1944 *Present:* **Howard C.J. and de Kretser J.**

PUSPAKANTHY, Appellant, *and* DR. BALENDRA, Respondent.

283—D. C. Colombo, 1,806.

Estoppel—Nature of representation—No defence that there was an absence of intention to deceive—Voluntary statement made to induce the representee to act upon it sufficient.

It is no defence to a plea of estoppel that the representation was not made to deceive the person to whom it was addressed. It would be sufficient if it appears that the representation was made voluntarily with the actual or implied intention of inducing the representee to act upon it.

APPEAL from a judgment of the District Judge of Colombo.

H. V. Perera, K.C. (with him *C. Renganathan*), for defendants, appellants.

N. Nadarajah, K.C. (with him *E. B. Wikremenayake*), for plaintiffs, respondents.

Cur. adv. vult.

May 22, 1944. HOWARD C.J.—

In this case the defendants appeal against a judgment of the District Judge declaring that the plaintiffs are entitled to certain property which was formerly known as No. 58, Hill street, Colombo, but which had been consolidated into one block with No. 59, Hill street, the whole now being known as No. 50, Hill street. It was contended by the defendants that the plaintiffs are estopped from denying the defendants' title to the land in dispute. The latter claim title through one Vallipuram who took an assignment from one Letchimanan who was the mortgagee of certain property owned and mortgaged to him by one Sivacolenthan, the father of the plaintiffs. Letchimanan had put the bond in suit and obtained a decree against Sivacolenthan. This decree was assigned to Vallipuram. The mortgage in favour of Letchimanan (P 10) specially mortgages and hypothecates " all those lands and premises in the schedule ' A ' hereto fully described. " Schedule " A " however describes two sets of premises both of which descriptions refer to No. 59, Hill street. A description of No. 58, Hill street, is not set out in Schedule " A ". Vallipuram, however, gave evidence on behalf of the defendants and stated that he took the assignment of this decree on the request of Sivacolenthan in order to save the property from being sold in execution by Letchimanan. Vallipuram further stated that he was aware of the fact that Sivacolenthan had bought the property in two blocks which he had amalgamated into one block on which he had built a new bungalow. He further stated in evidence that Sivacolenthan told him he had raised loans and mortgaged the whole bungalow and that the creditor was threatening to sell this bungalow if he did not redeem the debt. Vallipuram says that it was on the understanding that the whole property on which the new bungalow stood was mortgaged to Letchimanan that he took the assignment of the latter's decree.

It has been argued by Mr. Perera that having regard to the evidence of Vallipuram, the plaintiffs who claim as the heirs of Sivacolenthan are estopped from denying the title of the defendants to No. 58, Hill street, by reason of the representation of Sivacolenthan that he had mortgaged the whole of the property, on which the bungalow stood, to Letchimanan. The learned District Judge has stated that he cannot place any reliance on the testimony of Vallipuram. He further states that he does not think that Sivacolenthan could have made any misrepresentation to mislead Vallipuram because it would appear that Sivacolenthan was himself under the impression that the whole property was subject to the mortgage. Here the learned Judge seems to have become confused in his reasoning. It is not necessary for Sivacolenthan to have had

any intention to mislead Vallipuram. In this connection the following passage at p. 195 of Spencer Bower on Estoppel is in point:—

> " The contention which from time to time has been advanced on behalf of a representor that his honesty and innocence of intention ought to exempt him from liability to estoppel, as it does from liability to an action for damages, is based on a hopeless confusion between a cause of action based on fraud and a rule of evidence, and has always been rejected, for the obvious reason that, in the case of estoppel by representation, as, indeed, also in the case of proceedings for rescission of contract on the ground of misrepresentation, the only material suggestion is, not the state of the representor's morals, but the effect of the representation on the mind and will of the representee. Accordingly, it has always been held that it is no answer to a case of estoppel to establish, or rather, perhaps, that it is not incumbent on the representee to negative, the fact that the representation was made in innocent inadvertence or forgetfulness, or that the representor in making it, had no intention to defraud or injure the representee, or any other sinister design. If, as has already been explained, it appears that the representation was made ' wilfully ', in the sense of ' voluntarily ', that is, with the actual or implied intention of inducing the representee to act upon it, it is wholly irrelevant whether it was, or was not, made ' wilfully ' in any ethical sense. "

The only question that arises is whether Sivacolenthan in fact told Vallipuram that the whole of the property was mortgaged. The learned Judge has given no reason for disbelieving Vallipuram's evidence on this point and I think it should have been accepted. If it is accepted, the plaintiffs are estopped from denying the title of the defendants.

It was further argued by Mr. Perera that the defendants were entitled to prove the circumstances in which the loan was obtained by Sivacolenthan from Letchimanan in order to prove that both Nos. 58 and 59, Hill street, were mortgaged and hypothecated by P 10. There is no doubt an inconsistency between the words of " grant " which mortgage and hypothecate " lands " described in the Schedule " A " and Schedule " A " itself which describes only " one land ". The evidence of what was intended to be mortgaged is cogent. In this connection we have been referred to the case of *Van Diemen's Land Company v. Marine Board of Table Cape*[1]. The following passage from the judgment of Lord Halsbury on pp. 97-98 is relevant in considering Mr. Perera's contention:—

> " It is quite true that if the language of the grant itself were absolutely plain and unambiguous, no amount of user would prevail against the plain meaning of the words: see *North Eastern Ry. Co. v. Hastings* (1900; A. C. 260). It is, however, impossible to contend that the language of this instrument can be so represented. The language is very wide, but when one finds such a recital as this: ' the company have been authorised to take possession of several portions of land, and have ever since been and now continue in possession thereof, but no grant thereof has been made to the Land Company ': when these are the circumstances under which the grant is actually made—

[1] *(1906) A.C. 93.*

why is it not evidence, and cogent evidence, when the taking possession of the particular piece of land is proved, and the continuance in possession before and after the grant is proved ? The time when, and the circumstances under which, an instrument is made, supply the best and surest mode of expounding it, and when the obvious intention is to give a title to what has been taken and retained before the actual grant, it is manifest that what has been so taken and retained is cogent evidence of what is granted. ''

Applying the principle enunciated by the Lord Chancellor to the facts of the present case, I am of opinion that it is impossible to contend that the language of P 10 is absolutely plain and unambiguous. The time and circumstances in which P 10 was made make it manifest that not only No. 59 but also No. 58, Hill street, was mortgaged and hypothecated.

For the reasons I have given the appeal is allowed. The judgment in favour of the plaintiffs is set aside and the action is dismissed with costs to the defendants in this Court and the Court below.

DE KRETSER J.—I agree.

Appeal allowed.