plaintiff chooses to sue in respect of only part of that land, he cannot sue the same defendant again for the balance. Or, again, if the plaintiff fails to claim the damages suffered in consequence of the defendant's trespass, he cannot claim those damages later.

There is, however, no objection to the plaintiff uniting in one action several different causes of action against the same defendant in accordance with section 36 of our Code, as has been done in the present case. But the cause of action as stated earlier in respect of each land is different.

I do not think that the explanation to section 207 supports the inference (as submitted by Counsel for the defendant) that the cause of action in relation to different lands claimed on one title is the same. That section enacts that a decree passed by Court is final between the parties to it. Such a decree would, of course, be based on a judgment which decides the matters put in issue between the parties at the trial. The explanation goes on to say that every right of property (to take an example) which could have been put in issue between the parties to the action, whether put in issue or not also becomes a *res judicata* on the passing of the decree provided those rights could have been put in issue *upon the cause of action* for which the action was brought. The whole contention for the plaintiff (which in my opinion is correct) is that his rights to land A (for example) cannot be put in issue upon a cause of action which has accrued to him in respect of land B.

This contention must not be confused with the undoubtedly correct proposition, that once an issue (e.g., that of heirship to a particular person) has been decided, then the decision *on that issue* is *res judicata* in respect of every different cause of action where the same issue arises between the same parties.

It was on this principle that the case of *ingiri Menika v. Punchi Mahatmaya*[1] was decided. In that case the plaintiff claimed a number of lands by paternal inheritance. In an earlier case she had claimed one land on the same title against the same defendant. It was decided there (on the strength of a decisory oath) that as she had married in

[1] *(1910) 13 N. L. R. 59.*

deega she was not entitled to inherit from her father. That decree was, therefore, *res judicata* on the question whether the plaintiff is entitled to inherit from her father or not, and the decision in that case, with respect, was correct. It is true that in the course of that judgment one of the learned judges remarked that for the purpose of determining whether or not two causes of action are the same one has to look at the media on which the plaintiff asks for judgment. If by this remark it is meant that there is but a single cause of action against the same disputant in respect of different lands claimed from the same source, I must with great respect disagree.

The other case, *Samitchi v. Peiris*[1] relied on by the appellant was decided on the same principle. The learned judges were there dealing with the question of *res judicata* and the effect of section 207 on a consent order. Their minds were not directed to the meaning of "cause of action" in relation to a land.

The filing of the earlier case for three different lands does not, in my opinion, constitute a bar to the present action.

The second argument urged was that the Last Will did not create a fidei commissum, and the plaintiff could, therefore, claim no rights.

One must not lose sight of the fact that when construing a last will the primary duty of the court is to give effect to the testator's intention. On reading the Will it is abundantly clear that the testator desired that these properties should pass to his son Lewis Anthony when the latter reached the ago of 35 years, and that after his death they should devolve on his child or children. This fact is not seriously denied, but it was urged for the defendant that though the intention was clear, yet the testator had failed to achieve what ho intended.

It was submitted that if the Will only created a Trust with the three executors as trustees, then Lewis Anthony would get the properties absolutely, and that his title was in no way fettered. In other words that the prohibition against alienation in deed P6 was ineffective. It was argued that the trustees (who derived no benefit from the lands) should not be looked upon as fiduciaries—that such a construction would lead to the recognition of a "fidei commisum purum", which is now looked upon only as a historical curiosity. But I see no necessity for such an approach when construing the terms of the Will. Indeed that is not,—and never was—any part of the plaintiff's case.

Keeping in mind again that the paramount duty of a Court is to give effect to the testator's intention, we have to ask ourselves the question whether that intention has been clearly expressed, and if so, whether there is any legal impediment in the way of giving effect to it.

As Counsel for the plaintiff pointed out, in order to achieve what he desired, the testator created a Trust with the executors as trustees, and his son Lewis Anthony as the beneficiary. When tho deed P6 was

[1] *(1913) 16 N. L. R. 257.*

executed by the trustees in favour of Lewis Anthony, *the Trust was at an end.* The testator had directed, however, that the transfer to Lewis Anthony should be subject to certain conditions. There are no limitations placed on the directions which the author of a Trust may give his trustees and the trustees are bound to carry out those directions.

It is true that these directions are such that when given effect to they create what we call a " fidei commisum " with Lewis Anthony as fiduciary. Is there then, any rule of law which compels us to say " We refuse to give effect to the testator's clear intention " ? I can see none ; and I can see no objection to a testator in order to give effect to his wishes creating a trust and directing that the beneficiary, when he becomes the owner, should take the properties subject to a fidei commisum in accordance with his directions.

I think that the learned District Judge was right in his decision on both the points discussed above. His findings on questions of fact were not canvassed before us.

The appeal is dismissed with costs.

DE KRETSER, J.—

The facts relevant to this order are fully set out in the judgment of my brother Sirimane with whom I agree.

In regard to the bar imposed by the provisions of Section 34 of the Civil Procedure Code, I am of the view that the words " he shall not afterwards sue in respect of that portion " found in Section 34 (2) refer to the filing of a second action after a first one had been concluded. It is only after a first action is concluded that a Plaintiff gets fixed to a position in regard to the claim in that action, which is irretrievable, for up to that time any error or omission in setting out the whole of the claim on the cause of action can be rectified—e.g. by amending the Plaint.

It appears to me that there is a pointer to the correctness of this view in Section 34 itself, for Section 34 (2) runs on as follows :— " . . . . . a person entitled to more than one remedy in respect of the same cause may sue for all his remedies but if he omits (except with the leave of Court obtained before the hearing) to sue for any of such remedies *he shall not afterwards sue* for the remedy so omitted. "

It will be noted that the bar operates only *after the hearing* of the first case for until that point of time the Plaintiff can omit with the leave of court any particular remedy he wishes to leave out.

For these reasons also then it appears to me that it is not open to the Defendant Appellant to claim that Suit No. 9929 L, instituted earlier (15.7.62) but still pending, is a bar to Suit No. 10207 L instituted later (13.5.63) but taken up first for trial after Counsel on both sides had been heard, before the Trial Judge exercised his discretion as to which of the two cases, both of which had been set down for trial on that day, should be

taken up. In those submissions, the submission that No. 9929 L was pleaded as a bar to the other case and that therefore it was expedient that it should be taken up did not play a part. It also appears to be not without significance that there is not a single case in our reports in which the claim in a case not yet tried has been held to provide the suit in bar of the claim in the case which is being tried ; and that in the reported cases the provisions of Section 34 have so often been considered together with the provisions of Section 207.

In regard to the question whether the cause of action in L 9929 is the same as in L 10207 as Defendant claims, or different as Plaintiff claims, it is well to consider what a *rei vindicatio* action is, for both these cases in which the Plaintiff seeks :

(1) A declaration of title to the lands and premises described in the schedule to the Plaint (on the footing that the Plaintiff is the daughter and the fidei commissary successor of Lewis Anthony Morais).

(2) The ejectment of the Defendant (who is the widow of Lewis Anthony Morais and who has been, according to the Plaintiff, in wrongful and unlawful possession of these lands from 2.9.58 on which day Lewis Anthony Morais died).

(3) Accrued and continuing damages.

are actions known to our law as *rei vindicatio* actions.

"Reclame or rei vindicatio" says Van Der Linden (1.7.3.) "lies for the owner of anything movable or immovable, corporeal or incorporeal, against the possessor or any person who has mala fide divested him of the possession to deliver it up to the owner.....", while Voet says (6.1.2) "This action arises from the right of dominium. By it we claim specific recovery of property belonging to us but possessed by someone else." The fact that Plaintiff never had possession of the property is no bar to this action nor is it a bar that the Plaintiff's vendor had no possession. In a *rei vindicatio* action a Plaintiff has to prove title to the land in dispute as a means to an end for it is manifest that if he is not entitled to dominium, his action to regain or obtain possession of the property must fail ; but success in proving a contested title in a *rei vindicatio* action unless Plaintiff can also succeed in proving ouster by the Defendant can at best obtain for Plaintiff a decree merely declaratory of the Plaintiff's title to the property claimed as against the Defendant.

"Dominium or ownership" says Lee at Page 126 of his Treatise on Roman Dutch Law, "is the relation protected by law in which a man stands to a thing which he may—

(*a*) Possess
(*b*) Use and enjoy
(*c*) Alienate

The right to possess implies the right to vindicate—i.e., to recover possession from a person who possesses without title to possess derived from the owner." It will thus be seen that the cause of action in a *rei vindicatio* action is the trespass which has resulted in Plaintiff being kept out of property of which he is the owner, and which may have caused him consequential loss.

Mr. Thiagalingam has submitted that the test approved of by Wood Renton J. in the case of *Dingiri Menika v. Punchi Mahatmaya*[1] should be applied in determining whether or not two causes of action are the same, viz., we have to look not to the mere form in which the action is brought but to the grounds of the plaint and the media on which Plaintiff asks for Judgment. He says that it will then be seen that the true cause of action is the denial that the Plaintiff is the daughter and the fiduciary heir of Lewis Anthony Morais, and that Plaintiff had no right to bring separate actions in regard to each land but should have included, in terms of Section 34, all of them as representing the whole of her claim in one action based on the one cause of action—that is the denial of her title.

It appears to me, when I apply the test suggested and examine the grounds of the plaints and the media on which the Plaintiff asks for judgment in the two cases No. 9929L and No. 10207L that the wrong that the Plaintiff wants redressed is, that from the date of Lewis Anthony Morais' death she is being wrongfully kept out of the possessions of the lands set out in the schedules to the plaints, of which she is owner on the title—which she is aware is disputed—which she has set out in the plaint. Her title will then be an issue the answer to which can be vital if she is to succeed in her action, but one must not confuse matters which would form an issue in an action with the cause of action. Findings in the case that she is the daughter of Lewis Anthony Morais and his fiduciary heir will be findings on issues in the case and will certainly be *res adjudicata* between the parties in other cases between them where those matters are in issue, but such findings will not result *ipso facto* in it being possible for her to get an order that she should be restored to possession of the land of which she claims the dominium on that title, for that would turn on whether she can prove the alleged ouster by the Defendant. Proving ouster by the Defendant in respect of one land would not result in Plaintiff being able to claim that ouster is proved in respect of every other land in dispute between them claimed on the same title or that the damages consequential on each ouster have been proved. The cause of action in respect of each land is similar, viz. the trespass, but not the same. Section 34 has application only where the cause of action is the same.

Mr. Thiagalingam relied strongly on the case reported in A. I. R. 1949 P. C. at Page 78 but it appears to me that the facts that in our Code we have definition of a cause of action while India has not defined it at all, that in India there are mutation proceedings—which is something foreign

[1] *(1910) 13 N. L. R. 61.*

to our law—that our rules for joinder of defendants differ from those in India and that in India apparently the incidents of what we know as a *rei vindicatio* action are different are sufficient to show that the decision in that case turns on matters and principles which have no application in Ceylon.

In regard to the will P. 10 it seems to me that Mariam Morais in this will has created a perfectly valid trust and that there is no need to strain to show that it was in fact a fidei commissum in which the executor trustees were fiduciaries which was something Mr. Thiagalingam wrongly anticipated Mr. H. V. Perera would attempt to do to bring the matter into line with the case reported in 58 N. L. R. at Page 494. Mr. Perera submitted instead that the will did create a trust and that when the trustees in terms of Para 6 of the will transferred all the trust property by deed P. 6 to Lewis Anthony Morais when he attained the age of 35 years they had faithfully carried out the directions of the creator of the trust and the trust was at an end. I have considered anxiously whether there is any objection in Law to the trustees carrying out the directions of Mariam Morais burdening the property which they conveyed to Lewis Anthony Morais with what is known to us as a fidei commisum conditionale. It appears to me that the true test to apply is to consider whether the beneficiary of the trust held the property as owner and it appears to me that he did, for by P. 6 the ownership of these properties vested in Lewis Anthony Morais who became entitled to possess them, use and enjoy them, and to alienate his right title and interest in them, and the fact that he enjoyed these incidents of ownership only during his life time due to a condition imposed by the testator that on his death the property vested in his daughter made no difference to the position that with the execution of P. 6 his ownership of the property were quite independent of the trust which then ceased to operate. In these circumstances, I am of the view that the provisions of the will are unimpeachable.

The other matter mentioned in appeal was that in as much as there was no prohibition against forced sales the deeds executed in consequence of those sales must be regarded as valid. As the learned Trial Judge (Mr. Thambydorai) points out in his very lucid judgment there is a clear indication in the will that Lewis Anthony Morais should only possess and enjoy during his life time and that there could be no doubt that the prohibition against alienation included alienation by donation or by forced sale. In the case reported in 2 Ceylon Weekly Reports at Page 314 it has been held that a sale by fiscal against the fiduciaries of a land subject to fidei commisum does not put an end to the fidei commisum and that appears to me to conclude the matter.

For these reasons I dismiss with costs the appeal of the Defendant.

Appeal dismissed.