1900.
July 4 and September 25.

DE MEL *v.* FERNANDO.

D. C., Colombo, 9,391.

Fiscal's sale—Execution on money decree—Purchaser of land seized in execution of such decree—Suit to realize mortgage in respect of same land—Purchaser of hypothecated land—Rival claims of the two purchasers—Priority of conveyance and registration—Effect of registration under a wrong name—Ordinance No. 8 of 1863, s. 39.

D. M., being a simple creditor of J. H. G., obtained judgment against him and caused the Fiscal to seize his share in a property called Udupitiyagoda estate. At the sale in question D. M. became purchaser of his debtor's share under deed dated 22nd January, 1885, which was registered on 1st February, 1887.

In 1881 J. H. G. and C. L. G., the joint owners of the said estate, had mortgaged it to J. P., who put the bond in suit on the 22nd November, 1886, without making D. M. a party thereto. At the sale in execution of this mortgage decree, R. S. P. bought the whole estate under deed dated 24th September, 1887, which however was not registered till 29th June, 1896, R. S. P. conveyed the estate to J. P. by deed dated 11th November, 1891, and J. P.'s executor sold it to F. by deed dated 25th March, 1895.

Held, in an action brought by D. M. against F. to recover possession of the share bought by him under deed dated 22nd January, 1885, that, though the plaintiff had bought that share and registered his conveyance previous to the purchase and registration on the part of R. S. P., the defendant's predecessor in title, and though plaintiff was no party to the original hypothecary suit, yet the title of the defendant was superior to that of the plaintiff.

Per MONCREIFF, J.—As the conveyance tendered by the plaintiff for registration did not mention the real name of the land conveyed and assigned boundaries which could not be identified, so that the conveyance was registered in the wrong book, I am inclined to think that it was not registered, that the plaintiff was to blame for its non-registration,

1900.

July 4 and September 25.

and that his deed was void, under Ordinance No. 8 of 1863, section 39, as against the only registered deed of the defendants.

ACTION *rei vindicatio*. Plaintiff alleged that J. H. Grenier and C. L. Grenier were entitled to a land of about 142 acres by virtue of a Crown grant; that under a writ of execution issued against J. H. Grenier a defined portion of the said land was seized and sold by the Fiscal on the 2nd July, when plaintiff became the purchaser thereof, and the Fiscal granted to him a conveyance dated 22nd January, 1885, which was registered on the 1st February, 1887; that the plaintiff was placed in possession and continued to hold the land till the defendants took unlawful possession of the said portion in June, 1895. Plaintiff prayed for ejectment of defendants and for a declaration of title in his favour.

The defendants pleaded that the Greniers had in 1881 mortgaged the land in question to one Jeronis Peiris, and that the debt being unpaid the mortgage-creditor recovered judgment against them and caused the Fiscal to sell the land, when R. S. Peiris became the purchaser under deed dated 24th September, 1887, which was registered on 29th June, 1896; that R. S. Peiris conveyed it to Jeronis Peiris by deed dated 11th November, 1891; that Jeronis Peiris died in 1894, and his executor sold the land to the second defendant, wife of the first defendant, by deed dated 25th March, 1895, since when they have been in possession.

The District Judge, after evidence heard, found that the Fiscal's conveyance to R. S. Peiris, though dated 24th September, 1887, was not registered till June, 1896, till after Jeronis Peiris's executor had sold the land to defendant on the 25th March, 1895, by a conveyance registered in June, 1895. He held that plaintiffs had proved their title to the land " subject to considerations as to the bond granted by the Greniers, the rival registrations, and the question of improvements made by the defendants."

As regards these considerations, he was of the following opinion:—

"As to the bond, it appears to me that the cases cited in *3 C.L.R. 71* and *75* are entirely applicable, and that plaintiff's title is not at all impaired by the fact that, when he purchased in execution of his money decree, the land was subject to a registered mortgage which was put in suit on 22nd November, 1886, after the Fiscal had made conveyance to him of one of the mortgagor's rights to the land and before he had registered his conveyance. The only way in which their title, derived direct from the mortgagor, could be reached, reduced, and perhaps annihilated, would be by an hypothecary action and decree declaring the land liable to be made exigible for satisfaction of the mortgagee's writ.

1900.
July 4 and September 25.

" I have no note of any previous decision upon a question arising out of a double registration of a land through somebody's mistake in description of its name, locality, boundaries, &c. It is not alleged that it occurred through any fraud; and in the case of an error, pure and simple, I hold that the registration is not vitiated thereby.

" The Crown originally granted the 142 acres for a consideration of Rs. 1,430. At the Fiscal's auction of July, 1883, plaintiff bought of these 54 acres for Rs. 150, and at that of July, 1887, defendant's predecessor in title bought the 142 acres for Rs. 511 (the mortgage decree being for Rs. 2,765). Defendant's expenditure account for its conversion into a tea estate amounts to Rs. 51,314.86. This includes such charges as books, ink, and pen Rs. 35; trips Rs. 443; digging plumbago Rs. 556 (no sales thereof are credited); rearing poultry Rs. 10 (no credit for sale or consumption of eggs or birds); tea boxes Rs. 37; ' coals for curing tea ' Re. 1.20; tea leaves purchased Rs. 302. I should think this account would require vigorous pruning to ascertain how much could be properly debited to ' improvement of jungle into tea garden ' account. The receipts are Rs. 2,230, of which Rs. 1,258 is from sale of leaf, which as a fruit of the expenditure should not be credited to the account. I doubt if the village *goiya* would ever himself have made so great an expenditure, or if I should deem the land had been improved by such expenditure on it, to so little profit, at all events at present. No evidence of its present market value has been given save that defendants believe it to be worth Rs. 80,000, of Rs. 563 per acre. After this lapse of time the chances of an hypothecary action against plaintiff now are so small that I do not see it is proved he has benefited by the payment of the mortgage to an extent (per acreage) of of Rs. 511, say Rs. 124, so that the payment of the mortgage (though Rs. 511 did not satisfy the mortgage decree of Rs. 2,765 and interest) should be reckoned as an *impensa utilis*. Besides, if an hypothecary action was ever maintainable against him, he did not benefit by the payment.

" I hold that plaintiff is entitled to an undivided moiety of so much of the 142 acres as lies west of the line of the pathway delineated in Mendis's survey dated 25th October, 1884, and to Rs. 20 nominal damages and to the costs of this action."

The defendant appealed. The appeal came on for argument on 4th July, 1900.

Wendt, *Acting A.-G.*, and *Bawa*, for appellant.—Plaintiff was privy to the Greniers, the mortgage-debtors of Jeronis Peiris, whose action was raised before the Fiscal's transfer in favour of the plaintiff

1900.
July 4 and September 25.

was registered. The case of *Abeyagunawardana v. Andris* (*3 C. L. R. 71*) and that of *Silva v. Uparis* (*ibid, p. 75*) are distinguishable from the present case, since in those cases the conveyance made by the mortgagor had been registered before the action instituted to realize the mortgage, and therefore the mortgagees were fixed with notice. Defendants have priority over plaintiff's conveyance under Ordinance No. 8 of 1863, sections 37, 38, and 39.

In any case the defendants are entitled to compensation for improvements.

Sampayo, with him *De Saram*, for respondent.

Cur. adv. vult.

25th September, 1900. BONSER, C.J.—

I am of opinion that the appeal must be allowed. The question to be decided is, whether the purchaser of hypothecated land at a sale by the Fiscal in execution of a decree in a suit to realize the mortgage, or the purchaser at a sale by the Fiscal of the same land in execution of the judgment of an unsecured creditor against the mortgagor, has the better title.

The former is in possession, and the latter seeks to dispossess him, alleging that the title is in himself.

The sale to the latter was prior in date to that to the former, so no question of priority of registration arises. It is not suggested that, at the date of the sale under the hypothec, the mortgage money was not due, and that therefore the decree and the sale thereunder were not justified. That being so, I am of opinion that the sale under the mortgage gave the purchaser a title superior to that of the plaintiffs, who claim under the mortgagor, and that the defendants, who claim under that purchaser are entitled to retain the land as against the plaintiffs

MONCREIFF, J.—

In 1881 the brothers Grenier mortgaged an estate called Udupitiyagoda. The mortgage deed was registered in 1882, the Fiscal's sale and conveyance to the mortgagee passed in 1887, and the second defendant bought the property in 1895.

In 1882 the plaintiffs obtained a decree against J. H. Grenier, who held an undivided half of Udupitiyagoda. Under that decree 54 acres, out of 142, of the land were seized and sold by the Fiscal, the plaintiffs becoming the purchasers and registering their conveyance on 1st February, 1887.

The plaintiffs never were, as I believe, in possession of the property: their claim was unknown to the defendants. The hypothecary suit on the mortgage bond was begun before the conveyance to plaintiff was registered, and the plaintiff was bound by the decree in that suit.

1900.
July 4 and September 25.
MONCREIFF, J.

The defendants further urged that their Fiscal's conveyance was registered on the 29th June, 1896, and that although the Fiscal's conveyance of the plaintiff purported to have been registered on the 1st February, 1887, the registration was void as against the subsequent deeds duly registered.

Inasmuch as the conveyance tendered by the plaintiff for registration did not mention the real name of the land conveyed, and assigned boundaries which could not be identified, so that the conveyance was registered in the wrong book, I am inclined to think that it was not registered, that the plaintiffs were to blame for its non-registration, and that by virtue of Ordinance No. 8 of 1863, section 39, it was void as against the duly registered deed of the defendants.