

1919.

Present: Schneider A.J. and Loos A.J.

EDORIS v. ADEIAN. .

39—D. C. Galle, 13,318.

Sale by a person when he has no title—Subsequent acquisition of title—Fiscal's sale after vendor had acquired title—Competition between Fiscal's purchaser and vendee.

In 1906 the plaintiff not being owner sold to the first intervenient certain undivided shares in a field. The plaintiff described his title as by right of paternal inheritance and possession. In 1907 and 1914 the plaintiff acquired certain undivided shares in the field, which were nearly equivalent to what he had sold to first intervenient in 1906. The second intervenient claimed these shares by virtue of a Fiscal's sale (and transfer) on a writ against plaintiff in 1917.

Held, that the first intervenient had better title, as the subsequent acquisition of title by the plaintiff enured to the benefit of the first intervenient.

"The fact that the vendor in this case described the title he conveyed in 1906 as by inheritance and possession and his subsequent title as by purchase makes no difference in the operation of the deed to convey title."

THE facts appear from the judgment.

A. St. V. Jayawardene (with him Zoysa), for first intervenient, appellant.

J. S. Jayawardene, for second intervenient, appellant.

June 12, 1919. SCHNEIDER A.J.—

This is an action for the partition of a field. In the interlocutory decree certain undivided shares were allotted to the first plaintiff. Subsequently an undivided six kurunies extent out of these shares were claimed by the first intervenient by virtue of a deed to the first intervenient in 1906. In this deed the first plaintiff's title was described as "by right of paternal inheritance and hitherto possessed." In 1907 and 1914 the first plaintiff appears to have acquired certain undivided shares in the field, which are nearly equivalent to what he had sold to the first intervenient in 1906. It is in respect of these shares he had been allotted the shares in the interlocutory decree. These shares are nearly equivalent to six kurunies extent which he had sold to the first intervenient in 1906. The position, therefore, is this: in 1906 the first plaintiff, not being owner, sold to the first intervenient, but in 1907, and 1914 he acquired

the ownership of an extent equivalent to what he had sold. The second intervenient claims adversely to the first intervenient all the shares which in the interlocutory decree had been allotted to the first plaintiff. The second intervenient puts his title as derived under a Fiscal's transfer in June, 1918, the sale having taken place on November 16, 1917. The only point which has been submitted for our adjudication is whether the first intervenient or the second intervenient has a better title upon the documents which I have mentioned. It is contended that as the sale to the first intervenient was at a date when the first plaintiff had no title, that the deed in favour of the first intervenient conveyed no title, and that the title acquired by the first plaintiff under the deed of sale in his favour is now vested in the second intervenient by virtue of his purchase at the Fiscal's sale. The learned District Judge has decided in favour of the second intervenient, following the case of *Mohammed Bhoy v. Lebbe Marikar*,¹ and holding that the subsequent acquisition of title by the first plaintiff does not enure in any manner to the benefit of the first intervenient. The attention of the learned District Judge does not appear to have been drawn to a later case, that of *Rajapaksa v. Fernando*,² in which the case of *Mohammed Bhoy v. Lebbe Marikar*¹ had been considered. The present case, there can be no doubt, comes within the principle of the decision of that later case, where it was held that the title conveyed before the transferor had any title should prevail against a title purported to be subsequently conveyed after the transferor had himself acquired title. The fact that the vendor in this case described the title he conveyed in 1906 as by inheritance and possession and his subsequent title as by purchase makes no difference in the operation of the deed to convey title. I would, therefore, hold that the first intervenient is entitled to have six kurunies marked out of the undivided shares allotted to the first plaintiff. I would make the following order. Let directions be given to the Commissioner to mark out of lot No. 4 a portion equal to the second plaintiff's one-eighth, and let such portion be allotted to the second plaintiff. Out of the remaining portion, being the equivalent of the undivided $\frac{5}{56}$ and $\frac{1}{6}$ shares allotted to the first plaintiff, let the Commissioner mark out a portion equivalent to six kurunies, and let the first intervenient be declared entitled to this.

The second intervenient will be declared entitled to such portion, if any, as would remain thereafter. The first intervenient must bear the *pro rata* share of the costs of partition. The second intervenient must pay the first intervenient all the costs of the contest between them, both in the lower and this Court.

Loos A.J.—I agree.

Set aside.

¹ (1912) 15 N. L. R. 466.

² (1918) 20 N. L. R. 301.