Present : Ennis J. and Shaw J. 1918.

RAJAPAKSA *v.* FERNANDO.

407—D. C. Kurunegala, 6,369.

Sale by a person who has no title—Subsequent acquisition of title—Exceptio rei venditæ.

Where A without title sells to B, and A subsequently acquires title, the title ensures to the benefit of B, without a further deed from the vendor.

Don Carolis v. James [1] and *Mohammed Bhoy v. Lebbe Maricar* [2] dissented from.

C, when he had no title (in 1909), sold a piece of land to M and S, through whom defendant acquired title in 1915 and went into possession. The deed of 1909 was registered in folio F 68/253. C obtained a Crown grant in 1912, and the property was sold in execution against him, and purchased in 1916 by plaintiff's predecessor in title. The Crown grant was registered in a different folio, without reference to the previous registration.

Held, that defendant's title was superior.

ENNIS J.—C's sale in 1909 created an equitable right, a right which, by Roman-Dutch law, on confirmation by subsequent acquisition of legal title, gave the purchaser in possession an indefeasible claim. The instrument of sale was in writing, and the registration of the instrument gave constructive notice to all persons subsequently dealing with the property. I am therefore of opinion that by estoppel and registration the defendant was entitled to succeed ..... The earliest registration of land determines the place for subsequent registration. The plaintiff's documents have, therefore, not been duly registered.

[1] *(1909) 1 C. L. R. 224.* [2] *(1912) 15 N. L. R. 466.*

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"A person who ought to search the register must be taken as having notice of what he would find there if he did search. Facts and circumstances that might thus be discovered will then be the subject of constructive notice, and constructive notice, quite as much as actual notice, may afford evidence of fraud or want of *bona fides*."—*Hogg*.

SHAW J.—I am of opinion that the defendant is entitled to defend his possession under the provisions of the common law.

THE facts are set out in the judgment.

A. St. V. Jayawardene (with him *Samarawickreme*), for appellant.

Bawa, K. C. (with him *Drieberg* and *Cooray*), for respondent.

Cur. adv. vult.

March 6, 1918. ENNIS J.—

This was an action for declaration of title to land, ejectment, and damages. The plaintiff bases his title on a grant (P 1) dated February 22, 1912, from the Crown to Thomas Carry, who mortgaged the property by bond No. 1,237 (P 2), dated March 23, 1915, to Suppramaniam Chetty, who put the bond in suit. The property was sold under the orders of the Court and purchased by A. W. Perera, to whom it was conveyed by document No. 1,700 (P 6) on July 10, 1916. The next day A. W. Perera conveyed it to the plaintiff by document No. 1,701 (P. 7).

The defendant is in possession of the property as part of Medagoda estate, purchased in 1909 from Thomas Carry by H. L. de Mel and W. Rae Sands. De Mel conveyed an undivided half share to one Wills on April 27, 1912, and W. Rae Sands conveyed his half to his wife Mary Sands on February 22, 1912. Wills and Mary Sands conveyed on November 13, 1915, to the defendant.

The learned Judge decided in favour of the defendant, and the plaintiff appeals.

It appears (D 7) that Thomas Carry, in 1897, purchased from the Crown an allotment of land called Medagodamukalana, depicted on the plan attached to the grant. At various times, from 1899 to 1904, he purchased from villagers their holdings in the lands to the east of Medagodamukalana and planted these with rubber. On December 11, 1909, he executed a conveyance (D 2) No. 4,602 to De Mel and Rae Sands of the estate known as Medagoda. The schedule described the estate as consisting of Medagodamukalana (*i.e.*, the land purchased from the Crown on D 7) and twenty other allotments of land, "which adjoin each other and now form one property, and which from their situation as respects each other can be included in one survey."

This property, excluding two of the twenty allotments, which were apart from the rest, was registered as one property in folio F 68/253, and cross references to the folios in which the separate allotments had

been previously registered were given. The extract of incumbrances relating to this property is D 9. De Mel and Rae Sands entered into possession of the property, which De Mel caused to be surveyed. His survey plan is D 3 dated March 23, 1912. It appears that at the time of the sale Thomas Carry gave De Mel the plan D 1 dated April 6, 1906, as the plan of Medagoda estate. These plans and Mr. de Mel's evidence make it clear that the property now claimed by the plaintiff is a portion of Medagoda estate to the east of the portion purchased from the Crown in 1897. It is the portion purchased by Thomas Carry from the villagers and planted by him with rubber.

It was argued that the defendant's deed had not been duly registered, as the land had not been accurately described. The extract of incumbrances (D 9) gives a very full description of the property registered, and had the register been searched at the time of the subsequent dealing with the land, the fact that the land was already registered must have been discovered. It appears, however, that the search was dispensed with. In my opinion the land was sufficiently described when registered in 1909.

It was then argued for the appellant that the grant by the Crown shows that the villagers from whom Carry bought had no title to the land, and therefore Carry himself had no title when he conveyed to De Mel and Rae Sands in 1909. The legal title was, therefore, not vested in Carry till 1912, when he bought from the Crown, and if, as between De Mel, Rae Sands, and their successors in title on the one hand and Carry and his " representatives " on the other, Carry and his representatives would be estopped from setting up their title, it was urged that as the land was sold by order of the Court in execution, the purchaser, Perera, was not bound by the estoppel, as he was not a representative of Carry.

A distinction appears at one time to have been drawn between the position of a purchaser on a sale in execution and the purchaser at a private sale, on the ground that the former obtained his title by operation of law freed from all incumbrances effected by the judgment-debtor subsequently to the attachment of the property sold in execution (*Dinendro Rath Sannayal v. Ramcooniar Ghose* [1]); but in the later case of *Mahomad Hasseem v. Kishori Mohun Roy* [2] it was held by the Privy Council that an auction purchaser was bound by an estoppel which bound the person whose right, title, and interest he purchased (*Caspersz, Estoppel, 4th ed., p. 214*). In the case before us there was nothing secret in the transaction which gave rise to the estoppel. The sale in 1909 was in writing, and the document was duly registered, so that it complied with two requirements of the Ceylon law designed for the benefit of *bona fide* purchasers (and others) for value, viz., in the Ordinance No. 7 of 1840 (For the Prevention of Frauds and Perjuries) and the Ordinance

[1] *(1881) 8 I. A. 65.*

[2] *(1875) I. L. R. 22 Cal. 909.*

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No. 14 of 1891 (The Land Registration Ordinance). The appellant contended, however, that to comply with the provisions of the Ordinance No. 7 of 1840 a written conveyance of the legal title from Carry to De Mel and Rae Sands was requisite, and the cases of *Don Carolis v. James*,[1] *Mohammed Bhoy v. Lebbe Maricar*,[2] and *Kadirawel Pulle v. Pina*[3] were cited. *Kadirawel Pulle v. Pina*[3] was a Full Court case, but it is to be observed that the document evidencing the original transaction in that case did not purport to convey the *dominium*, the vendor covenating to obtain the legal title later. In the present case Carry, in 1909, purported to convey the full *dominium* and gave possession. I am not in accord with the decisions in *Don Carolis v. James*[1] and *Mohammed Bhoy v. Lebbe Maricar*.[2] The Ordinance No. 7 of 1840 provided that " No sale, purchase, transfer, assignment, or mortgage of land . . . . and no promise, bargain, contract, or agreement for effecting such object should be of force or avail in law unless in writing." This is clearly an enumeration of personal transactions, and does not include in its scope transmission of property by operation of law, for instance, on death to heirs, &c., on an order of the Court to the Fiscal or the auctioneer. It seems to me that the English law doctrine, that where A without title sells to B, and A subsequently acquires title, the title enures to the benefit of B; and the Roman-Dutch law doctrine in similar circumstances of " confirmation " (*Voet 21, 3, 1*) is such a transmission. It does not alter the position to say that it is a fictitious ownership, which passed by operation of law rather than a real one. The point is one which comes into prominence when considering the effects of registration. Lord St. Leonards in *Drew v. Norbury*,[4] cited in *Hogg on Deeds of Registration, page 115*, said: " Act of Parliament does not convert an equitable estate into a legal estate; that would be to confound the nature of those two estates; but it so impresses the title with the liability to give effect to the equitable estate that the person who obtains the legal estate is bound to support the equitable title and clothe it with the legal estate."

And the learned author of *Deeds of Registration* (*page 110*) says: " The rights conferred by registration are statutory; the statute makes one instrument effective and the other ineffective *pro tanto*," and this effect was commented on by Lascelles C.J. in *Kanapathipillai v. Mohamadutamby Levai*.[5] As to the application and effect of registration, it seems clear that deeds conveying the equitable estate before the land has been formally granted by the Crown are registrable (section 18 of Ordinance No. 14 of 1891; and see *Hogg, page 19*), and being registrable they obtain the benefit of priority of registration. The object of registration is the protection

[1] *(1909) 1 C. L. R. 224.*
[2] *(1912) 15 N. L. R. 466.*
[3] *(1899) 9 S. C. C. 36*
[4] *(1846) 3 J & L., at page 302.*
[5] *(1912) 15 N. L. R. 177.*

of *bona fide* purchasers; it enables them by search to discover previous dealings with the property; and *Hogg* (*page 99*) enunciates the consequent rule as follows: "The rule that a person searching the register has notice of what is on the register—in Lord Redesdale's words in *Bushell v. Bushell*, 'if he searches he has notice'—seems to supply the right principle on which to rest the further rule, that a person who ought to search the register must be taken as having notice of what he would find there if he did search. Facts and circumstances that might thus be discovered will then be the subject of constructive notice, and constructive notice, quite as much as actual notice, may afford evidence of fraud or want of *bona fides*."

An examination of the Ceylon Registration Ordinance leaves no doubt in my mind as to its object. It provides (section 9) that the Surveyor-General shall prepare a plan of the various villages and districts in the Island in divisions convenient for the purpose of the Ordinance. The registrar is then (section 15) to allot to a separate book a defined division, "so that every deed relating to land situate therein may be registered therein," and when a deed is produced for registration, it has to be registered (section 18) "on the appointed page of the book assigned for the division." On first registration "the property" is regarded as registered, and subsequent instruments dealing with the same property have to show the volume and folio of the register in which "the property" has been previously registered (section 24). This scheme is clearly meant to operate to give notice to subsequent purchasers and others of previous dealings with the property, be those dealings equitable or otherwise. Carry's sale in 1909 created an equitable right, a right which, by Roman-Dutch law, on confirmation by the subsequent acquisition of the legal title, gave the purchaser in possession an indefeasible claim (*Voet 21, 3, 3*). The instrument of sale was in writing, and the registration of the instrument gave constructive notice to all persons subsequently dealing with the property. I am therefore of opinion that by estoppel and registration the defendant was entitled to succeed.

It is to be observed that the property was first registered in 1909 in folio F 68/253. The subsequent Crown grant and mortgage by Carry were registered in another folio without reference to F 68/253. In *Fernando v. Pedro Pulle*,[1] *Senaratne v. Peiris*,[2] and *Peris v. Perera* [3] it was held that the earliest registration of land determines the place for subsequent registration. The plaintiff's documents have, therefore, not been duly registered.

For these reasons I am of opinion that the decree appealed from is right, and would dismiss the appeal, with costs.

[1] *2 C. W. R. 75* [2] *4 C. W. R. 65* [3] *1 A. C. R. 85.*

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SHAW J.—

The land in dispute having been found to have been chena land in a Kandyan province, and not coming within one of the exceptions mentioned in section 6 of the Crown Lands Encroachments Ordinance, No. 12 of 1840, it must be deemed to have been the property of the Crown at the time Carry obtained his deeds from the villagers. Carry therefore had no legal title when he sold to the defendant's predecessors in title in 1909, and his title only became perfected when he obtained the grant from the Crown in 1912.

The first point taken on behalf of the defendant-respondent is that under the Roman-Dutch law the title so acquired enured to the benefit of the defendant, and he is entitled to defend his possession in a suit by a subsequent purchaser of Carry's interest after the date of the Crown grant. In my opinion the defendant is entitled to succeed on this ground.

The Roman-Dutch law as laid down by Voet in book XXI., title III., *De exceptione rei venditæ et traditæ*, appears to me to admit of no doubt. The following extracts are from *Berwick's Translation. pp. 531 et seq.*:—

" Section 1.—Since on the confirmation of the right of an alienator (which was defective at the time of the alienation) the originally defective right of the alienee becomes confirmed from the very moment that the vendor acquired the *dominium*; and therefore the *dominium*, from that time annexed to the original purchaser. could not be taken away from him without his own act or consent; hence he has the right of suing his vendor or a third party-possessor on account of the loss of his possession, and of defeating his opponent's plea by the replication of ownership."

" Section 2.—But if the purchaser still possess the thing, and the same persons that are liable to be sued (by him) in respect of (its) eviction bring an action to evict the property from him, it is in his discretion, whether he will suffer eviction and afterwards, when it has been taken from him, sue the successful party by the action *ex stipulatio in duplum*, or by the action *exempto* for the *id quod intrest* (damages), or whether he will prefer to keep the property and repel his vendor and other like persons seeking to evict him either by the *exceptio rei venditæ et traditæ* or by the *exceptio doli.*"

" Section 3.—This plea may be opposed, not only to the original vendor, but to all those who claiming under him endeavour to evict a thing from the first purchaser; such as those to whom the vendor has again alienated the same thing, whether by an onerous or lucrative title after he became owner (*i.e.*, after he acquired the *dominium* which he did not have when he first sold it)."

There are, however, some decisions of this Court to the effect that the Roman-Dutch law as laid down by Voet has been altered in this Colony by legislation. In *Don Carolis v. James* [1] Hutchinson C.J. held, that in consequence of the provision in Ordinance No. 7 of 1840 requiring transfers of land to be in writing, the legal title to the land could not pass to the first purchaser upon his vendor subsequently acquiring title except by a writing under the Ordinance, and this decision was approved, on the ground given by Hutchinson C.J., by Lascelles C.J. and De Sampayo A.J. in *Mohammed Bhoy v. Lebbe Maricar.*[2] That case, however, was not a case of a first purchaser seeking to defend his possession, but of a person out of possession laying claim to the land.

Although feeling some mistrust of an opinion opposed to such authorities, I find myself unable to accept the correctness of the view taken in these cases. The provisions of section 2 of Ordinance No. 7 of 1840 do not appear to me to refer to, or to be intended to refer to, assignments by act of law, nor does any further assignment appear to me to have been necessary under the Roman-Dutch law, as stated by Voet, to enable the first purchaser to defend his possession. It would seem to me to be as reasonable to argue that lands cannot now pass to an heir on an intestacy because there is no assignment in writing. In *Mohammed Bhoy v. Lebbe Maricar* [2] De Sampayo A.J. suggested that it was not very clear from the passage in Voet that under the Roman-Dutch law the title passed to the first purchaser, but in view of the express statement in *Voet 21, 3, 3,* it appears clear that such a purchaser could, at any rate, defend his possession at the suit of a subsequent purchaser under the plea *de exceptione rei venditæ et traditæ.* The case of *Kadirawel Pulle v. Pina* [3] does not appear to me to be in point. In that case all that the purchaser bought was the right to have a conveyance when his vendor obtained a Fiscal's transfer, which conveyance was not obtained.

I am of opinion that the defendant is entitled to defend his possession under the provision of the common law, and that he is entitled to judgment on this ground alone. It is therefore unnecessary for me to consider the other points involved in the action.

I would dismiss the appeal, with costs.

Appeal dismissed.

[1] *(1909) 1 C. L. R. 224.*

[2] *(1912) 15 N. L. R. 466.*

[3] *(1899) 9 S. C. C. 36.*