[FULL BENCH.]

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Present: Bertram C.J., and Ennis and De Sampayo JJ.

GUNATILLEKE *v.* FERNANDO *et al.*

265—D. C. Colombo, 51,907.

Sale by a person who has no title—Subsequent acquisition of title—Exceptio rei venditae et traditae—Res judicata—*Land Acquisition Amendment Ordinance, No. 44 of 1917—Is it retrospective in its effect?*

Where a vendor sells without title, but subsequently acquires one, this title accrues to the benefit of the purchaser and those claiming through him from the moment of its acquisition by the vendor.

Held, by the Full Court, this principle of the Roman Dutch law—

(a) Is not abrogated by Ordinance No. 7 of 1840.

(b) Is not available only as a defence, but can also be made the foundation of an action.

(c) Is not, in the latter case, limited to actions brought for the recovery of a lost possession.

But, *held*, *per* DE SAMPAYO J., what passes to the purchaser is not an actual title, but a right, if defendant, to protect himself by an equitable exception, or, if plaintiff, to recover the property by an action based on a legal fiction.

Per DE SAMPAYO J.—This principle cannot be asserted against a *bona fide* purchaser for value. (This question was reserved by Bertram C.J.)

Where in an action a claim to put forward a certain contention is disallowed, without prejudice to the right of the person raising it, to bring a separate action to assert it, the matter is not *res judicata* even though no such action is brought.

Section 48 of the Land Acquisition Amendment Ordinance, No. 44 of 1917, has not a retrospective operation.

Maria conveyed a property to her son Palis, subject to a *fidei commissum* in favour of her sons Stephen and Nicholas, if he died without issue, and subject to a life interest to herself. It was contemplated by the deed that, notwithstanding the *fidei commissum*, Palis should have a free power of disposition of the property during his lifetime after attaining the age of twenty-five, subject always to his mother's life interest.

Stephen and Nicholas, before their title as *fidei commissaries* accrued, sold the property to A. After their title accrued they gifted the same property to F.

Held, that F acquired no title as against those claiming through A.

Held, per BERTRAM C.J., that Maria having thus created a specific trust in favour of Stephen and Nicholas could not defeat their rights by joining with Palis in a conveyance of the property.

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THE facts are set out as follows in the judgment of the District Judge (L. Maartensz, Esq.):—

This is an action for declaration of title to two contiguous allotments of land situated in Colpetty, which admittedly belonged to Maria Felsinger.

Maria Felsinger gifted the land to her son Palis Swaris by deed No. 860 dated September 23, 1882, subject to the following conditions, namely:—

(1) That Maria Felsinger was to have the right of possession, the rents, income, and produce until Palis Swaris arrived at the age of twenty-five years.

(2) That if Maria Felsinger was alive when Palis Swaris attained twenty-five years of age, he was not to sell, mortgage, or alienate the property during her lifetime.

(3) That if Maria Felsinger died before Palis Swaris attained twenty-five years of age, then Palis Swaris was not to sell, mortgage or alienate the property until he arrived at the age of twenty-five years.

(4) That if Palis Swaris died without issues, the land was to devolve on his two brothers Stephen Swaris and Nicholas Swaris, or their lawful issue, subject to a life interest in favour of Maria Felsinger.

Maria Felsinger and Palis Swaris, by deed No. 884 dated December 5, 1893, sold the land to D. J. Fernando.

Nicholas and Stephen Swaris, by deed No. 1,923 of February 23, 1895, sold the land to one Don Cornelis, who by deed No. 4,028 dated February 2, 1905, transferred the land to Mr. Charles Perera. Mr. Charles Perera died leaving a will by which he appointed Mr. James Perera his heir and executor. Mr. James Perera died leaving a will by which he appointed the plaintiff his executor.

The plaintiff bases her title on deed No. 1,923 executed by Nicholas Swaris and Stephen Swaris. She also pleads that the defendant is bound by the decree in case 2,307, D. C. Colombo (land acquisition).

Palis died on February 27, 1896, having attained twenty-five years of age in 1891. Maria Felsinger died on January 8, 1916.

The defendant denies that Nicholas Swaris and Stephen Swaris has any title to convey when they executed deed No. 1,923, and claim title to the land by virtue of deed No. 61 dated October 17, 1913, executed by Nicholas Swaris and Stephen Swaris in his favour, and deed No. 884 executed by Maria Felsinger and Palis Swaris in favour of D. J. Fernando.

Whatever title D. J. Fernando had under deed No. 884 has devolved on the defendant.

[The learned Judge discussed some other points and continued]:—

I accordingly hold that Nicholas Swaris and Stephen Swaris had no title to convey when they executed deed No. 1,923.

The next question is, whether the plaintiff is entitled to rely on the title subsequently acquired by Nicholas and Stephen Swaris after the death of Palis Swaris, although Nicholas and Stephen have not executed a conveyance in her favour after they had acquired title.

With regard to this question, the Supreme Court held, in the case of *Mohammed Bhoy et al. v. Lebbo Marikar et al.*,[1] that where a vendor had no title at the time of the sale, but afterwards acquires title, the purchaser's title is not confirmed from the time the vendor so acquires title without a further deed from the vendor after he acquired title.

The Supreme Court held further, that "the plea of *exceptio in rei venditae et traditae* which a vendee is entitled to set up against the vendor is not available against a subsequent purchaser from the vendor."[1]

The ruling in this case is, in my opinion, fatal to plaintiff's claim, but the plaintiff relies on the case of *Rajapakse v. Fernando*,[2] in which Mr. Justice Ennis and Mr. Justice Shaw held (dissenting from the judgment in the case of *Mohammed Bhoy et al. v. Lebbe Marikar ub. sup.*) that where A sells to B without title, and A subsequently acquires title, the title enures to the benefit of B without a further deed from the vendor.

In this case the land was sold by C to M and S, who sold to the defendant, the land then belonged to the Crown. C subsequently obtained a Crown grant, and the land was sold in execution and purchased by plaintiff's predecessor in title, and Mr. Justice Shaw held that the defendant in possession was entitled to set up the plea of *exceptio rei venditae et traditae* against the plaintiff, a ruling which is inconsistent with the ruling in the earlier case, that the plea could not be set up against a purchaser from the vendor.

The plaintiff is not in possession in the present case, but her counsel argued that that was because she was not entitled to possession during the lifetime of Maria Felsinger, and that the plaintiff should have the benefit of the possession by those who held under Maria Felsinger.

I am unable to accept that argument.

I am of opinion that the *exceptio rei venditae* can only be set up by a person in actual possession, either by himself or through another, provided that the other party in possession is not the defendant claiming title adversely to the person who seeks to set up the plea.

The plaintiff is therefore, restricted to the plea that his title was confirmed as soon as his vendor acquired title. This plea arises from the passage in *Voet, book xxi., title iii.*, which is as follows (*Berwick's translation, passage 531, old edition*):—

Section 1. "Since on the confirmation of the right of an alienator (which was defective at the time of alienation), the originally defective right of the alienee becomes confirmed from the very moment that the vendor acquired *dominium*, and, therefore, the *dominium* from the time accrued 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 a third party possessor on account of the loss of his possession, and of defeating his opponent's plea by the replication of ownership."

The earliest decision on the point is the case of *Kadirevelu Pulle v. Pina*,[3] where A, who had purchased a land at a Fiscal's sale, sold it to B before obtaining a Fiscal's transfer, and undertook to obtain and give B the Fiscal's conveyance.

It was held that, in the absence of any conveyance from A, after his title was perfected by the Fiscal's transfer, B had no interest.

[1] *(1912) 15 N. L. R. 466.* [2] *(1918) 20 N. L. R. 301*

[3] *(1889) 9 S. C. C. 36.*

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The passage quoted from Voet does not appear to have been cited or considered.

In the case of *Carolis v. Jamis*,[1] Hutchinson C. J. held that a purchaser of immovable property from a vendor who has no legal title at the time of sale may, if the vendor subsequently acquires title, have a right to call for a new conveyance, but the title does not pass to him without a new conveyance. The Chief Justice adopted the argument that a transfer of land must, since the passing of Ordinance No. 7 of 1840, be made in the manner prescribed by section 2 of Ordinance No. 7 of 1840.

This judgment was followed in the case of *Mohammed Bhoy et al. v. Lebbe Marikar et al.*[2]

Both these judgments were dissented from by Ennis A.C.J. and, Shaw J. in the case of *Rajapakse v. Fernando*.[3] Ennis A.C.J. said: "I am not in accord with the decision in *Carolis v. Jamis* and *Mohammed Bhoy v. Lebbe Marikar*." He then quoted the section of Ordinance No. 7 of 1840 and continued: "This is clearly an enumeration of personal transaction, and does not include in its scope transmission of property by operation of law, for instance, on death to heirs. 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*) in such a transmission Mr. Justice Shaw says: "Although feeling some mistrust of an opinion opposed to such authorities, I find myself unable to accept the correctness of the view taken in those 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."

Voet, title i., section 2, book xix., lays down that "The effect of delivery of this vacant possession is that if the vendor has been owner, he also makes the purchaser owner; if he has not, he is only liable to the purchaser on account of eviction." Section 14 lays down that a vendor cannot be precisely compelled to make delivery of a thing sold, but is discharged on paying the *id quod interest;* later on, in the same section, he deals with the usages under the Roman-Dutch law, and casts doubts on the opinion of Grotius that the vendee has his election, whether he will accept from the vendor the amount of the *id quod interest* or will insist "tooth and nail" on delivery.

The contract of sale is complete when the price and commodity are agreed on, but according to the Roman law the contract is not fulfilled until there is delivery of possession. *Section 2, Burge, page 527.* If possession is not delivered, the purchaser can only sue for the *id quod interest.*

Section 1 provides that the purchaser has the right of suing his vendor or third party possessor on account of the loss of his possession, and of defeating his opponent's plea by the replication of ownership.

This section clearly contemplates the case of a purchaser who has been placed in possession, and who has been ousted from possession by

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

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

[3] *(1918) 20 N. L. R. 301.*

his vendor or a third party in such circumstances as entitled him to be replaced in possession.

Is that the case of the plaintiff?

I am of opinion that it is not. There is no evidence that either she or her predecessors in title were placed in possession by Nicholas and Stephen Swaris. Further, when Mr. James Perera Gunatilleke was sued by D. J. Fernando in case No. 29,620, D. C., Colombo, he did not plead that he was entitled to possession and ownership by virtue of deed No. 1,923, but relied on a Fiscal's transfer, No. 7,894, which was issued to Mr. Charles Perera as purchaser at a Fiscal's sale when the premises were sold in execution against Palis Swaris and D. J. Fernando.

The deed No. 1,923 was relied on for the first time in the land acquisition case, and then Mr. James Perera was held not to be entitled to possession under that deed.

It appears to me, therefore, that the plaintiff cannot, apart from the decision in the case of *Alim Mohamed Bhoy v. Marikar* rely, on section 1 of book xxi., title iii., of Voet.

The case of *Mohammed Bhoy v. Lebbe Marikar* is more in point than the case of *Rajapaksa v. Fernando*, for in the former case the party pleading the exception was not in possession, and in the latter case he was. Further, in the case of the latter case, it was not exactly necessary to decide whether the defendant was affected by Ordinance No. 7 of 1840, as he was able to plead the *exceptio rei venditæ et traditæ* against the successor in title of his vendor.

I am, therefore, of opinion that the plaintiff cannot rely on section 1 of book i., title ii., of Voet, and that her action must fail on the ground that defendant acquired a better title under deed No. 61 than Cornelis did under deed No. 1,923.

I dismiss plaintiff's action, with costs of the defendant and added defendant.

Bawa, K.C. (with him *F. M. de Saram, A. St. V. Jayawardene*, and *Croos-Dabrera*), for plaintiff, appellant.—The subsequent acquisition of title by Nicholas and Stephen enured to the benefit of plaintiff's predecessor in title. No further deed was necessary. Under the Roman-Dutch law the transferee's title was confirmed from the moment of the acquisition of the *dominium* by his vendor. He could bring the *actio publiciana* against the vendor or any third party who has deprived him of his possession. If he is still in possession, he could, when sued, plead the *exceptio rei venditæ et traditæ*. *Ficta traditio*, or symbolical delivery, is sufficient to enable the vendee to maintain a vindicatory action. If his title is disputed, he can put forward the plea *exceptio dominii acquisiti. Voet 21, 3, 1 et seq.* Ordinance No. 7 of 1840 has not done away with these pleas. The title acquired is by operation of law, and no deed is necessary. *Kadirevelu Pulle v. Pina* [1] was decided on the question of registration. The principles of the Roman-Dutch law were not considered, and the *dictum* of Clarence J. is *obiter*. The principle of

[1] *(1899) 9 S. C. C. 36.*

the confirmation of the vendee's title by the subsequent acquisition of title by the vendor has been considered and adopted in the following cases: *Selohamy v. Raphael*,[1] *De Silva v. Shaik Ali*,[2] *Guruhamy v. Subaseris*,[3] *Rajapaksa v. Fernando*,[4] *Nonohamy v. Appusingho*,[5] *Kodipilly v. Davith Sinno*,[6] *Endoris v. Adirian*,[7] and *Abraham v. Nonno*.[8]

The vendor and his successors in title are estopped from questioning the title of the first vendee. *Guruhamy v. Subaseris*;[3] *13 Halsbury's Laws of England 373; Partridge v. Ward*.[9]

The Roman-Dutch law permits the sale of an expectancy. *Voet 18, 1, 13.* Nicholas and Stephen, the *fidei commissarii*, could sell the rights that would accrue to them on the death of their brother Palis.

The matter is *res judicata*. The defendant's predecessor in title was asked to bring a separate action when he tried to put forward this same claim in the land acquisition proceedings. He was asked to bring a separate action. He failed to do so, and the order is *res judicata*.

Counsel also cited *1 Nathan 379* and *Appuhamy v. Appuhamy*.[10]

Cooray (with him *Samarawickreme* and *Canakeratne*), for defendant, respondent.—The proceedings in the land acquisition case are not *res judicata*. The claim now put forward is through another source. Section 4 of Ordinance No. 44 of 1917, regarding *res judicata* in land acquisition proceedings, has got a retrospective effect. *Res judicata* is a matter of procedure. *Caspersz on Estoppel, s. 465; Hukm Chand, p. 8.* Rules of procedure have a retrospective effect. *Maxwell 339.*

The plea of *exceptio rei venditæ et traditæ* is not open to a plaintiff. It can only be set up by a defendant. *Wakista v. Munasinghe*.[11] It is not available to a person who is not in possession, and cannot be set up against a subsequent purchaser from the vendor. *Voet 21, 3, 1; Mohammed Bhoy v. Lebbe Marikar*;[12] *Rajapaksa v. Fernando*.[13]

The title of the first vendee is not confirmed until he gets a conveyance from his vendor. Ordinance No. 7 of 1840 must be taken to have abrogated the principles of the Roman-Dutch law. *Carolis v. Jamis*;[14] *Alvis v. Fernando*;[15] *Mohammed Bhoy v. Lebbe Marikar*.[12]

The *actio publiciana* is available only to a person who has got possession from his vendor. The summary given by Voet at the commencement of his chapter shows that it could arise only in the

[1] *(1889) 1 S. C. R. 73.*
[2] *(1895) 1 N. L. R. 228.*
[3] *(1910) 13 N. L. R. 112.*
[4] *(1918) 20 N. L. R. 301.*
[5] *(1915) 1 C. W. R. 80.*
[6] *(1917) 4 C. W. R. 27.*
[7] *(1919) 21 N. L. R. 224.*
[8] *(1912) 15 N. L. R. 302.*
[9] *(1910) 2 Ch. 342.*
[10] *(1880) 3 S. C. C. 61.*
[11] *(1913) 2 Matara Cases 156.*
[12] *(1912) 15 N. L. R. 466.*
[13] *(1918) 20 N. L. R. 301.*
[14] *(1909) 1 Cur. L. R. 224.*
[15] *(1911) 14 N. L. R. 90.*

case of lost possession. Possession is a condition precedent. The remedy by way of possessory suit given by Ordinance No. 22 of 1871 has abolished all Roman-Dutch law remedies. The Publician action was not introduced into Ceylon. *Walter Pereira 303*. The equitable remedy is given only to a vendee who has taken the precaution of obtaining possession from his vendor. When he has failed to do so, a subsequent purchaser gets good title.

Bawa, K.C., in reply.

Cur. adv. vult.

December 19, 1919. BERTRAM C.J.—

The case under consideration in this appeal is that of a person who purchases property from a vendor who is not at the time entitled to it, but who subsequently acquires a title to the land which he purports to have sold. The principle of the Roman-Dutch law on this question is enunciated by Voet at the commencement of his chapter, " De Exceptione Rei Venditæ et Traditæ:—

" *Confirmato iure alienantis, ius quoque eius, in quem alienatio initio inspecto non iure facta erat, primo dominii per venditorem primum quæsiti momento confirmatum fuit, adeoque dominium ex eo tempore emtori primo adiectum, sine facto aut voluntate eius auferri non potuit.* "[1]

This is entirely in accord with English law on the subject, which is that a person who sells property is estopped from disputing the title of his vendee, and that when he subsequently acquires a title, that title passes to his vendee. As it is put in the leading case of *Doe v. Oliver*,[2] " the interest when it accrues feeds the estoppel." *Cf.* Rawlin's case,[3] in which it was held that " if a man leased land in which he had nothing, and afterwards bought the land, such lease would be good against him by conclusion, but nothing in interest till he bought the land; but as soon as he bought the land, it would become a lease in interest. "

The French law on the subject is the same. The Code Civil Art 1599, departing from the Roman law, enacted : " *La vente d'une chose faite par un non-propriétaire est nulle.* " But jurisprudence has since decided that this nullity is relative only, and ceases as soon as the vendee acquires the property in the thing sold.

In this Colony the principle enunciated by Voet seems to have been viewed with a certain unexplained suspicion, and various suggestions have been made from time to time in the authorities in

[1] " Upon the confirmation of the title of a transferor, the title of the transferee, though in its inception invalid, was also confirmed from the first moment of the acquisition of the *dominium* by his vendor. Accordingly, from that time the *dominium* accrued to the original purchaser, and he could not be divested of it except by his own act or will."

[2] *2 Smith's Leading Cases, 11th edition, 724.*

[3] *4 Coke 33.*

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our books with a view to nullifying its effect or limiting its application. These suggestions are as follows:—

(1) That this principle was abrogated by the enactment of Ordinance No. 7 of 1840. (See *per* Hutchinson C.J. in *Carolis v. Jamis;*[1] *per* Middleton J. in *Alvis v. Fernando;*[2] *per* Lascelles C.J. and De Sampayo J. in *Mohammed Bhoy v. Lebbe Marikar;*[3] and Wood Renton C.J. in *Wakita v. Munesinghe.*[4])

(2) That it is only available as a defence, and cannot be made the foundation of an action. (See *per* Lascelles C.J. in *Mohammed Bhoy v. Lebbe Marikar*[3] and *per* Wood Renton C.J. in *Wakista v. Munasinghe.*[4])

(3) That, even if it can be made the foundation of an action, it can only be asserted by a person who has been in possession and for the recovery of a possession previously lost. (See judgment of the District Judge in this case.)

My opinion is that there is no foundation for any of these suggestions. In the first place, with regard to the suggestion that the principle is abrogated by Ordinance No. 7 of 1840, the process under consideration, namely, the conferment upon an existing deed of efficacy which it did not previously possess, is not a " sale, purchase, assignment, or mortgage, " nor is it a " promise, bargain, contract, or agreement for effecting any such object, or for establishing any security, interest, or encumbrance. " It is, therefore, not within the words of the Ordinance. I agree with the views expressed by my brothers Shaw and Ennis in the case of *Rajapaksa v. Fernando*[5] that the Ordinance does not apply to a case of title passing by operation of law. I may remark, incidentally, that the Statute of Frauds, which is in force in England, and which in this particular was on the same general lines as Ordinance No. 7 of 1840, has never been understood in any way to impair the operation of the corresponding principle of English law enunciated in *Doe v. Oliver.*[6]

In the second place, with regard to the suggestion that that principle can only be available as a means of defence, and cannot be made the foundation of an action, this appears to be derived from an imperfect examination of the title of the chapter under consideration. An examination of the terms of the whole chapter and of the text of the Title on which it comments discloses that it is laid down in express terms that the principle may be asserted both by way of an exception and by way of an action. See the passage quoted from Julian in the *Digest, XXI., iii., 2: " Iulianus ait aequius esse priorem te tueri, quia et si ipse Titius fundum a te peteret, exceptione summoveretur et si ipse Titius eum possideret, Publiciana peteres. "*

The third suggested qualification, namely, that the principle can only be asserted by a person who has been in possession and for the

[1] *(1909) 1 Cur. L. R. 224.*
[2] *(1911) 14 N. L. R. 90.*
[3] *(1912) 15 N. L. R. 466.*
[4] *(1913) 2 Matara Cases 156.*
[5] *(1918) 20 N. L. R. 301.*
[6] *2 Smith's Leading Cases 11th ed., 724.*

recovery of a lost possession, appears to have been made for the first time by the learned District Judge in this case. It must be conceded that at first sight there is considerable apparent support for this suggestion in the Roman and Roman-Dutch authorities. These authorities indicate that when a purchaser sues to enforce the principle in question, his appropriate action is the Publication action. Now it is the essence of this action that it is brought for the recovery of a lost possession. Its basis is a fictitious usucaption. The Prætor on equitable grounds, pretended that a period of usucaption, which was not complete, had in fact been completed. See *Gaius, Inst. IV., v., 36:* "*Datur autem haec actio (Publiciana) ei qui ex justa causa traditam sibi rem nondum usucepit eamque amissa possessione petit. Nam quia non potest eam EX JURE QUIRITIUM SUAM ESSE intendere, fingitur rem usucepisse.*" But for this purpose there must have been either actual delivery of possession, or something which can be treated as its equivalent. See *Voet, VI., ii., 6:* "*Proinde nec . . locum haec actio invenit . . in iis quæ neque vere neque ficte sunt traditæ . . cum utique usucapiendi potestas in hac actione necesaria sit, nec sine possessionis acquisitione ea procedat, aut habeat initio.* Possession was essential for this action, but any possession was enough even though it were for a moment of time. "*Suffecerit autem vel momento possedise, ut hac actione liceat experri*" (*ibid.*) The importance of *traditio*, whether asserted in attack or defence, is emphasized in all the texts. It may also be noted that Voet's summary of the chapter under consideration, XXI., iii., commences with the words; "*Si is, cui res aliena vendita et tradita possessionem amiseret.*" All this, however, is illusory. The basis of this equitable doctrine is not possession, but natural equity. See *Digest, XXI., ii., 17.:* "*Improbe enim rem a se distractam evincere conatur.*" *Cf. Zoesius XXI., iii.:* "*Quia nemo facto suo potest contravenire.*" See also Huber; *Prælectiones, XXI., iii.,* "*Nec suum factum alio iure subvertere possit.*"

What, then, is the meaning of the persistent references to delivery and to possession in the texts? The explanation would appear to be a simple one. The case which the authorities are considering is the ordinary case of a fully completed transaction. But under the Roman law no title passes upon a sale except by actual delivery to the purchaser. See *20 C. de pact. (2, 3) Diocletian* "*Traditionibus et usucapionibus dominia rerum, non nudis pactis transferuntur.*" This is no longer the law. *Traditio*, whether actual or symbolic, is no longer necessary for the consummation of a sale of immovable property, and has been replaced by the delivery of the deed. See *Appuhamy v. Appuhamy*,[1] where the whole subject is lucidly explained. The same protection, therefore, which the Roman law gave to a person who had completed his title by possession, our own

[1] *(1880) 3 S. C. C. 61.*

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law will give to a person who has completed his title by securing the delivery of a deed. The Publician action, as the law then stood, was the appropriate form of action for the purpose of giving effect to the right which the law recognized. The fact that this action was based upon a fictitious usucaption, and therefore presupposed a possession, however short, was an accidental circumstance. This form of action, if it now existed, would no longer be appropriate for the purpose of asserting that right, as the law now stands. But we are no longer tied to forms of action. If the law recognizes a right, it will provide its own forms for enforcing it.

I may remark, incidentally, that it is a mistake to suppose that in the case under consideration (*i.e.*, the case of a person who sells land not his own and subsequently acquires title) the Roman law will not protect a purchaser unless he has obtained possession. There is express authority to the contrary. The *Actio Publiciana* is no doubt not appropriate, but the purchaser in such a case can avail himself of the *Actio Empti*. See *Digest, XIX., i., 46*: "*Si quis alienam rem vendiderit et medio tempore heres domino rei exstiterit, cogitur implere venditionem.*" See also the discussion of this passage in *Voet, XIX., i., 14.*

I would further remark that another question raised in the argument was equally beside the point, viz., the question discussed by Voet in the first paragraph of this title, whether the *dominium* which he understands the *Digest* to impute to the purchaser is a *verum dominium* or only a *fictum dominium*. It does not matter in the least whether the *dominium* was fictitious or real. When the Roman lawyers invented a legal fiction, their object was not to set up a distinction, but to make an assimilation. If in this case the Prætor imputed a *fictum dominium* to the purchaser (as Voet thinks), he meant him to be in exactly the same position as a person with a *verum dominium*.[1]

It is clear, therefore, according to Roman-Dutch law, that in the case under consideration the purchaser acquires a title (whether legal or fictitious it does not matter) in the property originally sold to him by his vendor. I will now proceed to examine the Ceylon authorities with reference to the principle above enunciated. Until the case of *Rajapaksa v. Fernando*[2] the current of the authorities in recent years (in spite of occasional fluctuations) seemed to run strongly in the direction of qualifying and limiting the application of the principle. The first of the authorities is *Kadirevelu Pulle v. Pina.*[3] This was a Full Court case, and if it really turned upon the question of the application of the principle would be decisive. (See *Perera v. Perera.*[4]) But a careful examination of the case shows that it

[1] For a further discussion of the origin and significance of the *exceptio rei vinditæ et traditæ* see footnote at the end of this judgment.

[2] *(1918) 20 N. L. R. 301.*

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

[4] *(1903) 7 N. L. R. 173.*

really turned upon something quite different. What was it that *Kadirevelu Pulle v. Pina*[1] actually decided? If the facts are carefully examined, it will be seen that what it decided was that the registration of a deed of transfer was inoperative where the transferor had no title *at the date of registration*. It contains, indeed, a dictum by Clarence J., to the effect that a purchaser who has bought a property before his vendor acquires title has nothing more than a right to call upon his vendor for a conveyance when his vendor does acquire title, and has no title in himself by virtue of the subsequent title accruing to the vendor. This dictum, however (which was made without any reference to, or discussion of, the principles of law above explained), was in the circumstances purely *obiter*.

The next case, which was a fluctuation in the opposite direction, was *Selo Hamy v. Raphael*,[2] where a purchaser at a Fiscal's sale, before he obtained the conveyance of the Fiscal, sold it to M, who afterwards sold it to the plaintiff. The Fiscal's conveyance was obtained after this second sale, and the title conveyed by that conveyance was held, *ipso facto*, to pass to the plaintiff. The passage from Voet was not considered, and the judgment was based upon the equitable principle that equity will consider everything done which ought to be done.

The question next arose incidentally in the case of *De Silva v. Shaik Ali*,[3] and Withers J. there laid down the law in the following uncompromising terms:—

"If A sells for value and delivers to me a land which does not at the time belong to him, if he acquires it afterwards and bring an action to re-vindicate it, I may defeat him by saying: But you sold and delivered it to me. I may plead sale and delivery with equal effect against the true proprietor, who, inheriting the land from my vendor, seeks to re-vindicate it, and this plea is available to those to whom I sell for value and their assigns."

The current now begins to set strongly against the doctrine thus enunciated by Withers J. The case next in order is *Carolis v. Jamis*,[4] where Hutchinson C.J. for the first time put forward a theory that Ordinance No. 7 of 1840 abrogated the principle enunciated by Voet. This was a decision by a single Judge.

Guruhamy v. Subaseris,[5] the next case, was a temporary fluctuation in the other direction. Wood Renton and Grenier JJ. declined to follow *Carolis v. Jamis*[4] for the purpose of the case before them, declaring that it has been held in a long series of decisions that the provisions of Ordinance No. 7 of 1840 are not to be used as a covering for fraud or what is tantamount to fraud. But it may be suggested that if the case was one of this nature, it was a case not for the *exceptio rei venditæ et traditæ*, but for the *exceptio doli*.

[1] *(1899) 9 S. C. C. 36.*
[2] *(1889) 1 S. C. R. 73.*
[3] *(1895) 1 N. L. R. 228.*
[4] *(1909) 1 C. L. R. 224.*
[5] *(1910) 13 N. L. R. 112.*

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In *Alvis v. Fernando*,[1] which was a decision by a Bench of two Judges, Middleton J. associated himself with the opinion previously expressed by Hutchinson C.J. in *Carolis v. Jamis*, but this was a case not for sale, but of mortgage. Middleton C.J.'s observations were therefore, to a certain extent only *obiter*.

Next came *Mohammed Bhoy v. Lebbe Marikar*,[2] in which a Bench of two Judges, Lascelles C.J. and De Sampayo J. for the first time adopted the proposition that Ordinance No. 7 of 1840 abrogated the principle enunciated by Voet. Lascelles C.J. also suggested that the principle was only available as a defence, and could not be made the basis of an action.

This case was followed by *Wakista v. Munasinghe*.[3] There Wood Renton C.J. did not discuss the principle, but merely said that the case of *Mohammed Bhoy v. Lebbe Marikar*,[2] being a decision by two Judges, was binding on the Court. He expressed the opinion, however, that the principle of the *exceptio rei venditæ et traditæ* would not be invoked by a plaintiff, but was a plea only appropriate to a defendant.

In 1915, however, in *Nonohamy v. Appusinno*,[4] a counter-current for the first time set in. This is a decision by a Bench of two Judges. The action was a partition action. The question of the supposed limitation of the principle to the protection of a defendant was ignored. So also was the question of the effect of Ordinance No 7 of 1840. The Court held that the original deed of a vendor who subsequently acquired good title estopped him from denying the title of his vendee to the interest purported to be conveyed.

Finally came the case of *Rajapaksa v. Fernando*,[5] which was decided by my brothers Ennis and Shaw. The Court was here face to face with conflicting decisions, and in its judgment it declined to follow *Mohammed Bhoy v. Lebbe Marikar* [2] as to the effect of Ordinance No. 7 of 1840. The Court held that that Ordinance did not apply to estates vesting by operation of law, and that consequently there was nothing in that Ordinance to limit the application of the principle of the Roman-Dutch law. Shaw J., however, notes that this was a case in which the defendant was merely seeking to defend his position, and he left open the question of the rights of a plaintiff to assert the same principle.

The case is now open for the consideration of this Court, and, in view of what I have said before, it is hardly necessary to say that I am of opinion that we ought to follow the line of cases to which *Rajapaksa v. Fernando* [5] belongs, and that for the purpose of the assertion of the principle of the Roman-Dutch law enunciated by Voet, no distinction is to be drawn between the case of a person defending his possession and that of a person claiming possession of a property.

[1] *(1911) 14 N. L. R. 90.*
[2] *(1912) 15 N. L. R. 466.*
[3] *(1913) 2 Matara Cases 156.*
[4] *(1915) 1 C. W. R. 80.*
[5] *(1918) 20 N. L. R. 301.*

It now remains to apply these principles to the circumstances of the present case. The origin of the dispute in this case is a deed No. 860 of September 23, 1882, in which Maria Felsinger conveyed the property in question to her son Palis Swaris, subject to a *fidei commissum* in favour of his brothers Stephen and Nicholas if he died without issue and subject to a life interest in herself. Stephen and Nicholas, before their rights as fidei commissaries actually accrued to them, purported to convey the title to one Don Cornelis Appuhamy. He is the *primus emptor*. In 1896 Palis died without issue, and Stephen and Nicholas thus for the first time acquired a definite title. According to the position above explained, this of itself vested a similar title in Don Cornelis Appuhamy. In 1905 he conveyed this title to Charles Perera, who is thus the *secundus emptor*.

What was the defendant's position? He first of all set up title under a deed No. 884 of December 5, 1893, in which Palis Swaris and his mother Maria Felsinger purported to join together in a conveyance to Maria Felsinger's second husband Daniel J. Fernando. Palis and Maria Felsinger claimed to be entitled to make this conveyance, notwithstanding the terms of the deed of 1882. This contention has already been fought out between the two contending sides in certain land acquisition proceedings, and judgment was given against it. Those claiming through Palis thereupon adopted another line of campaign. In 1913 Stephen and Nicholas were induced to execute a deed in favour of Lionel Oswin Fernando, the son of Daniel J. Fernando, and it is contended that this document, having been executed subsequent to the date when Stephen and Nicholas obtained title to the property, conveys a good title to Lionel Oswin Fernando, whereas the earlier deed of 1895, by which they purported to convey to Don Cornelis Appuhamy, having been executed before they obtained title, could convey no title to him.

The property which Stephen and Nicholas thus purported to convey to Lionel Oswin Fernando was by him convey to his father Daniel J. Fernando, and was by him convey to his son Justin Victor Fernando, and was finally conveyed back to Lionel Oswin Fernando in 1918.

For the reasons I have given above, I am clearly of opinion that upon Stephen and Nicholas' obtaining title to the property on the death of their brother in 1896, Don Cornelis Appuhamy obtained full title to the property under the deed of 1895, and that nothing whatever passed to Lionel Oswin Fernando under the deed of 1913.

The only remaining question is whether the plaintiff (who is the executrix of the executor of Charles Perera, the *secundus emptor*) could recover the property by virtue of the title which was thus conferred upon Don Cornelis Appuhamy, the *primus emptor*. I entertain no doubt whatever that she can. It is expressly laid down in the *Digest* that both the " successors " of the *primus emptor* and also the *secundus emptor* have the benefit of the *exceptio rei venditæ*

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et traditæ. (See *Digest, XXI., iii., 3.*) There is no reason why the *secundus emptor* should not have the benefit of the corresponding action. Similarly, if the *secundus emptor* has this right, his " successors " must have it also, and these must include the executrix of his executor.

The next question is: Against whom can the principle be asserted, and can it be asserted against the defendant in the present action? Voet declares that the exception can be opposed, not only to the first vendor, but to all *ab eo causam habentes*, and he explains that by these are meant all " *quibus venditor, iam dominus factus, eandem rem rursus titulo, sive oneroso sive lucrativo, concessit.* " It seems clear that these words would include the case of a purchaser from a vendor after the vendor had acquired title. This appears from the express words of the *Digest*, where it is declared if a vendor who sold a farm to a man before he obtained title, after he obtained title sold it to Maevius, it was considered more equitable that the first purchaser should be preferred to Maevius. (See *Digest, XXI., iii., 2.*) It is clear, therefore, that the words also include a person who, like the defendant in this action, only claims as a donee from the vendor. Nor is the question affected by the fact that this donee has caused this property to pass through a series of transfers in his own family before it ultimately reverts to himself. I express no opinion on the question whether the principle could be asserted against a *bona fide* purchaser for value without notice. The defendant in this case was not a purchaser for value, and, moreover, there can be no question that he had full notice.

It remains to consider certain subsidiary questions which were discussed in the course of the argument. The first is a plea raised by Mr. Bawa that the matter is *res judicata* in his favour. I have referred above to certain land acquisition proceedings in which the plaintiff was victorious. It was subsequent to these proceedings that the defendants tried to secure another string to his bow by procuring the transfer from Stephen and Nicholas, on which he relies in this action. After he had succeeded in procuring this transfer, there were certain other land acquisition proceedings, supplementary to those just mentioned, and an attempt was there made by the plaintiff's family to put forward his new claim. The matter was carried to this Court, and this Court declined to listen to the new plea, referring plaintiff's counsel to a separate action, and giving judgment against him. Mr. Bawa contends that, inasmuch as the plaintiff did not bring the separate action, the judgment against him was conclusive as to his new plea. It is hardly necessary seriously to consider this proposition. A judgment cannot be conclusive against any person on a question that that judgment expressly leaves out of account.

The next point is also a question of *res judicata*. I have already explained that in the land acquisition proceedings above mentioned

Daniel J. Fernando claimed that the fidei commissary rights of Stephen and Nicholas under the deed of 1882 had been extinguished by the deed of 1893, under which Maria Felsinger and Palis Swaris have purported to convey the entire *dominium* to Daniel J. Fernando. This contention was decided against them, and the plaintiff maintains that the matter must be treated as *res judicata* in this action. Mr. Cooray, however, prays in aid the Land Acquisition Amendment Ordinance, No. 44 of 1917, which declares in effect that in proceedings under the Land Acquisition Ordinance any determination of a matter involving less than Rs. 1,000 shall not be *res judicata*, except in so far as it relates to the title to the land actually acquired. In the present instance the land acquired is a small strip valued at considerably less than Rs. 1,000. The acquisition proceedings were prior to the enactment of Ordinance No. 44 of 1917, but Mr. Cooray contends that any enactment relating to the principle of *res judicata* is an enactment dealing with a matter of procedure, and that enactments dealing with matters of procedure have a retrospective action, and, therefore, in this action he is entitled to the benefit of this Ordinance. The principle that enactments dealing with matters of procedure have a retrospective effect means, I take it, this, that when any law is passed affecting the procedure in an action, the benefit or the burden of the new enactment comes into play in any proceedings subsequent to the enactment, and even in proceedings pending at the time of the enactment, notwithstanding the fact that the subject-matter of the proceedings was a thing anterior to it. It may very well be that any enactment enlarging or limiting the principle of *res judicata* is a matter of procedure. If in the Civil Procedure Code now under the consideration of the Legislature it were determined to codify the law of *res judicata*, the provisions ultimately enacted, being declared matters of procedure by the Code, would apply to all proceedings subsequent to its promulgation, even though they related to matters which had taken place before that promulgation. But in all cases it is necessary to scrutinize first of all the terms of the enactment itself. The question must be always: What was the intention of the particular enactment? The enactment now under consideration is in the following terms:—"Where in any proceedings under this Ordinance any question of title is determined by the Court under such circumstances that in any subsequent legal proceedings the determination would be deemed to be *res adjudicata* as between the parties, such determination shall not operate as *res adjudicata*, except so far as it relates to the portion of land actually acquired."

"This Ordinance" means not the amending Ordinance of 1917, but the principal Ordinance of 1876. What the amending Ordinance did was to add a new section to the principal Ordinance. By the effect of Section 1 this addition took place from a date determined by Proclamation, the date in fact being December 28, 1917.

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It seems to me that the case propounded in the initial words of the new section: " Where in any proceedings under this Ordinance it is determined . . . . " is the case of a determination made subsequent to the date on which the new section comes into operation. The thing contemplated is surely contemplated as happening after the date of the operation of the new section. In order to bring the section into operation a new contingency must arise. The words of the section do not cover a contingency which arose before its enactment. In other words, the introductory phrase: " Where in any proceedings under this Ordinance . . . . " limits the application of the section to a determination made subsequent to the commencement of the Ordinance. I do not think, therefore, that it is competent to Mr. Cooray to discuss over again the question already determined in the land acquisition proceedings above referred to.

I think it right to say that if I am wrong in this opinion, and that if Ordinance No. 44 of 1917 has a retrospective effect, I should, nevertheless, be of the same opinion with regard to the effect of the deed of 1882 as the Court which in 1913 gave judgment against Daniel J. Fernando, through whom Mr. Cooray's client now claims. That deed is in a very peculiar form. The parties to it are Maria Felsinger and Palis. Maria Felsinger conveyed to Palis the land under consideration, subject to a restriction on alienation in favour of Stephen and Nicholas. So far as this restriction on alienation is concerned, it appears to be the implied intention that it shall be suspended during the lifetime of Palis, from his attainment of the age of twenty-five years until his death. The words are: " But shall not be at liberty to sell, mortgage, or alienate the same until he shall arrive at the said age of twenty-five years." The deed goes on to provide that " if the said Swarisge Palis Swaris should die without issue, then the said land and premises shall devolve and go to his two brothers Swarisge Stephen Swaris and Swarisge Nicholas Swaris." If this were all, and if it were necessary to give an interpretation to this peculiarly-worded restriction, it would seem to belong to that special class of *fidei commissa* discussed in *Perera v. Perera*.[1] In other words, it would have to be interpreted as giving Palis Swaris the right of disposing of the land from the time he attained the age of twenty-five until his death, but as providing that if in the interval he made no disposal of the property and died without issue (and, possibly, without disposing of the property by will), it should vest in his two brothers. But this is not the whole of the deed. Superimposed on this restriction on alienation there is another restriction in favour of Maria Felsinger herself. She reserves to herself the right to possess and enjoy the rents, &c., of the property until her death. It is only, therefore, in the event of Maria Felsinger dying before Palis attains the age of twenty-five, that he is contemplated

[1] *(1918) 20 N. L. R. 463.*

as having a free right of disposal of the property. If his mother survives his attainment of that age, his right of disposal is suspended until her death. Those who prepared the deed of 1893, by which Maria Felsinger and Palis purported to convey the whole *dominium* to Daniel J. Fernando, appear to have considered that this restriction on alienation between Palis' attainment of the age of twenty-five and his mother's death was solely intended for the benefit of Maria Felsinger, and that, therefore, if she joined in the deed, the restriction would be inoperative and the *dominium* would pass. I do not think that this is a correct interpretation. It may very well be that all that Maria Felsinger had in her mind when she imposed this particular restriction on her son was to secure herself, but what she, in fact, did by the terms of the deed was to confer a definite contingent interest upon Stephen and Nicholas. As long as Maria Felsinger lived, the fidei commissary rights of Stephen and Nicholas were secure. Their mother did, in fact, create a trust in their favour, and she could not afterwards put an end to that trust by joining in a disposition of the property. I am of opinion, therefore, that the previous decision of the Court was right; that Stephen and Nicholas succeeded to the property on the death of their mother, and that upon their so succeeding, their title, *ipso facto*, passed to the predecessors of the plaintiff.

In my opinion, therefore, the appeal should be allowed, with costs.[1]

[1] The following considerations are of so academical and historical a character that it is thought best to relegate them to a footnote:—

The *exceptio rei venditæ et traditæ* in its origin (if Sohm's account of its origin is to be accepted) had nothing to do with the special class of cases now under discussion. It originated in the difference between the "Quiritarian" and the "Bonitarian" tenure of property, which was finally abolished by Justinian. Sohm's account is as follows:—

"The rule was that *res mancipi* could only be acquired in full Roman ownership (*dominium ex jure Quiritium*) by civil modes of acquisition. According to the Civil Law, ownership could not be acquired in a *res mancipi* by a mere *traditio* or *occupatio*. But towards the close of the Republic the Prætor intervened to reform the Civil Law in this respect. He declared that, where a *res mancipi* had only been informally sold (or otherwise alienated) and delivered, he would, nevertheless, protect the alienee and present possessor by means of an *exceptio rei venditæ et traditæ*, if the alienor (whose *dominium ex jure Quiritium* was not, of course, affected by the transaction according to the form of Civil Law) brought an action to enforce his ownership. The effect of the Prætor's intervention was to render the *dominium ex jure Quiritium* (which on an informal alienation remained in the alienor) worthless as against the alienee. And, conversely, if a person who had acquired a *res mancipi* in an informal manner lost possession of the thing, the Civil Law would not allow him to sue for its recovery by *vindictiao*. For having acquired it infomally, he was not owner. The Prætor, however, granted him the so-called *actio Publiciana in rem*, and thereby enabled him, in point of fact, to assert his right as effectually, in all essentials, as if he had really been the owner of the thing. The Prætor, in short, set aside the ownership of the Civil Law (quiritary ownership), and opposed to it what was practically a different kind of ownership, namely, prætorian ownership; and though the prætorian title did not make the alienee formal owner, nevertheless, it operated by means of the *exceptio* and *actio* just mentioned, to make the thing, for all practical purposes part of the alienee's property. Hence property held in prætorian ownership was said to be *in bonis* ('Bonitary ownership'). (*Shom's Institutes of Roman law, 3rd ed., pp. 310-311.*)"

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This was an action for declaration of title to land, for ejectment, and damages. The land originally belonged to one Bastian Alwis, who on September 21, 1849, conveyed 1 rood 14.92 perches to George Felsinger. George Felsinger and his wife gifted this portion to Maria Felsinger, subject to a *fidei commissum* in favour of Palis Swaris, Stephen Swaris, and Nicholas Swaris. On November 21, 1872, Bastian Alwis conveyed a further 2 roods 28 perches to Maria Felsinger.

Voet, in *XXI., ii., 3*, points out that the *Digest*, as he understands it, imputes the *dominium* to a purchaser, whose title, originally invalid, is confirmed through the vendor's subsequent title. He asks, why then, the Publician action? And suggests as an answer that it is *fictum magis quam verum dominium* that is understood.

It is submitted, with great deference to so high an authority, that Voet has here misunderstood the Latin text; this text does not, if properly read, impute a *dominium* to the purchaser at all. The sentence he has in mind is from an opinion of Julian quoted by Ulpian (*Digest De Rei Vindicatione, section 72*).

"*Sed et si ipse possideret et tu peteres, adversus exceptionem dominii replicatione utereris.*" He understands this to mean: "But if the vendor were in possession and you were plaintiff, then, in reply to his defence, you would set up a *replicatio dominii, i.e.*, a replication claiming that you had the *dominium*." But this is not the meaning. *Dominii* goes with *exceptionem*, and not with *replicatione:* Pothier prints the two expressions with a comma between them. thus: "*adversus exceptionem dominii, replicatione utereris.*" The meaning is "upon the vendor's setting up the *exceptio dominii, you would reply with an appropriate replication.*"

This is placed beyond doubt by another version of the same opinion, given in another chapter of the *Digest*, where the "appropriate replication" is more fully indicated: "*Et, si ipse eum possideret et Publiciana peteres adversus, excipientem SI NON SUUS ESSET, replicatione utereris, et per noc intelligeretur eum fundum rursum vendidtisse quem in bonis non haberat.*" (*Digest, XLIV., iv., 32.*): Here the exception *si non suus esset* is the *exceptio dominii*. Another form of it referred to elsewhere in the *Digest* is *SI EA RES POSSESSORIS NON SIT*. See *Digest VI., ii., 17*. The meaning is as follows:—The case contemplated is that of Titus selling you a farm which really belongs to Sempronius. Afterwards Titius becomes the heir to Sempronius, and having thus for the first time acquired a *dominium*, he sells the same farm to Maevius. Titius is in possession. (It is not clear why. One would have expected Maevius to have been in possession, and the action to be brought against Maevius.) You sue Titius(? Maevius) by the Publician action. The matter comes before the Prætor for reference to the *arbiter*, and the Prætor draws up the formula of reference. The defendant, by way of *exceptio* pleads title. This is the *exceptio dominii*. The Prætor, therefore, inserts a clause to the effect that plaintiff is only to be given his remedy if it appears that the defendant was not entitled to the *dominium*. The plaintiff, thereupon, asks for a replication on the equitable grounds of the case. The Prætor inserts, therefore, a counterbalancing replication, instructing the arbitrator that effect is not to be given to the defendant's *exceptio*, if it appears that the farm which he has since sold to Maevius had already ceased to be held by him *in bonis* by virtue of its previous sale and delivery to you.

Voet's comment on this passage is as follows: "*In quantum venditor quidem naturaliter dominus esse non desiit ex venditione ac traditione, quae dominii acquisitionem antecessit, et ita antiquior est dominio acquisito; sed tamen Prætor fingit, rem venditam, acquisito postmodum per venditorem dominio ex bonis ejus recessisse, emptorique adiectam esse.*" (*Voet VI., ii., 8.*)

The Prætor does not pretend that the actual *dominium* has passed away from the vendor, but only that he had ceased to hold the farm, *in bonis*, which is not quite the same thing. Pothier's comment more exactly expresses the situation:—"*Sensus est: intelligeret Titius per hanc replicationem se eum fundum in bonis non habuisse, quum eum, iam tibi a se venditum, ipse rursus vendidit Maevio. Quamvis enim Titius, eo tempore quo rursus fundum vendi dit Maevio, esset iam hujus fundi dominus ex subtilitate iuris, upote domino heres factus; tamen re vera et effectu eum fundum in bonis non habuisse intelligitur.*"

On September 23, 1882, Maria Felsinger, by deed No. 860, gifted the whole land, 5 roods 2.92 perches, to her son Palis. It has been twice held by the Supreme Court that this gift contained a *fidei commissum* in favour of Palis' two brothers Stephen and Nicholas.

On September 25, 1893, by deed No. 884, Maria Felsinger and Palis convened the whole land to Daniel J. Fernando, subject to a life interest to Maria Felsinger.

On May 23, 1895, Stephen and Nicholas conveyed the whole land, by deed No. 1,923, to Don Cornelis Appuhamy.

Palis died without issue in 1896.

Don Cornelis Appuhamy, on February 2, 1905, by deed No. 4,028, conveyed his interest to Charles Perera, who entered into possession. Don Cornelis Appuhamy had previously purchased the land at an execution sale against Palis and obtained a Fiscal's transfer on July 24, 1903.

Don Cornelis died on March 25, 1908, leaving the property by will to James Perera.

On August 31, 1909, D. J. Fernando brought a possessory action No. 29,620 against James Perera. The case went to the Privy Council, and D. J. Fernando was declared entitled to the possession until the death of Maria Felsinger.

On June 7, 1910, the Crown, having acquired 2.50 perches of the land, paid into Court the sum of Rs. 392.62 in case No. 2,307. On appeal, this Court held that D. J. Fernando was entitled to the interest on the money till the death of Maria Felsinger, and after her death the principal was to be paid to Stephen and Nicholas.

On December 17, 1913, by deed No. 61, Stephen and Nicholas gifted the land, subject to Maria Felsinger's life interest, to Lionel Oswin Fernando, who gifted it by deed No. 302 of January 17, 1916, to his father Daniel J. Fernando, who gifted it by deed No. 3,676 of August 27, 1918, to another of his sons, Justin Victor Fernando, who, by deed No. 20 of September 17, 1918, gifted it, subject to a lease in favour of the added-defendant in the case, to his brother Lionel Oswin Fernando, the defendant in the case.

Maria Felsinger died in January, 1916.

James Perera died on September 18, 1918, leaving the property by will to his wife, the plaintiff in the case.

On January 24, 1916, on an appeal in proceedings in the Land Acquisition Case No. 2,307, in which James Perera had applied for payment of the sum in Court on Maria Felsinger's death, which was opposed by D. J. Fernando on the basis that he was entitled by right of his conveyance No. 302 of January 17, 1916, based on Stephen and Nicholas' gift of December 17, 1913, the Supreme Court held that D. J. Fernando's claim should be made in a separate action.

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It was urged in this appeal that as D. J. Fernando did not institute further proceedings, the matter was *res judicata* against him. As, however, D. J. Fernando's rights were expressly reserved, I am unable to see how the matter is *res judicata*.

It was further urged on appeal that the defendant acquired no title at all through the gift of Stephen and Nicholas in December, 1913, as they had previously sold on March 27, 1897, to one Hendrick Silva, who sold it to Karimjee Jafferjee. Karimjee Jafferjee brought a case, No. 20,345, against Charles Perera, who was in possession, and his action was dismissed on September 3, 1906. It is impossible to deal with this point as there was no issue on it, and the documents have not been put in evidence.

The main point urged on appeal was that the sale by Stephen and Nicholas, by their deed No. 1,923 of May 23, 1895, *i.e.*, before the death of Palis, was confirmed by the acquisition of title by them on the death of Palis in 1896, and that the title passed without a written conveyance.

I have already expressed an opinion in the case of *Rajapaksa v. Fernando* [1] that the Roman-Dutch doctrine of confirmation and transmission of land by operation of law is not affected by the Ordinance No. 7 of 1840.

The learned Judge in the District Court held that the Roman-Dutch doctrine of confirmation applied only where the *exceptio rei venditæ* was set up by a person in possession, and he dismissed the plaintiff's action on that ground.

Mr. Bawa, for the plaintiff on appeal, addressed to us an exhaustive argument on the Roman-Dutch law, tracing the commentary in *Voet XXL., 3, 1* to the *Digest*. The passage in Voet has been cited at length in the Court below and by my brother Shaw in the case of *Rajapaksa v. Fernando*. It says that from the time the vendor acquired *dominium*, the "*dominium*" annexed to the original purchaser. The passages in the *Digest* speak, in one instance, of the original purchaser acquiring priority; in another, of the original purchaser acquiring *dominium;* and in a third, of the original purchaser being able to rely upon an exception framed to meet the case. It would seem that a defendant in possession could defend his possession by the *exceptio rei venditæ*, and that a plaintiff could use, in replication, a similar defence or a defence framed to meet the case.

A purchaser could sue whether he was in possession or not, for it would seem that delivery might be made without possession, *e.g.*, *adjudicata* (*Dig. VI. 11, 7*).

I am accordingly of opinion that the plaintiff is entitled to succeed, and I would allow the appeal, with costs, in both Courts, and damages as agreed in the Court below.

[1] *(1918) 20 N. L. R. 301.*

DE SAMPAYO J.—

I have had the advantage of reading the judgment prepared by the Chief Justice. All the authorities are there collated and discussed, and it is unnecessary for me to refer to them in detail. I wish only to say a word with regard to my judgment in *Mohammed Bhoy v. Lebbe Marikar.*[1] The only passage cited to the Court in that case was *Voet, XXI., iii., 2.* But when the whole law on the subject of the Publician action is examined, I think it will be found that the right of a vendee to bring that form of action depends on possession. For that purpose I do not think the *ficta traditio*, or symbolical delivery, such as takes place when the deed of conveyance is delivered, is enough. Such delivery satisfies the requirement of the Roman-Dutch law, that in order to pass title there should be delivery of the thing, but I think that for the purpose of the Publician action there must have been actual possession, however short the period of possession may be. For the Prætor's legislation enabled the vendee to rely on a legal presumption that he had acquired title by usucapion or prescription, though the necessary period of possession was not complete. This presumption the vendee was not allowed to controvert. The fiction involved in the action is not that the plaintiff had possession, but that he had prescriptive title. Consequently, I think it was necessary that the plaintiff should have had possession, though not possession for the period required for usucapion. Neither do I think that *Voet, XXI., iii., i.*, means that on the vendor acquiring title subsequently to the sale the title passes, *ipso facto*, to the vendee. The *confirmatio* he speaks of is not, I think, vesting of title, but the protection which the vendee acquires. For Voet goes on immediately to say that the vendor then has the right of suing his vendor or party in possession and defeating his opponent by pleading the *exceptio dominii* in his replication, and later in the same passage he says that the *actio Publiciana* is given in respect of an ownership, which is only supported by a legal fiction. It appears to me that the vendee acquires no legal title as such by the mere fact of his vendor acquiring good title subsequently to the sale. The law appears to work out as follows: If the vendee is still in possession and is used by the vendor or any successor from him, he can successfully plead the *exceptio rei vinditæ et tradiæ*, or, as we call it, the *plea of estoppel.* If he has lost possession and is obliged to sue his vendor or successor, he can bring the Publician action. Whether the Publician action and the fiction on which it is founded are available to us or not, I think the same result may be obtained here. The question, after all, is one of procedure. It is true that the vendee will not be able to bring a vindicatory action because he has no title. But he may in his plaint merely put forward his deed from the vendor,

[1] *(1912) 15 N. L. R. 466.*

1919.

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and if the vendor claims title in himself, he may be met by the plaintiff in the replication by the same *exceptio rei venditæ et traditæ*, or by the other plea *exceptio dominii acquisiti*. Under our present procedure a replication is not absolutely necessary, but the same purpose may be served by having an issue stated at the trial. This is practically what happened in this case. For the District Judge heard counsel on the question as to the effect of the deeds of Stephen Swaris and Nicholas Swaris to the plaintiff's predecessors in title and to the defendant's predecessor in title respectively. I agree that in the circumstances disclosed the defendant's deed from his so-called vendor was of the same quality as the vendor's own deed from Stephen Swaris and Nicholas Swaris, which was a deed of gift. Consequently the defendant is in the possession of a successor of those two persons, and is subject to the same pleas as they themselves would have been. I do not think that a real second purchaser who has purchased *bona fide* and for value can be defeated, except by the first purchaser obtaining a further deed from the vendor under the Ordinance No. 7 of 1840.

With regard to *Rajapaksa v. Fernando*,[1] I quite agree that the Ordinance No. 7 of 1840 has no application when the title passes by operation of law. But the difficulty I feel is whether in a case of the kind under consideration title does pass whether by operation of law or otherwise. I have already alluded to that matter and need say no more. There remains the question of a suitable remedy for a vendee. I am prepared, if necessary, to sweep away the forms and technicalities which the Roman Prætor still surrounded the newly invented action, and to give the vendee a straight action against the vendor or his successor. As I have above indicated, however, there is already such an action available, and in the present case, which is one of that description, the plaintiff, I think, ought to succeed.

I also agree with the Chief Justice with regard to the circumstances of *res judicata* relied on by the plaintiff.

I think that the appeal should be allowed, with costs.

Appeal allowed.

[1] *(1918) 20 N. L. R. 301.*