

1944

*Present: Soertsz J.*

PERERA, Appellant, and JAYAMANNE, Respondent.

241.—*C. R. Colombo, 88,050.*

*Mortgage—Movable, mortgaged by person not owner—Subsequent acquisition of ownership—Sale to third party—Mortgage confirmed.*

Where a person who is not the owner of a movable mortgages it and subsequently acquires ownership, the mortgage is confirmed and prevails against a subsequent sale of the movable by the mortgagor.

**A** PPEAL from a judgment of the Commissioner of Requests, Colombo,

*L. A. Rajapakse* (with him *S. R. Wijayatilake*), for the defendant, appellant.

*E. B. Wikremenayake*, for the plaintiff, respondent.

*Cur. adv. vult.*

May 3, 1944. SOERTSZ J.—

The relevant facts are these. One Siriwardene entered into a hire-purchase agreement with Hunter & Company in respect of a Raleigh bicycle. The defendant, appellant, was his guarantor. After he had paid a few instalments, Siriwardene deposited the bicycle with the defendant, appellant, for him to hold against a sum of Rs. 114.50 due to him from Siriwardene. Thereafter, Siriwardene, on document P 4, purported to sell the bicycle to the plaintiff, respondent, and the two of them, as found by the Commissioner, acting in collusion in order to recover possession of the bicycle, resorted to the stratagem of a complaint by the plaintiff to the Police that the bicycle was stolen from the possession of a servant of the plaintiff. The Police went in search of the bicycle and found Marthelis, a relative of the defendant, in possession of it. He was actually riding it. Marthelis and the defendant made statements to the Police accounting for their possession of the bicycle. The Police, quite rightly, took no steps to prosecute them. The bicycle is now in the custody of the Court, and the plaintiff has obtained judgment for it to be restored to him and for costs as well.

If this judgment has to stand, it would afford a striking instance of successful chicanery. But, fortunately, the law will not let it stand. The Commissioner has, apparently, taken the view that Siriwardene, not



having been the owner of the bicycle at the time he pledged it with the defendant—for that in effect was what he did—but having become its full fledged owner only at the time of the sale to the plaintiff the plaintiff's title prevails. But, as was held in the case of *Goonetilleke v. Jayasekera*<sup>1</sup>, under the Roman-Dutch Law, a person may mortgage property of which he is not the owner at the time and when the rights of such a mortgagee come into competition with those of a later mortgagee, who took his mortgage after acquisition of title by the mortgagor, the first mortgagee is preferred “because the right of pledge was confirmed from the moment of the mortgagor's acquisition of ownership.” This doctrine of “convalescence” was laid down by that Bench in regard to both movable and immovable property. In the course of the argument, Counsel for the unsuccessful appellants had conceded that this “convalescence” or “relation back” of subsequent title applied to *movables* but he contested its applicability to *immovables*. This is what Voet says on this point (20.3.4)—

“Another person's property can be mortgaged conditionally on the debtor becoming owner of it, which condition is tacitly understood when one binds to another a thing not yet his own but due to him; for that such a thing may be mortgaged by him to whom the ownership is about to come is plain from Dig. 20.4.16 . . . . Nor does it matter whether at the time of the mortgage the creditor knew or was ignorant that the thing was another's provided that the mortgagor afterwards acquires ownership because when the right of a giver has been confirmed, the right of the recipient is also confirmed.”

This view was followed again in *Adicappa Chetty v. Negris*<sup>2</sup>.

I set aside the judgment of the Commissioner and direct that the bicycle be returned to the defendant unless he is paid the sum of Rs. 114.50 within a fortnight of the record being received in the court below. The defendant will be entitled to retain it till he is paid that sum. The plaintiff will pay the defendant costs in both Courts. If the defendant desires to proceed with his claim in reconvention, let the Commissioner frame the necessary issues and proceed to try these. But the order I have made on this appeal shall not be delayed by these proceedings.

*Appeal allowed.*

<sup>1</sup> 14 N. L. R. p. 65.

<sup>2</sup> 20 N. L. R. 476.