PIERIS APPUHAMI v. BOTEJU.

1895. *June 28 and July 19.*

D. C., Colombo, C/2,482.

Ordinance 5 of 1877, ss. 31, 32—Certificate of title—Effect thereof—Setting aside such certificate—Necessity for entry of name of administrator instead of his intestate—Ordinance No. 14 of 1891, s. 26.

The object of a certificate of title granted under section 31 of Ordinance No. 5 of 1877 is to make it, unless and until it is impeached by an action under section 32 thereof, conclusive evidence of the title of the holder of such certificate to the land referred to therein ; and the certificate is a bar to the assertion by any one of any claim to such land, which arose or accrued prior to the date of the certificate, and which might have been registered ; and it is a bar to the claims of persons as well in as out of possession of the premises.

Any one seeking to set aside such certificate need not resort to a separate action, but that object may be gained by means of a claim in reconvention under section 32 of the Ordinance, in an action already filed against him.

Every administrator should get himself placed on the register kept under Ordinance No. 5 of 1877, as required by section 26 of Ordinance No. 14 of 1891, in place of his intestate, and his failure to do so will, under section 31 of Ordinance No. 5 of 1877, operate as a bar to any claim by him as administrator.

Cassim v. Marikar (1 S. C. R. 185) questioned.

THE facts of the case are set forth in the judgment of his Lordship the Chief Justice. It was argued in appeal on 28th June, 1895.

Dornhorst, for appellant.

Pereira, for respondent.

Cur. adv. vult.

19th July, 1895. BONSER, C.J.—

In this case we have to determine the effect of a certificate of title given under Ordinance No. 5 of 1877.

The plaintiff, who is the holder of a certificate of title of the second class to 3-28ths of a certain field, sues the defendant, alleging that he has been ousted therefrom, and prays for a declaration that he is the owner, and that he may be placed in possession of the share, and for damages.

The defendant, by his answer, alleges title in himself. He says that the plaintiff derives title from his father, Johanis Pieris, by inheritance, and that such title was and is a defeasible title, subject to any disposition of the said lands to be made by the duly appointed legal representative of the said Johanis Pieris.

He further alleges that Johanis Pieris died intestate on the 6th April, 1888, and that Misso, who was appointed administrator, sold and on the 16th of June, 1892, conveyed to the defendant 25-28ths

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of the said land, being all the interest of the said Johanis Pieris therein, and has claimed in reconvention that, in terms of section 32 of Ordinance No. 5 of 1877, he should be declared the lawful owner of the share as against the plaintiff. It appears that Misso was appointed administrator on the 2nd January, 1891, and the certificate dated the 10th March, 1892, states that the plaintiff was registered as owner on the 5th October, 1891.

The Acting District Judge gave judgment for the plaintiff for possession only, and the defendant has appealed.

The question is, what is the effect of registration?

The 31st section of the Ordinance provides that "every certificate "of ownership shall have the effect of absolutely barring all claims "to the land therein mentioned, or to any right or interest thereto "or therein which shall have arisen or accrued prior to the date of "such certificate, and which might have been registered under the "provisions of this Ordinance, but which at the date of such "certificate had not been so registered, save and except as is "excepted by the following section." The following section provides that persons having or claiming to have any right, title, or interest in or to any land against the holder of a certificate of the second class shall be entitled to prosecute their claim by action within four years of the date of the certificate, and that, if such action be decided against the holder of the certificate and in favour of any party, that party shall be entitled to have a certificate, but that no such action shall prevent any claims being barred, unless written notice of such action shall be previously given to the registrar.

Section 35 provides that the holder of a certificate of the second class, if within four years from its date the registrar has received no notice of action, shall be entitled to a certificate of the first class.

In this case the defendant had got into possession of the land, and the plaintiff seeks to eject him on proof of his own title.

It was argued on behalf of the defendant that section 31 only barred claims of persons out of possession, and did not apply to a case like the present, where the claimant had managed to get into possession; but this, in my opinion, is not a fair reading of the section. Having regard to the inquiries which have to be made, and the notices which have to be given before the certificates of title are granted, and to the fact that the Ordinance contemplates a sort of judicial settlement of all claims within the district in which it is brought into force, I am of opinion that the intention was to make the certificate, unless and until it was impeached by an action brought under section 32, conclusive evidence of the title of the holder, and to prevent any claim being asserted in any

way to the land which arose or accrued prior to the date of the certificate, and which might have been registered. The defendant claims by the conveyance from the administrator, Misso, of the 6th June, 1892. Then the question arises,—had Misso, at the date of the certificate, such a right or interest in the land as might have been registered under the Ordinance ?

The right of an administrator in respect of land has been much discussed.

It was suggested in a recent case that his position with regard to land differs altogether from that of an English administrator with regard to his intestate's chattels real, and that he has only a limited estate in them—an estate sufficient for administration and limited thereto ; and it was said that, subject to the exercise of that power, the land devolves on the heirs direct, not as in England through the medium of the administrator (*Cassim v. Marikar, 1 S. C. R. 185*). For my own part, I cannot understand the nature of such a limited estate. I know of nothing like it in English law.

But whether that view be correct or incorrect, it can hardly be maintained since Ordinance No. 8 of 1863, that an administrator has not such an interest in his intestate's lands as is capable of registration.

Section 38 of that Ordinance requires every grant of administration effecting any land to be registered.

More recently Ordinance No. 14 of 1891, section 16, specially requires every grant of administration affecting any land to be registered in the books kept under Ordinance No. 5 of 1877, and section 26 of the same Ordinance provides that " on the death of a " registered owner, all lands belonging to him shall remain in his " name until probate or administration of his estate shall have been " granted, whereupon, and upon a written application on that " behalf, the name of the executor or administrator shall be " registered in the books until a partition, transfer, or alienation of " the land shall have been effected, whereupon such partition " transfer, or alienation shall be registered."

These provisions do not appear to have been brought to the notice of the learned Judges who decided *Cassim v. Marikar*.

It was the duty, therefore, of the administrator to get himself placed on the register in the stead of his intestate.

As he did not do this, his claim was barred under section 31 by the plaintiff's certificate of ownership, and the defendant who claims through him can be in no better position.

But the defendant has claimed in reconvention the benefit of section 32 of the Ordinance No. 5 of 1877. It was suggested in

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argument that the certificate could only be set aside in an independent action, but I am of opinion that this is not so, and that it is competent for a defendant to do as this defendant has done. But before the action or claim in reconvention can be of any avail, notice must be given to the registrar. The word "previously" cannot mean "previously to action brought," for in section 35 the notice is referred to as being "notice of an action having been "commenced." The words "unless written notice of such action shall have been previously given to the registrar" mean "unless and "until written notice of such action shall have been given to the "registrar."

If the registrar has no notice of any action to set aside the second class certificate before four years have elapsed, he will proceed to give the holder a first class certificate. In my opinion, therefore, it not having been proved that notice of this claim in reconvention had been given to the registrar before the date of trial, the plaintiff was entitled to a decree in his favour.

Under all the circumstances, however, I think that the proper order to make in this appeal will be to send the case back to the District Court with directions to try the cross claim. If the defendant proves a good title and notice of action given to the registrar, he will be entitled to succeed, but he must pay the costs of the action in any event, and the costs of this appeal.

BROWNE, A.J.—I agree.