1922.

Present : Bertram C.J. and Schneider J.

APPUHAMY *et al. v.* BABY SINGHO.

101—D. C. Galle, 18,853.

Assignment of a usufructuary mortgage—Mortgage of the land by the assignee as though he were the owner—Land sold by auctioneer—Conveyance of land to purchaser—Right of purchaser to take the produce.

Plaintiff executed a usufructuary mortgage of the land in favour of T. T assigned this mortgage to J. J executed in favour of P what was apparently intended to be a mortgage of his mortgage rights. The deed, however, purported to mortgage the lands originally mortgaged by the plaintiff as though J was the owner. P put the bond in suit, and under the decree the land was sold by an auctioneer, who conveyed the land itself to the purchaser.

Held, that the purchaser under this deed acquired the usufructuary rights of J to take the produce of the land in lieu of the interest on the mortgage debt.

THE facts are set out in the judgment.

Samarawickreme (with him *M. W. H. de Silva*), for plaintiff, appellant.

E. W. Jayawardene (with him *Samarakoon*), for defendant, respondent.

September 19, 1922. BERTRAM C.J.—

This was an action by way of *rei vindicatio* on the part of the plaintiff, who is admittedly the owner of the land. In 1889, by D 1, he executed a usufructuary mortgage of the land to one Thomis. In 1912 Thomis assigned this mortgage to Johanis. In 1915 Johanis executed in favour of Podinona what was apparently intended to be a mortgage of his mortgage rights. The deed in fact, however, purported to mortgage the lands originally mortgaged by the plaintiff as though Johanis was their owner. Certain words were, however, added with reference to the mortgage debt, so that the deed concluded as follows: "These properties and the amount, which was kept for safety in the herein said deed bearing No. 7,088, together with all the right and title which I have thereto, do hereby mortgage and hypothecate, &c." It was admitted by Mr. Samarawickreme, who appeared for the appellant, that the inclusion of the words "the amount which was kept for safety, &c.," may be

regarded as an assignment of the mortgage bond by way of a mortgage. Podinona put this bond in suit and recovered judgment. There can be no doubt that, had the proper formalities been observed, the Fiscal could have seized the mortgage debt and the right to have the land realized for the purpose of discharging it. He did not do so, however. What happened was that an auctioneer's transfer was executed which purported to convey the land itself. The property sold was set out in the schedule, but in the body of the deed it was declared that what was granted and conveyed to the purchaser was all the property appearing in the schedule. "together with all easements, rights, and advantages whatsoever, &c. . . . . and all the estate, right, title, interest, claim, and demand whatsoever of the said Johanis" in the property.

Now, the question that arises is whether the purchaser under this deed acquired the usufructuary rights of Johanis to take the produce of the land in lieu of the interest on the mortgage debt. Mr. Samarawickreme has contended that no such rights passed to the purchaser. He says that these usufructuary rights are purely ancillary to the mortgage debt, and can only exist in conjunction with the mortgage debt. He contends, therefore, that they did not pass to the purchaser. In my opinion this contention is erroneous. It is quite true that in a mortgage there are certain rights which are ancillary to the main obligation, and can only exist with that obligation. I refer particularly to the right to have the land sold for realization of the debt, but the right to take the produce in lieu of interest is not a right of this description.

It must be conceded that if a man is indebted to me, and the debt carries interest, I may assign to others the debt and the interest separately. The right to take the produce of a land, subject to a mortgage in lieu of interest, is only a way of collecting the interest. I fail to see why, if this right may be assigned separately, it should not pass separately in execution if appropriate words are used for the purpose. It is quite true that when once the mortgage debt is paid, the right to take the produce disappears, but so long as the mortgage debt exists this right to take the produce is an interest in the land.

Now, what does the auctioneer's transfer purport to convey in this case? It purported to convey the *dominium* of the land, but Johanis had not the *dominium*. He had certain rights which are essential to the *dominium*, but only constitute one or more strands out of the bundle of rights which go to make up the *dominium*. He had the right *fructus percipiendi:* it may be said also that he had the right *utendi* . . . . These are constituent parts of the whole *dominium*, see *Vanderlinden*.[1] What actually passed by the mortgage deed was the interest of Johanis in the property, and these particular rights, as my brother put it, were caught up

[1] *Institute of Holland : Bk. 1, chap. VII., S. I.*

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by the general sale of the *dominium* and passed to the purchaser, although the *dominium* did not so pass. It is clear law that a usufructuary mortgagee can lease his usufructuary rights. I can see no objection to those usufructuary rights existing in a person other than the mortgagee or an assignee of the mortgagee. It seems to me, therefore, that they passed by the sale, and that Mr. Samarawickreme's legal point on which he rests his claim is not sound.

There is another point which is also fatal to him, and that is this: This is an action *rei vindicatio*. It implies that the plaintiff is entitled to the possession of the land, but the right to the possession of the land has passed from him for the time being, and in any view of the case either in Johanis or in the defendant. Neither Johanis, nor the defendant, nor anybody else, contest his title to the *dominium* subject to the mortgage. Mr. de Silva relied upon the case of *Allis Appu v. Endris Hamy*.[1] In that case the owner was allowed to assert his rights in spite of the fact he had leased the land against a person who was challenging his whole title. This person is said to have prevented him from exercising his proprietary rights during the existence of the lease, because his proceedings hindered the owner from disposing of his rights, had the effect of imposing a blot upon his title. There is nothing of the sort here, and I think these facts distinguish this case from the one cited. In any case, the first point is fatal.

Mr. de Silva says that if he is unsuccessful in this action, it is conceivable that the purchaser may prescribe against him. I do not think that there is any real danger of this sort, but, as Mr. Jayawardene sees no objection, I think that plaintiff might be declared entitled to the possession of the land on discharge of the mortgage debt.

Subject to this, I think the present appeal should be dismissed, with costs.

SCHNEIDER J.—I agree.

Appeal dismissed.