1954 *Present :* **Gratiaen A.C.J. and Gunasekara J.**

S. A. A. P. JAYATILLEKE *et al.*, Appellants, *and* H. C. T. P. SIRIWARDENA *et al.*, Respondents

S. C. 314—D. C. Gampaha, 604/5608

Co-owners—Mortgage of his undivided share by one co-owner—Amicable partition among the co-owners thereafter—Effect of it on the earlier mortgage—Equitable considerations involved—Rule against "unjust enrichment".

In Ceylon, the rights of a mortgagee, to whom a co-owner has hypothecated his undivided share of the common property, continue to attach exclusively to that share notwithstanding a subsequent "amicable partition" of the property into divided allotments. The mortgage does not automatically attach to any share of the divided allotment conveyed to the mortgagor which had not been previously covered by the bond.

A, B and C who were co-owners effected an "amicable partition" of the common property, implemented by cross-conveyances. The basis of the arrangement was that each should become the sole owner of an unencumbered divided allotment in exchange for his original undivided share in the larger land which each (apart from the implied warranty against eviction) expressly warranted to be unencumbered. In fact A had previously mortgaged his undivided $\frac{1}{3}$ share in the common property to D, but fraudulently suppressed this from B and C.

Held, that, in an action by D to enforce his mortgage bond, D was entitled to a hypothecary decree in respect of the whole land to the extent of A's original interest therein which had been mortgaged. In the result, B and C received less than they had bargained to receive from A in the "amicable partition".

By the acquiescence of all parties, however, the execution-purchaser (who became the owner of an undivided $\frac{1}{3}$ share of the larger land) adopted the earlier "amicable partition" and went into occupation of A's divided allotment, leaving B and C in continued occupation of the other allotments; and this mode of possession continued for approximately nine years.

Held, that the *status quo* could not be disturbed at the instance of A's heirs. The rule against "unjust enrichment" prevented them from now asserting title to the unencumbered $\frac{2}{3}$ share of the divided allotment possessed by the execution-purchaser, because this relief could not be granted without causing prejudice to B and C whose interests in the other allotments A and A's heirs were under a contractual obligation to protect. The form of decree asked for by A's heirs would be "unjust" because it would indirectly have the effect of diverting the execution purchaser into occupation as a co-owner of the allotments conveyed to B and C which A had warranted to be free from encumbrances.

APPEAL from a judgment of the District Court, Gampaha.

H. V. Perera, Q.C., with *G. T. Samarawickreme*, for the 2nd and 3rd defendants appellants.

N. E. Weerasooria, Q.C., with *D. S. L. P. Abeysekera*, for the 1st defendant respondent.

S. Nadesan, with *J. Senathirajah*, for the plaintiffs respondents.

Cur. adv. vult.

February 17, 1954. GRATIAEN A.C.J.—

Thomas, Edwin and Alexander (the 2nd defendant) were until 12th February, 1928, co-owners in equal shares of Pinkumbura Estate 113 acres 0 roods and 4 perches in extent. They then agreed to partition the property into three allotments of equal value, and to enter into deeds of exchange whereby each of them should become the exclusive owner of one such allotment. Accordingly, Thomas obtained a conveyance P4 from Edwin and the 2nd defendant of their undivided shares in lot A (37 acres 2 roods and 28 perches in extent) in exchange for conveyances of his undivided interests in Lot B (39 acres 3 roods and 14 perches in extent) in favour of Edwin, and in Lot C (35 acres 2 roods and 11 perches in extent) in favour of the 2nd defendant. The scheme of partition is shown in the plan P1 filed of record.

The terms of the cross-conveyances have not been briefed to us in their entirety, but learned counsel have agreed that they include covenants which, translated into English by an Interpreter of this Court, are to the following effect :

> " Further, the said premises are *free from any disputes that would arise as a result of leases, mortgages, &c.*, and no act has been done that will cause dispute for the said premises or any part thereof, and the 2nd and 3rd parties to this document (i.e., the transferors) have not previously done any act that would render this document void. Further, the 2nd and 3rd parties above referred to and their heirs, executors and administrators and assigns *further bind themselves to warrant and defend title* to the party of the 1st part above referred to (i.e., the transferee) and their aforewritten in the event of such a request being made by them at the expense of the party of the 1st part in order more fully to secure their title to the said premises."

In addition, the implied warranties against eviction must be read into the documents.

The amicable division was implemented as agreed upon, and the basis of the arrangement was that each co-owner should receive unencumbered shares in one divided allotment in exchange for his (professedly) unencumbered shares in the others.

The effect, both actual and intended, of the conveyance in favour of Thomas was that the legal title to an additional 2/3 share of Lot A passed exclusively to him, free of encumbrances. The corresponding conveyances relating to Lot B and Lot C were intended to produce a similar result for the benefit of Edwin and the 2nd defendant respectively ; but it later transpired that Thomas (contrary to his specific assurances) had previously executed in favour of Mrs. C. H. Obeysekera a duly registered mortgage bond P2 dated 19th June, 1914, hypothecating his (then) undivided share in the whole of Pinkumbura Estate. The bond had not been discharged, so that Edwin and the 2nd defendant in fact received in respect of Lots B and C respectively a title less secure than that which Thomas had bargained to convey to them.

Mrs. C. H. Obeysekera had assigned her hypothecary rights under P2 to the 1st defendant by P3 of 6th October, 1914. Thomas died intestate in 1933 leaving as heirs the 1st plaintiff (his widow who was also the administratrix of his estate) and 6 children (including the 2nd plaintiff). In 1939 the 1st defendant instituted an action to enforce the bond, joining Thomas' former co-owners as parties in view of the registration of the cross-conveyances which had been executed in 1928. A decree was entered on 22nd January, 1940, and in execution thereof the shares hypothecated by Thomas, *i.e., an undivided 1/3 share of the entirety of Pinkumbura Estate*, were purchased by the 1st defendant under a Fiscal's conveyance dated 10th June, 1940. Thomas' debt under the mortgage was thus discharged, and satisfaction of the decree against his estate was duly entered of record.

The 1st defendant as execution-purchaser now became vested with legal title to an undivided 1/3 share of Lots A, B and C. She went into possession, however, of only Lot A in its entirety, which, after the amicable partition of 1928, had been enjoyed by Thomas and (upon his death) by his intestate heirs including the plaintiffs. Edwin (whose interests have since passed to the 3rd defendant) and the 2nd defendant continued to possess Lots B and C respectively. By this means, the 1st defendant virtually adopted the arrangement arrived at between Thomas, Edwin and the 2nd defendant. The plaintiffs and Thomas' other heirs acquiesced in this procedure without protest of any kind.

It is convenient to analyse the legal estate which (apart from the impact of equitable considerations) was held by each of the persons concerned in respect of Pinkumbura Estate on 10th June, 1940 :

(1) The 1st defendant had legal title to $\frac{1}{3}$ only of Lot A, and also $\frac{1}{3}$ of Lots B and C ; nevertheless she possessed the entirety of Lot A and no part of Lots B or C ;

(2) Edwin was divested of his title to $\frac{1}{3}$ of Lot B which Thomas had conveyed to him under the amicable partition ; nevertheless, he continued to possess the entirety of Lot B as if his legal rights had not been affected by subsequent events ;

(3) similarly, the 2nd defendant had lost his title to $\frac{1}{3}$ of Lot C which Thomas had conveyed to him, but continued to possess the entirety of Lot C ;

(4) the heirs of Thomas retained at least the bare legal title to the unencumbered $\frac{2}{3}$ shares of Lot A which he had obtained in 1928 from Edwin and the 2nd defendant ; nevertheless, they claimed no interests in those shares until the present action was instituted by the plaintiffs on 10th February, 1949—i.e., more than 9 years after the date of the Fiscal's conveyance in favour of the 1st defendant.

There can be no doubt that the 1st defendant, after the purchase in 1940 of the undivided shares actually mortgaged to her, could immediately have insisted, if she so desired, on being admitted by the 2nd and 3rd defendants to co-ownership of Lots B and C respectively. Had she done

so, the 2nd and 3rd defendants could in their turn have enforced against the heirs of Thomas the appropriate remedies arising from Thomas' breach (*a*) of his implied warranty against eviction and (*b*) of his express warranty as to freedom from encumbrances which had been the foundation of the amicable partition of Pinkumbura Estate; for, by his suppression of the mortgage then subsisting over his undivided interests in the entire property, he had induced each of them to part with an unencumbered share of Lot A in exchange for a share over which the 1st defendant in fact enjoyed hypothecary rights. For over 9 years, however, the practical necessity for such retaliatory action did not arise, because the heirs of Thomas acquiesced in the 1st defendant's adoption of the earlier scheme of divided possession. During this long interval, Edwin and the 2nd defendant were lulled into a sense of security, and effected valuable improvements on Lots B and C respectively.

So matters stood until this action commenced on 10th February, 1949—i.e., very shortly before the rights of the heirs of Thomas to $\frac{2}{3}$ of Lot A would (in any view of the matter) have effectively been extinguished by prescription.

The plaintiffs had in the first instance sued the 1st defendant alone for a declaration of title to their proportionate shares in that part of Lot A which was not covered by her Fiscal's conveyance P4. The 1st defendant, however, moved the Court to have the 2nd and 3rd defendants joined in the action so as to ensure an effectual and complete adjudication upon all matters arising in the dispute. The application was allowed, and I entirely agree with the learned Judge that this was an appropriate case for invoking the statutory provisions of section 18 of the Civil Procedure Code. A decree in favour of the plaintiffs in respect of Lot A would inevitably have prejudiced the 2nd and 3rd defendants' rights in respect of Lots B and C respectively, and they were therefore directly concerned in the success or failure of the plaintiffs' claim in these proceedings.

The case for the plaintiffs, upon the admitted facts which I have set out, has been presented to us by Mr. Nadesan with almost disarming simplicity. The undivided $\frac{2}{3}$ share of Lot A which passed to Thomas in terms of the amicable partition, it is argued, had not yet passed to the 1st defendant by adverse prescriptive user, nor do her rights under the Fiscal's conveyance cover these particular interests; on the other hand, her claim to an undivided $\frac{1}{3}$ share of Lots B and C as against the 2nd and 3rd defendants (who are bound by the mortgage decree of 1948) is unanswerable, so that the 2nd and 3rd defendants cannnot dispute her co-ownership in respect of Lots B and C. In other words they must (so far as issues relating to title in the present action are concerned) be content with less than they had bargained for under the agreement to partition Pinkumbura into 3 separate allotments; and, if they complain of any breach by Thomas of his express or implied warranties, their remedy lies in independent proceedings.

Each defendant filed an answer which bears evidence of much research in an endeavour to discover some equitable doctrine which would prevent the heirs of Thomas from taking advantage of the "fraud" which he

had perpetrated on his former co-owners. But, as the facts are not in dispute, it matters little whether the available defences are precisely covered by the pleadings or by the issues framed at the trial—*vide* the observations of the Privy Council in *Jayawickrema v. Amarasuriya* [1].

The learned trial judge approached the case by a process of reasoning which is different from that which Mr. Nadesan submitted for our consideration. He took the view that, under the Roman Dutch law, the amicable partition which took place on 12th February, 1928, had the automatic effect of converting the 1st defendant's hypothecary rights over a $\frac{1}{3}$ share of the entirety of Pinkumbura Estate into hypothecary rights restricted to the whole of Lot A ; that is to say, the existing mortgage over Thomas' earlier interests in Lots B and C was extinguished, and in its place a fresh mortgage was created by operation of law over the $\frac{2}{3}$ shares of Lot A which he has received from Edwin and the 2nd defendant. Proceeding from this hypothesis, the learned judge decided that the 1st defendant had misconceived her remedy by not claiming in the hypothecary action instituted by her in 1939 a decree affecting the entirety of Lot A ; similarly, the 2nd and 3rd defendants, being parties to the action, should have objected to a decree being passed in respect of any part of Lots B and C which had in truth been freed from mortgage by reason of the earlier partition ; not having done so, they too were bound by the decree ; in the result, none of the defendants could resist the claims of Thomas' heirs to be placed in possession of the outstanding shares in Lot A which the decree and the Fiscal's conveyance had left untouched.

With regard to the 1st plaintiff's claim, it was disclosed at the trial that she had sold her interests in Lot A to outsiders in 1937. Her claim was accordingly dismissed. The 2nd plaintiff was however declared entitled to 26/504 shares in Lot A and to consequential relief upon that basis.

It will be observed that the entire judgment under appeal presupposes the correctness of the proposition as to the legal effect of an amicable partition among co-owners on an earlier mortgage created by one of them over his undivided interests in the common property. I am satisfied, however, that this does not correctly represent the law applicable in Ceylon.

Under the Roman Dutch law, " where things are the property of several co-owners, each of them can only sell or transfer by delivery to the purchaser to the extent of his own share ", subject to certain exceptions (irrelevant in the present context) in favour of the Fisc. *Voet 18.1.14.* Similarly, " if one has mortgaged to his creditor a thing which he has in common with another, only the debtor's share is bound, whether the thing which was in common to the debtor and another has been mortgaged to a private person or even to the Fisc. ". *Voet 20.3.3.* Voet explains that " among the Romans " (by way of contrast) the position of a mortgagee was more favourable.

[1] *(1918) 20 N. L. R. 289 at 297.*

There is however, a passage in *Wille : Mortgage and Pledge in S Africa (2nd Ed.) p. 39* to the following effect :

> " Under the Roman Dutch law, one of several joint owners could mortgage the joint property even against the will of the others, but when a division or partition of the property took place, only the lot or the share of the mortgagor was bound ",

and *Voet 20.3.3* is quoted (besides other authorities) in support of this view. It is probable, however, that the author, who has previously pointed out that " a co-owner could not mortgage the common property without express or implied authority from the others ", merely intended, in the passage which I have quoted, to explain the effect of a subsequent " partition " on a subsisting mortgage which a single co-owner had purported to create *over the entirety of the common property, and not* (as occurred in the present case) *over only his undivided share in the entirety.* In the former case, the professedly unrestricted mortgage might well be regarded, upon a partition, as attaching to the whole of the divided portion which has been allotted as the mortgagor's share—for in that event, the terms of the bond would have purported from the outset to cover the entirety of that allotment (and something else as well).

In Ceylon, at any rate, a mortgage over a co-owner's interests would be entirely unaffected by a subsequent *amicable partition* to which the mortgagee himself was not a consenting party ; and even if he did consent, the provisions of the Prevention of Frauds Ordinance must be satisfied before the subsisting hypothecary rights could be enlarged in some respects or reduced in others. A so-called " amicable " partition, if it is to have immediate legal effect, must be implemented by notarial cross-conveyances. In the case of a *judicial partition*, on the other hand, different considerations arise, and special statutory provisions operate to determine the rights of mortgagees. (To what extent the common law of partition and mortgage is regulated by statute in S. Africa, I do not profess to know).

Applying the true principles which govern this case, I am satisfied that the 1st defendant did not misconceive her remedy in the action instituted by her in 1939 to enforce the mortgage bond P2 ; nor did the 2nd and 3rd defendants misconceive the defences available to them in those proceedings. The hypothecary decree binding an undivided one-third share of all three allotments to secure the repayment of the debt incurred by Thomas under the bond was the only decree which could properly have been entered in those proceedings, and the Fiscal's conveyance dated 10th January, 1940, passed to the 1st defendant legal title to all those interests. It follows that, although the learned Judge's reasons for entering judgment in favour of the 2nd plaintiff cannot be supported, the judgment itself is *prima facie* correct unless it ought to be set aside, on the facts of this particular case, on independent considerations founded on equity.

It is this part of the case which has caused us the greatest difficulty. One's instinct prompts one to believe that the law is not powerless to prevent the heirs of Thomas from directly or indirectly obtaining, to the

detriment of the 2nd and 3rd defendants, an unfair advantage from the "fraud" which Thomas originally perpetrated on them when he obtained an amicable partition of the common property. Let me summarise the relevant facts :

1. Thomas obtained from Edwin and the 2nd defendant an enlarged and unencumbered interest in Lot A in exchange for his existing interests in the other allotments which he had falsely represented to be also unencumbered ;
2. the heirs of Thomas now seek to assert their ownership of property which (but for his fraud) Thomas would never have received, and indirectly (but inevitably) to divert the 1st defendant into possession, at the expense of the 2nd and 3rd defendants, of property *in respect of which Thomas was under a special duty to protect them from eviction ;*
3. by acquiescing for 9 years in the arrangement by which the 1st defendant had adopted the earlier scheme of partition, the heirs of Thomas had stood by while the 2nd and 3rd defendants improved Lots B and C under the belief that their position was secure.

The civilised rules of modern jurisprudence are not devoid of an adequate reply to unconscionable claims of this kind. The 1st defendant is content to preserve the *status quo*, but, as far as she alone is concerned, the inconvenience of now taking over proportionate shares of Lots B and C (at the expense of the 2nd and 3rd defendants) in exchange for a $\frac{2}{3}$ share of Lot A would possibly not cause her appreciable detriment. On the other hand, the 2nd and 3rd defendants would be gravely prejudiced if the judgment under appeal were to be affirmed.

As for the equitable principles which govern the case, some might say that the solution lies particularly in the doctrine against "unjust enrichment", because Thomas, through his heirs, cannot ask the aid of a Court "to stultify his own act"—*Voet 21.2.2*. Others would point out, by reference to the express and implied warranties which formed the basis of the amicable partition implemented by cross-conveyances, that a man shall not "derogate from his own grant" or act "in fraud of his covenant". The rule of estoppel by acquiescence could also be called in aid. Indeed, all these are allied rules, and the underlying reason behind each of them protests strongly against the injustice of granting the 2nd plaintiff the relief which he has claimed in these proceedings.

Shortly stated, the prayer of the 2nd plaintiff is that the Court should permit him to oust the 1st defendant from some part of Lot A, thereby sanctioning indirectly the consequential eviction of the 2nd and 3rd defendants from a corresponding interest in Lots B and C. In other words, he seeks to enrich himself at their expense by depriving them of those very rights which his predecessor Thomas was under a contractual and common-law duty to respect.

It is impossible to grant the plaintiff relief in respect of Lot A without at the same time indirectly giving judicial sanction to some consequential injury to the 2nd and 3rd defendants. Having regard, therefore, to the

contractual relationship in which the 2nd plaintiff (by succession) stands to those defendants, the " enrichment " which he seeks in the form of a declaration of title in respect of Lot A would be manifestly " unjust ". " It is equitable and in accordance with the law of nature that no person should be enriched at the expense of, and by the infliction of an injury on another "—*Dig. 50.17.206.* As Lord Kenyon observed in *Doe v. Carter* [1], in a similar context, " that which cannot be done *per directum* shall not be done *per obliquum* ". In England, the rule against unjust enrichment has been adopted by gradual stages, with the assistance of legal fictions such as the " quasi-contract " and, in more recent times, the " quasi-estoppel ". But in countries which are governed by the Roman Dutch law, this broad and fundamental doctrine is unfettered by technicalities, and there is no need to insist on proof that the general rule has been previously applied in a precisely similar situation. The comprehensiveness of the Roman Dutch law principle must be enforced whenever the " enrichment " asked for would, in the facts of a particular case, be demonstrably " unjust ".

For these reasons, I am of the opinion that the appeal should be allowed. The action of both plaintiffs must be dismissed with costs as against the 1st, 2nd and 3rd defendants. The 2nd plaintiff must also pay to the appellants their costs in appeal.

GUNASEKARA J.—I agree.

Appeal allowed.