[FULL BENCH.] 922.

Present : Bertram C.J. and Porter and Schneider JJ.

SUPPRAMANIAM *et al.* *v.* ERAMPAKURUKAL *et al.*

75—D. C. Jaffna, 13,170.

Prescription—Trust property—Deed of dedication for founding a madam*—Appointment of another person as co-trustee along with the person dedicating the property—Does title pass to co-trustee ?—Is declaration of trust an instrument which requires registration ?—Mortgage by heir of person dedicating—Prior registration of mortgage bond—Priority—Acceptance of mortgage with knowledge of trust—Prior registration of Fiscal's transfer by purchaser under the mortgage decree—Priority—Is Fiscal's transfer an instrument for valuable consideration ?—Can persons asserting the trust go behind judgment and show that mortgage was collusive and not for valuable consideration ?*

In 1881 Visuvanather and his wife, Kathirasipillai, dedicated a field and a garden for the purpose of founding a *madam*, and appointed themselves and Suppramaniam (a brother of Visuvanather) as trustees. The deed which was not registered merely dedicated the land for the purpose, but did not transfer any title to Suppramaniam who signed it as a party. In pursuance of a plan to get rid of the trust among some of the heirs of Visuvanather in 1893, Arunachalam (an heir of Visuvanather) granted a usufructuary mortgage of a share of the properties to Sinnetamby by a deed which was duly registered. Twenty-five years later, Chellachchi, the heir of Sinnetamby, put the bond in suit, and at the Fiscal's sale purchased the share mortgaged and obtained a Fiscal's transfer, which was duly registered. On the Fiscal going to place Chellachchi in possession, the respondents objected claiming the property as trust property.

Held, (1) *Per* BERTRAM C.J. and PORTER J.—No title passed to Suppramaniam, the co-trustee, as the deed did not convey any title to him.

"It was doubtless supposed that by the mere dedication and by the appointment of Suppramaniam as co-trustee, title passed to him and would devolve from time to time on the various trustees successively appointed. This, of course, is a mistake, though a mistake that is often made. The title remained after the dedication in Visuvanather and his wife subject to the trust. In order to vest Suppramaniam and the other trustees with the legal title, notarial transfers were necessary, and the successive trustees were at all times entitled to call for these transfers. Consequently, on the death of Visuvanather, the legal title to his interest in these properties passed to his heirs, subject in all cases to the obligations of the trust, and, in

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particular, to the obligation to transfer the legal title to the trustees for the time being. For this purpose the heirs were constructive trustees of the charity."

(2) *Per* FULL COURT.—Sinnetamby gained no priority by registration of the mortgage bond over the declaration of trust.

A declaration of trust does not require registration; consequently, declarations of trusts are not documents which are liable to be defeated by the prior registration of a subsequent competing instrument. It is only where a trust of immovable property is established by a document *inter partes* that this document must be registered in order to secure priority.

(3) *Per* FULL BENCH.—If Sinnetamby had notice either actual or constructive of the trust he would be bound by it; if he advanced his money in good faith without notice of the trust he would not be so bound.

(4) *Per* FULL BENCH.—Chellachchi gained no priority by the registration of her Fiscal's transfer.

"The deed by virtue of which the petitioner's claim the adverse interest is the mortgage bond and not the Fiscal's transfer, and therefore the registration of the Fiscal's transfer would not avail them."

"In *Ferdinando v. Ferdinando*[1] there are certain observations of my own which seem to suggest that where there is a series of deeds each dependent upon the other and each registered, the fact of fraud or collusion in one of them would destroy the priority which might otherwise be claimed on behalf of the subsequent deeds by virtue of registration. I think it must be admitted that those observations require qualification. A party claiming the benefit of prior registration can ordinarily rely on any one of the deeds in such a series . . . . But this principle, I think, only applies to successive deeds which are in fact independent transactions. A mortgage deed, a sale to the mortgagee in execution of that mortgage, and a Fiscal's transfer in pursuance of that sale are circumstances so closely connected that it would be extraordinary if fraud in the first should not be held not to affect the last for the purpose of priority."

"It would be competent to those supporting the trust to go behind the judgment and show that it really represented a collusive debt, and that consequently there was no genuine valuable consideration for the transfer."

(5) *Per* BERTRAM C.J. and PORTER J.—No length of possession avails against a charitable trust where it is sought to recover trust property taken with the knowledge of the trust. Section 3 (1) (*c*) makes no change in the law in this respect.

THE plaintiffs, appellants, instituted this action for declaration of title in favour of the second plaintiff, appellant, for one-fourth share of the land called Paranthanpuliyady and Varipulam for an undivided one-third share of the paddy field called Rasahkulankari and Suriveli.

[1] *(1921) 23 N. L. R. 143.*

The second plaintiff, appellant, purchased the said shares at a sale under writ of execution issued in case No. 11,370 of the District Court of Jaffna, in which action the second plaintiff, appellant, who is the sole heir of the late Kovindar Sinnetamby, sued on an *otty* mortgage bond granted in 1893 by one Arumugam Arunachalam in favour of her deceased father, Kovindar Sinnetamby.

The second plaintiff, appellant, obtained a writ of possession in case No. 11,370, and when the Fiscal's officer went to deliver possession to her, the respondents objected to the delivery of possession. Thereupon, the plaintiffs, appellants, applied to the Court under section 325 of the Civil Procedure Code, and notice was issued on the respondents to show cause why they should not be dealt with for obstruction caused by them.

The respondents filed objection claiming title to the entirety of the lands on behalf of a charity *madam* called *Vellikkilamai madam* by virtue of two donation deeds (D 1 and D 2) of 1881, whereby the original owners—Arumugam Visuvanather and wife Kathirasipillai—donated to the *madam* the entirety of the two lands referred to above. The first and second respondents claimed to be the officiating priests of the Pillaiyar temple, situated in a room in the said *madam* by virtue of a deed of appointment marked D 6 of 1886, and the third respondent claimed to be the manager of the *madam* on behalf of the then trustee Subramaniar Tiruchittampalam.

In view of the claim of the third respondent, the District Judge (G. W. Woodhouse, Esq.), ordered that the petition of the appellants be registered as a plaint in terms of section 327 of the Civil Procedure Code. The District Judge dismissed plaintiff's action.

The deed of dedication was as follows :—

No. 2,188.

We, Arumugam Visuvanather and wife Kathirasipillai of Vannarponnai West, Jaffna, wishing that our souls may go to heaven, have executed charity deed, to wit :—

Whereas it is necessary to have Viknechuvara Puja performed on the Vianayakachatiya Nadchathiram occurring on the twenty-first day from the Rockaney Nadchathiram in the month of November of every year, to have Suppramania Swamy Puja performed on the Vichaka Nadchathiram of the month of May, &c., to have Siva Puja performed on every Friday, and to give rice and things enough for a day meal to every one of the Brahmins; Saivakkurukkal singers of Thevaram and Saiva people who may at any days come from the holy places of India, &c., and to allow those who are willing to cook rice and take meal to do so, and also to have Saiva Puja, Kuru Puja, Brahmin's meal, and Saivites' meal performed on all the aforesaid occasions, the place we fix and appoint for these matters is our land by right of purchase and possession, as per transfer deed executed on April 26, 1841, before Kantappa Visuvanather Mudaliyar, Notary of Nallur, in favour of the first-named of us, situated at Vannarponnai West, registered in the *thombu* in the names of Kathirkamasinka Mudaliyar, Vinasithamby,

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and others called "Varipula Paranthanpuliyady," in extent 11½ lachams with four-sided stone-built house, kitchen, building, portico, well, palmyras, and plantations, &c., is bounded, &c. We have executed charity deed for the whole of the land, buildings, well, palmyras, and plantations contained within these boundaries, giving it the name of *Vellikkilamai madam*, in order to do the aforesaid several matters and things and to be useful for the . . . . The estimated value of this is the sum of Rs. 4,000. We shall manage all these aforesaid matters, and all the movable and immovable properties that shall be given to the said *madam* during our lifetime as trustees, and further, in order to manage the said matters and the properties, we do appoint Arumugam Suppramaniam of Vannarponnai as a trustee together with us. If we intend to appoint another trustee or trustees more than one in order to manage the said matters and the properties before our death or after it, the first-named of us and the said Arumugam Suppramaniam shall jointly do the same, or if either of them dies, the other surviving one shall so appoint individually. The trustee or trustees so appointed shall have the right of appointing trustee or trustees in their stead, or to manage the matters together with them from age to age. There shall always be trustees more than one to look over and manage the said matters, otherwise if it happens that one trustee to be alone, and individually that trustee who is alone and individual shall at once appoint another trustee or trustees more than one. The aforesaid trustee, Suppramaniam, consenting to be such a trustee, has set his hand. Witnesses hereto are Dr. Thampiyapillai Sivaprakasapillai of Vannarponnai; Kantappar Arunachalam of the same place; Aiyampillai Chinniah of the same place; these being witnesses this charity deed has been executed on April 18, 1881.

E. W. Jayawardene (with him *Spencer Rajaratnam*), for plaintiffs, appellants.—The appellants have prescribed against the trustees by adverse and uninterrupted possession since 1893. Section 111 (*c*) of Ordinance No. 9 of 1917, which takes charitable trusts out of the provisions of the Prescription Ordinance, does not affect titles acquired before that Ordinance. It has no retrospective effect. Under the English common law, which applies to Ceylon, trusts could be prescribed by a third party in possession (*Lewin on Trusts, 11th ed., p. 1087*). Where a *cestui que trust* and his trustee are both out of possession for the prescriptive period, the party in possession gains a good title against them both (*Lewellin v. Mackworth.*[1]) It was held in *Magdalen Hospital v. Knots*[2] that charitable trusts could be prescribed by a person who claims independently of the charity. Sinnetamby and his descendants have been possessing the lands by a title independent of the trust. Counsel cited also *Hovenden v. Annesley.*[3] *Attorney-General v. Christ's Hospital*[4] does not apply, as here is no evidence that we had notice of the trust. In that case there was clearly an express notice of a charitable trust. It was held in India that a third party in possession who had got the

[1] *2 Eq. Cases Ab. 579.*
[2] *(1879) 4 App. Cases 324.*
[3] *(1806) 2 Sch. Lef. 607.*
[4] *(1834) 3 Myl. Skeen's 244.*

property for valuable consideration could prescribe against it. (*Dattagiri v. Dattaraya*,[1] *Sannadhi v. Pandaram*,[2] and *Nandi v. Goswani*.[3]

[BERTRAM C.J.—The deed itself does not transfer any property. So the legal title is in the heirs who may be called upon by the trustees to transfer the same to them at any time.]

The registered mortgage bond of 1893 is entitled to priority over the unregistered trust deed of 1881. There is nothing in our law which exempts trust deeds from registration. The learned District Judge holds that public and Crown lands are exempted from registration by section 48 of Ordinance No. 5 of 1877. That Ordinance clearly does not apply to lands in Jaffna, as it has not been proclaimed there. Section 104 of Ordinance No. 3 of 1907 has a similar provision, but this Ordinance has not become law yet. Thus sections 16 and 17 of Ordinance No. 14 of 1891 applies. The third respondent had no interest at the time he objected, and, therefore, he cannot maintain this action (*Silva v. Fernando*[4] and *Ponnamma v. Weerasuriya*.[5]) An action has to be determined according to the rights of the parties as existing at the date of its institution. (*Silva v. Nona Hamine*[6] and *Cooneratne v. Fernando*.[7])

Arulanandan, for defendant, respondent.—Sinnetamby being the holder of the legal estate he is a constructive trustee (*28 Hals. 87*), and, therefore, cannot prescribe against his *cestui que trusts*. Even if he were not a constructive trustee, he must be presumed to have had notice of the trust at the time he got the mortgage. This is the very property he got as dowry, and there is evidence that the entrance to the garden contains figures, such as are found in Hindu temples. As by the most casual inquiry he would have become aware of the trust, prescription cannot enure to his benefit. (*Attorney-General v. Christ's Hospital* (*supra*).) The District Judge has found that the transactions are fraudulent. No priority can be gained by registration under the circumstances. The present appellants are in the same position as Sinnetamby as they are his heirs.

E. W. Jayawardene, in reply.—There was no allegation of fraud in the answer, nor was it ever raised at the trial. Party raising fraud as a defence must specially raise and prove it. "With regard to fraud, if there be any principle which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice." (*Per Selborne L.C. Wallingford v. Mutual Society*[8]): "Fraud is never to be presumed." (*Poothan v. Kathirasan*.[9])

Cur. adv. vult.

[1] (*1902*) *I. L. R. 27 Bom. 363.*
[2] (*1899*) *I. L. R. 23 Mad. 271.*
[3] (*1906*) *I. L. R. 33 Cal. 611.*
[4] (*1912*) *15 N. L. R. 499.*
[5] (*1908*) *11 N. L. R. 317.*
[6] (*1906*) *10 N. L. R. 44.*
[7] (*1913*) *3 C. A. C. 19.*
[8] (*1880*) *5 App. Cases 697.*
[9] (*1891*) *5 Tam. 98.*

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March 20, 1922. BERTRAM C.J.—

Suppramaniam v. Erampalurukal

This case raises important questions in connection with the law of religious trusts. It relates to a *madam* founded in the neighbourhood of Jaffna in the year 1881 and land dedicated in connection with it, and the questions for consideration are, whether the heirs of the donor can annul the pious founder's bounty through the operation of the law of prescription; and, secondly, whether they have succeeded in effecting the same result by taking advantage of the law relating to registration.

The *madam* in question was founded by one Arumugam Visuvanather and his wife, Kathirasapillai, in the year 1881. For this purpose they dedicated, in the first place, a piece of land comprising 11½ lachams with the building and plantation thereon (subsequently in this judgment referred to as "the garden"). They declared that they would manage this property together with all movable and immovable property given to the *madam* during their lifetime as trustees, and they appointed a brother of Visuvanather Suppramaniam, as co-trustee. They, further, made provision for the appointment of subsequent trustees. The deed specified the various rites to be performed in the *madam* throughout the year, and provided for sustenance to be given to the Brahmin priests of the *madam* and to religious pilgrims from India. The donors further dedicated, in connection with the *madam*, two other pieces of property, one a field of the extent of about 92 lachams (afterwards referred to as the field) (D 2), and five years later by a deed dated August 6, 1886 (D 6), the endowment of the *madam* was increased by the addition of another field of the extent of 31½ lachams. All these deeds gave the most specific directions for the maintenance and proper execution of the charity. No question arises with regard to the last mentioned deed, as none of the donor's heirs has made any attempt to appropriate this property. The garden on which the *madam* was situated was bought by Visuvanather before his marriage. The field of 92 lachams, however, was bought after the marriage, and was, consequently, part of the *thediathetam*.

The *madam* was duly established, and during Visuvanather's lifetime and for some short time after his death, the prescribed rites were performed and the prescribed charities were attended to. Persons were initiated into the Saivite religion in the *madam* and a free school was also established in connection with it. Very shortly after the death of Visuvanather, however, his two brothers—Arunachalam and Muttucumaru—together with the children of a deceased brother, Sinnetamby, deliberately set themselves fraudulently to appropriate the greater part of the endowments of the *madam*. Suppramaniam, another brother of Visuvanather, who he had appointed co-trustee, was an honest man, and took no part in this conspiracy. Its discreditable character is aggravated

by the fact that before his death, which took place in 1888, Visuvanather and his wife executed a joint will (D 8), in which the *madam* and the lands dedicated in connection with it were expressly referred to and excluded from the dispositions made by the will. Muttucumaru, one of the brothers, was made executor of the will, and the other brother must have been acquainted with its contents.

It will be convenient at this point to state the legal position at the death of Visuvanather. The deeds of dedication were, unfortunately, none of them registered and they had a further unfortunate feature, they merely dedicated the lands, they do not transfer any title to Suppramaniam who was appointed co-trustee with the donors. It was doubtless supposed that by the mere dedication and by the appointment of Suppramaniam as co-trustee, title passed to him and would devolve from time to time on the various trustees successively appointed. This, of course, is a mistake, though a mistake that is often made. The title remained after the dedication in Visuvanather and his wife subject to the trust. In order to vest Suppramaniam and the other trustees with the legal title, notarial transfers were necessary, and the successive trustees were at all times entitled to call for these transfers. Consequently, on the death of Visuvanather, the legal title to his interest in these properties, which had been excluded from the will, passed to his heirs, subject in all cases to the obligations of the trust and in particular to the obligation to transfer the legal title to the trustees for the time being. For this purpose the heirs were constructive trustees of the charity.

Who then were the heirs of the properties in respect of which Visuvanather thus died intestate? The heirs with respect to the garden on which the *madam* was situated were his brothers—Suppramaniam, Arunachalam, and Muttucumaru—and Arumugam and Ponniah, the son of his deceased brother Sinnetamby. With regard to the field of 92 lachams, as this was part of the *thediathetam*, and as his wife survived him only half of this field passed to the brothers and nephews above-mentioned, the remaining half being still vested in Visuvanather's wife, Kathiresapillai.

As I have said, on Visuvanather's death, an attempt was made to despoil the charity, and it is claimed on behalf of those who made this attempt that they have successfully carried it through, and that they have acquired by prescription a title to the property so appropriated.

The case, as a matter of fact, does not turn upon this question of prescription which only arises incidentally. But it may be convenient at this point to recapitulate the law as to the acquisition of trust property by prescription. The law is, of course, now regulated by our Trusts Ordinance (No. 9 of 1917), section 3. But it seems clear that if a prescriptive title had been acquired before the

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enactment of that Ordinance in 1917, it could not be affected by the provisions of that section. We must, therefore, inquire what was the law of the Colony upon the subject before the enactment of the Trusts Ordinance.

The English law of Trusts was long ago received into the law of this country. (See *Marshall's judgments, p. 523,* and *Ibrahim v. Oriental Banking Corporation.*[1]) One of the principles of that system of law is that for certain purposes it does not allow a trustee to set up the Statute of Limitations against a *cestui que trust,* or any one claiming on his behalf. The same principle has been applied in Ceylon with reference to our own Prescription Ordinance. (See *Antho Pulle v. Christoffel Pulle.*[2]) The English principle that time was no bar to an action on a trust applied only to express trusts. But the doctrine was extended to certain cases of constructive trusts which for the purpose were by the law of England put upon the same footing as express trusts. The law on this subject will be found expounded in the judgment of Bowen L.J. in the leading case of *Soar v. Ashwell.*[3] It was clearly with reference to that case, and in order to give effect to the principles there expounded, that sub-section (5) was inserted in section 3 of our own Trusts Ordinance (No. 9 of 1917).

It will not be necessary to determine whether the present case (in which constructive trustees have fraudulently appropriated trust property as their own) comes within any of the categories enumerated by Bowen L.J. as cases to which the doctrine applies, because there is another principle of the English law of Trusts which is of itself effective for the purpose of disposing of the plea of prescription. It is that no length of possession avails against a charitable trust, where it is sought to recover trust property taken with knowledge of the trust. In the case of *Attorney-General v. Christ's Hospital* (*supra*) the principle was asserted against a corporation after the lapse of over 150 years. It is quite true that the principle has been seriously trenched upon in English law by the operation of sections 24 and 25 of 3 & 4 William IV., c. 27, which, after some conflict of judicial opinion, was held to apply to charitable trusts. (See *St. Mary Magdalen, Oxford, v. Attorney-General.*[4]) But it is the general principles of the English law which apply in Ceylon and not their statutory modifications. Section 3 (1) (c) of our Trusts Ordinance thus appears to make no change in the law. The suggestion, therefore, that Muttucumaru, Arunachalam, and their nephews, and those claiming through them, have destroyed or impaired this charitable trust by prescription need not further concern us. As above observed, however, it is not upon this question that the case really turns.

[1] *(1874) 3 N. L. R. 148.*
[2] *(1889) 1 N. L. R. 398.*
[3] *(1893) 2 Q. B. 390.*
[4] *(1857) 6 H. L. 189.*

The attempt to despoil the charity commenced almost immediately after the death of Visuvanather. In 1889 Suppramaniam, the trustee and only honest brother, took criminal proceedings in the Police Court against Arunachalam and the others to protect the trust property, but though he succeeded in the Police Court he was referred by the Supreme Court to his civil remedy. Four years later, those attacking the trust took another step. A daughter of Muttucumaru, Valliamma, was to be married to one Kovindar Sinnetamby who resided at Pussellawa. Arumugam and Muttucumaru then concerted the following scheme. Muttucumaru by a deed of September 18, 1893 (P 2), purported to convey by way of dowry to his daughter one-fourth of the garden on which the *madam* was situated and one-third of the field of 92 lachams. On the same day Arunachalam executed an *otty* mortgage in favour of Kovindar Sinnetamby, also purporting to deal with one-fourth of the garden and one-third of the field. The consideration for the mortgage was recited to be an old debt and a further advance. Almost immediately afterwards, that is, on September 16, 1893, by what the learned District Judge describes as " a most ingenious step," Kovindar Sinnetamby and his wife leased both the dowry and the *otty* shares to Thamotherampillai, son of Arunachalam. All these deeds were duly registered.

The fraudulent and dishonest character of this dowry deed and this mortgage, so far as Muttucumaru and Arunachalam are concerned at any rate, are apparent. Both of them must have known all about the trust, particularly Muttucumaru who was the executor of his father's will. The fact that the deeds were executed on the same day shows that the arrangement was a concerted one. Both brothers must have known that quite apart from the trust they had not the legal title to one-third of the field of 92 lachams. To begin with, Kathiresapillai, the wife of Visuvanather, was still alive, and thus had the legal title to half. In the second place, whatever legal title they may have had, Suppramaniam, the trustee, was on the same footing as themselves. In appropriating the dedicated properties they thus appear to have deliberately ignored the title of both Kathiresapillai and Suppramaniam. The only explanation which appears to be put forward for this extraordinary step is the peculiar one, that as Suppramaniam was faithful to the trust, and as Muttucumaru and Arunachalam and presumably the children of Sinnetamby were unfaithful to it, Suppramaniam had forfeited all his rights to a share in the legal title.

The learned District Judge, with regard to these transactions, very truly observes that Muttucumaru and Arunachalam " had set to work to manufacture deeds and other documents in order to obtain possession of the lands." Indeed, so soon as the following year the real object of the transactions became apparent, namely, that the brothers might arm themselves with documents to repel

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any further assaults from the trustee, Suppramaniam. In 1894 Suppramaniam renewed the attack in the Police Court (see P 4), including Kovindar Sinnetamby among the persons accused. Thamotherampillai, Kovindar Sinnetamby, Arunachalam, and Muttucumaru then came forward and made formal statements. Thamotherampillai said he had taken the lands on lease from Kovindar Sinnetamby; Kovindar Sinnetamby put forward the dowry deed and the *otty* mortgage and referred to the previous case of 1889. Muttucumaru actually declared that the field originally belonged to his parents, that he inherited it as *mudusem* property. He further declared that he had solemnly put Kovindar Sinnetamby in possession, that he had given him the key, and that he had put him in possession of the house itself. As a result Suppramaniam was again referred to his civil remedy.

To continue the story of this property, in 1901 Suppramaniam, apparently despairing of further protecting the trust, retired to his village, and appointed two new trustees in his place (D 3). He recites the deplorable position of the trust, and specially charges one of the trustees with the duty of bringing it to order.

In 1908 there was a peculiar incident. Thamotherampillai who was the only heir of Kathiresapillai, widow of Visuvanather, brought an action against the other members of the family claiming that half of the dedicated properties belonged to himself. They claimed to have acquired title against him by long possession. The District Judge said that there was " abundant evidence showing that the three brothers—Arunachalam, Muttucumaru, and Sinnetamby—had been in possession and dealing with the whole land of 92½ lachams as their common property." In this case Thamotherampillai, who it will be remembered had taken a lease from Kovindar Sinnetamby, boldly denied this transaction, and said that the lease bond was a forgery. Neither the Judge nor anyone, in this civil action, seemed to have thought it necessary to have made inquiries as to the original trust, although the trust is incidentally referred to.

The next development is that in the year 1909 (the learned Judge says 1902, but I do not understand on what authority) the children of the deceased brother, Sinnetamby, having, as the District Judge says: " probably taking the cue from Arunachalam and Muttucumaru " themselves, began to manufacture deeds to demonstrate their ownership in the property. Their share is made to pass in a circuitous course from hand to hand among the members of the family. As the District Judge says there are " any number of documents all made with the one object, namely, to get a firm title to the property that Visuvanather and his wife had donated to the *Vellikkilamai madam* in 1881."

Kovindar Sinnetamby and his wife left Pussellawa and went to live in the Federated Malay States, where they died, leaving as their only heir a daughter, Chellachchi, who is the 2nd petitioner

in this case, and who married A. Suppramaniam, the first petitioner. In 1911 petitioners appointed an attorney to represent their interests, and in 1917 they put the *otty* bond in suit and obtained judgment. At the sale in execution of the judgment, Chellachchi, the heir of the deceased mortgagee (according to the petition of appeal), herself purchased the share which was the subject of the mortgage action. There is some confusion as to who was the actual purchaser, as in the petition it is stated that both she and her husband sued on the mortgage bond and became the purchasers, while in the Fiscal's conveyance (P 20) it is stated that the highest bidder was Changarapillai Ampalavanar, the attorney of the husband of the first petitioner. The amount realized by the sale was less than the mortgage debt. In pursuance of the sale the petitioners obtained a writ of possession, and upon the Fiscal's officer going to the land to put them in possession, the defendants-respondents set up a claim to the land, and that claim was investigated in the proceedings under appeal in pursuance of sections 325 and 327 (*b*) of the Civil Procedure Code.

The claim was made in the interests of the trust, and the persons setting it up were the first and second defendants-respondents. The first respondent was one of the original officiating priests appointed by Visuvanather, and the second respondent who was a son of another of these priests and had succeeded to his father's office, and the third respondent, a son of Thamotherampillai, who, at the time of the institution of the proceedings, claimed to be in possession of the *madam* on behalf of one of the trustees of the trust, Tiruchittampalam, and who since the institution of the proceedings has himself been appointed a trustee.

The claim which the petitioners make under the purchase is to the share set out in the *otty* deed, namely, one-fourth of the garden and one-third of the field of 92 lachams. As I have above explained, Arunachalam had not even a bare legal title to one-third of the field at the time of the mortgage. He had a legal title to only one-eighth, that is to say, a half share was still vested in Kathirasapillai, and he, Muttucumaru, Suppramaniam, and the children of Sinnetamby were each legally entitled to one-fourth of the remaining half, that is to say, one-eighth each. Therefore, he was not competent in any view of the facts to mortgage more than this one-eighth. It is contended on behalf of the petitioners that by long possession this title to one-eighth had been enlarged into a title to one-third, but as I have already pointed out it is not possible for a person who occupies a property comprised in a charitable trust with notice of the trust to acquire title by prescription against the trust. It is not possible, therefore, for Kovindar Sinnetamby or his heirs to enlarge any rights they may have under the mortgage deed by prescription at the expense of the trust.

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There remain, therefore, two questions for consideration. The first is this : Did Kovindar Sinnetamby by taking the mortgage of the year 1893 from Arunachalam and by registering the deed obtain priority as against the deeds of trust to the extent of the title which was vested in his mortgagor at the date of the mortgage, or was he precluded from obtaining that priority through fraud or collusion in obtaining the deed ? The second question is this : Assuming that the mortgage deed was tainted with fraud or collusion, and that priority could not be claimed in respect of it, are the petitioners, as against the trust deeds, entitled to rely upon the Fiscal's transfer as parties claiming an adverse interest on valuable consideration by virtue of a subsequent deed."

With regard to the first of these questions, the learned Judge has made no express finding. He was satisfied with a solution of his own which was unfortunately erroneous. In perusing the pages of the Legislative Enactments dealing with land registration, his eye seems to have caught section 48 of Ordinance No. 5 of 1877, and he appears by mistake to have treated this, as though it was a section of the Land Registration Ordinance of 1891. He considered, therefore, that those interested in the trust, as a section of the public, were protected by that section. This is clearly erroneous, and the section cited even though it could be so interpreted has nothing to do with this subject. Being satisfied with this solution, the learned District Judge made no finding on the question of fraud or collusion, but he, nevertheless, clearly indicated what his opinion was. In more than one place in his judgment he refers to the deeds of 1893 as mere manipulations for the purpose of creating an ostensible title; and he clearly believes that Kovindar Sinnetamby was party to these collusive transactions, for he describes his lease to Thamotherampillai " as a most ingenious step." Further, he obviously regards with the utmost suspicion the evidence of the alleged leases made by Kovindar Sinnetamby.

It is, of course, necessary to prove that Kovindar Sinnetamby was a party to this transaction. It is not sufficient to prove that Arunachalam and Muttucumaru were actuated by a fraudulent motive, nor would it be sufficient to hold merely that Kovindar Sinnetamby must have been acquainted with the trust. Mere knowledge of the competing instrument is not sufficient. He was legally entitled even though he knew that there was an unregistered trust affecting lands claimed by the family into which he was marrying to take a mortgage over a share of that land and to register it, if he could do so, in advance of the trust deed. If, however, this was a family conspiracy and he became a party to that conspiracy ; if there was that laying of heads together, which is referred to in one of the previous cases, and Kovindar Sinnetamby was one of the persons who took part in it, then he could not claim priority for his mortgage. Personally, I find very great difficulty in

seeing how Kovindar Sinnetamby could have failed to be a party to this arrangement. He could not have honestly believed that the family into which he was marrying had any sort of honest claim to the land. Kathiresapillai, one of the original donors, was still alive. Four years before, the deceased Suppramaniam had asserted the rights of the trust, and the most elementary inquiries would have disclosed to him the will of Visuvanather. The very fact that Suppramaniam was impliedly excluded from the share in the property must have disclosed to him what was going on. I do not believe that he would have made any further advance on such a security, and further his going into Court a year later and solemnly reciting a bogus transaction as though it took place, in pursuance of a genuine chain of title, seems to me to point very strongly to his being implicated in the fraud. As, however, I think it desirable that the second point above referred to should receive further discussion, I think it would be best to leave open the question of fact with regard to the first point.

With regard to the second point, it seems to me a question of some difficulty. Assuming that the purchaser at the Fiscal's sale was Chellachchi, the heir of Kovindar Sinnetamby, can it be said that she paid valuable consideration for property transferred to her under these circumstances. The purchase was in liquidation of the mortgage decree and no money actually passed, and if the transaction of 1893 was a bogus transaction, it is a question whether there was any actual debt to support the decree. The determination of this question may depend upon the view taken of the facts of the case, and as the question does not appear to have arisen before and is of some importance, I think it is desirable that any further discussion, both of this question and of the connected question of fraud and collusion, should be referred for further argument before a Court of three Judges.

PORTER J.—I agree.

The case was duly listed for argument before a Court of three Judges consisting of Bertram C.J. and Porter and Schneider JJ.

E. W. Jayawardene (with him *Spencer Rajaratnam*), for plaintiffs, appellants.—Section 16 of Ordinance No. 14 of 1891 clearly applies to the trust deeds, and they must, therefore, be registered. Unless Sinnetamby was guilty of collusion in obtaining the deed in his favour, the deed is good. Mere knowledge of the existence of the trust deed after he had got the mortgage bond will not make his mortgage a fraudulent transaction. Nor will Sinnetamby be guilty of fraud in securing prior registration, unless it is shown that he actively prevented the registration of the trust deed before his deed

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(*Aserappa v. Weeratunga*[1] and *Brown v. Vinasitamby*[2]). The evidence shows that no attempt was made at any time to have the trust deed registered.

Issue of fraud must be specifically raised and proved. "Defendant could not be allowed in special appeal to object that the Lower Court had not determined the *bona fides* of plaintiff's purchase unless he (defendant) had not only alleged fraud, but shown the way in which the fraud was intended to be carried out." (*Sett v. Burmono*[3] and *Gupta v. Chowdhry.*[4]) In this case the issue of fraud has been of set purpose abandoned. The Appeal Court should not try issues raised for the first time in appeal, unless all the evidence is before the Court (*Manian v. Sanmugam*[5]).

Even assuming that the deed in Sinnetamby's favour is tainted with fraud, the appellants are not affected by it. They are the purchasers at a Fiscal's sale for valuable consideration and have obtained a conveyance from the Fiscal. The deed of conveyance is good till it is set aside on the ground of fraud or want of consideration in a properly constituted action.

A. St. V. Jayawardene, K.C. (with him *Arulanandan*), for defendant, respondent.—The trust deeds need not be registered as they do not transfer any property, but merely create a trust. Section 16 of the Registration Ordinance, No. 14 of 1891, is taken *verbatim* from Ordinance No. 7 of 1840, section 2. These deeds which merely declare a trust do not come under the latter section. They need not be notariably executed, as that section does not refer to a declaration of trust which is only a unilateral contract. Under these deeds the trustees do not get any interest beneficiary or otherwise.

[Bertram C.J.—"A declaration of trust is the exact opposite of any conveyance or transfer of the property. It imposes the trust without any conveyance upon the person who holds it." *Per Lord Buckmaster in O'Meara v. Bennett.*[6]]

The real transaction between the parties shows that Sinnetamby must have been aware of the trust at the time he got the mortgage. The present appellants who are heirs of Sinnetamby are on the same footing, and are subject to the same equities as Sinnetamby. They cannot acquire a title superior to that which Sinnetamby had. If the appellants had been innocent purchasers for value they would get a clear title. At the Fiscal's sale no money was paid, but appellant was given credit to the extent of his judgment. Counsel cited *Mutturaman v. Masilamany;*[7] *Silva v. Goonewardene;*[8] *Jaya on Regn., pp. 100–103;* and *Bhat v. Bhat.*[9] "Fraud is not a

[1] (*1911*) *14 N. L. R. 417.*
[2] (*1905*) *4 Tam. 147.*
[3] (*1868*) *10 W. R. 231.*
[4] (*1888*) *I. L. R. 15 Cal. p. 533 at p. 537.*
[5] (*1920*) *22 N. L. R. 249 at p. 251.*
[6] (*1921*) *1 A. C. H. L. p. 80 at p. 85.*
[7] (*1913*) *16 N. L. R. 289.*
[8] (*1915*) *18 N. L. R. 241.*
[9] (*1879*) *I. L. R. 3 Bom. 30 at p. 33.*

thing that can stand even when robed in a judgment" (*Black on Judgments, vol. I., paragraphs 292–293.*)

E. W. Jayawardene, in reply.—The attestation by the notary in the mortgage bond shows that Rs. 730 in cash passed before him as part consideration. Fraud is not even alleged in the course of the proceedings. Ordinance No. 9 of 1917, section 5, declares that trusts affecting immovable property shall be notarially executed.

[BERTRAM C.J.—A deed merely constituting an interest in land does not necessarily require registration.]

All trust deeds will be in this form unless *cestui que trusts* are clearly defined. There has been a sufficient acceptance by Suppramaniam on behalf of *cestui que trusts*. Assignment of an interest comes under section 2 of Ordinance No. 7 of 1840. Fraud does not vitiate a judgment (*Madar Saibo v. Sirajudeen*[1]). Under Roman-Dutch law a fraudulent deed is valid until it is cancelled.

The appellants are not mere volunteers, but purchasers for value, *i.e.*, their judgment.

Cur. adv. vult.

June 2, 1922. BERTRAM C.J.—

The questions for the consideration of the Full Court in this case and the facts relating to them are set out in the previous judgment of myself and my brother Porter. They were, firstly, whether the mortgage of 1893 obtained priority by registration over the unregistered declaration of trust of 1881? And secondly, whether, assuming that this priority was not established, it could be claimed by virtue of the registration of the Fiscal's transfer twenty-five years later?

It was assumed in submitting these questions that the declaration of trust is a document requiring registration. Mr. A. St. V. Jayawardene, however, who appeared for the first time before the Full Court, has raised the contention that a declaration of trust does not require registration, and that, consequently, declarations of trusts are not documents which are liable to be defeated by the prior registration of a subsequent competing instrument. This question is so fundamental to the first question reserved that, though not expressly propounded, it must be taken into consideration.

The contention appears to me well founded. The two documents creating the trust, namely, P 1 and P 2 (we need not consider P 3 for present purposes) are both simple declarations of trusts. They transfer no title, and, so far as the creation of the trust is concerned, are unilateral instruments. As was said, in a recent case in the Privy Council (*O'Meara v. Bennett*[2]). "A declaration of trust is the exact opposite of any conveyance or transfer of the property. It imposes the trust without any conveyance upon the person who holds it." Now, singular as it may seem, though a declaration of trust

[1] *(1913) 17 N. L. R. 97.*

[2] *(1922) A. C. on p. 85.*

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constitutes an interest affecting the land to which it relates, and though it would seem most desirable that a document creating such an interest should be registered, it does not come within the terms of the enactment requiring registration of documents, namely, section 16 of Ordinance No. 14 of 1891. Mr. Jayawardene appears to be right in contending that the object of that section was to impose the necessity of registration upon all documents which were required to be notarially executed by section 2 of Ordinance No. 7 of 1840. A comparison of these two sections is of assistance in determining the construction of the former. The documents which are required to be registered on pain of losing priority will be best appreciated if set out in the following form :—

Every deed or other instrument—

(*a*) Of sale, purchase, transfer, or assignment ;

(*b*) Of mortgage : Of any land or other immovable property ;

(*c*) Of promise, bargain, contract, or agreement—

(1) For effecting any such object, or

(2) For establishing or transferring any security, interest, or encumbrance affecting land or other immovable property;

(*d*) Of contract or agreement for the future sale or purchase or transfer of any such land or property.

If the above arrangement of the words of the section be examined, it will be found that the documents in question do not come under any of these heads. They undoubtedly establish an interest affecting land, but they are not deeds of promise, bargain, contract, or agreement for that purpose. In other words, it is only where a trust of immovable property is established by a document *inter partes* that this document must be registered in order to secure priority.

Mr. E. W. Jayawardene sought to escape from this position by pointing out that the first of these documents was executed by the trustee, Suppramaniam. I do not think, however, that this execution by Suppramaniam meets the case. Suppramaniam merely executed the document to show that he consented to act as trustee. No interest in the property was actually conferred upon him. This acceptance of the office of trustee might have been embodied in an entirely separate instrument. It did not make him a party to any promise, bargain, contract, or agreement for the purpose of establishing the trust. The trust was established simply by the words of dedication. Suppramaniam was, in any case, not a party to the second document which relates to the field of 92 lachams. Mr. E. W. Jayawardene suggested that the use of the word " grant " " we have granted this charity " indicated that here an interest must be presumed to have passed to somebody. But here the word

translated "granted" must, I think, simply have meant "dedicated." A similar phrase was used in the document considered in the case of *O'Meara v. Bennett* (*supra*) above cited, but it was held nevertheless, that no interest was transferred.

The result appears to be that we have now to consider this question entirely independently of the question of priority of registration. We are not thereby altogether emancipated from considering the question of fact. Arunasalam, the legal owner of one-fourth of the garden and of one-eighth of the field by the mortgage deed of 1893, purported to transfer an interest in the property to Kovindar Sinnetamby. Kovindar Sinnetamby if he had notice, either actual or constructive, of the trust would be bound by it. If he advanced his money in good faith without notice of the trust, he would not be so bound (see section 66 of the Trusts Ordinance, No. 9 of 1917, the principle of which presumably would apply to persons acquiring an interest in property by way of mortgage). The question of fact, therefore, is not precisely the same as that originally contemplated. It is not whether Kovindar Sinnetamby by taking the mortgage was a party to a fraudulent or collusive arrangement, but whether in taking this mortgage he had actual or constructive notice of the trust. In whichever form the question is propounded, in my opinion, it must be answered in the affirmative. The facts set out in my previous judgment convince me that the whole arrangement was a bogus arrangement, and that Sinnetamby was a party to it. That conclusion is intensified by the circumstance to which I had not previously alluded, that the mortgage bond remained unenforced for twenty-five years, and I do not in the least believe the suggestion that this was so, because Sinnetamby and his heir were enjoying the fruits of the property by virtue of continuous leases. It is hardly necessary seriously to consider, therefore, whether Kovindar Sinnetamby had actual or constructive notice of the trust. The most elementary inquiries would have put him on the track of Visuvanather's will and the deeds of trust.

Mr. E. W. Jayawardene urged that the issue of fraud or collusion was never definitely raised in the Court below, and that under these circumstances we ought not to base our judgment in this Court on a finding of fraud or collusion. All the facts, however, were fully before the Court below. I do not think that any further facts could have been adduced on either side if the issue had been expressly raised, and it would be futile to refer the matter to the District Judge for a considered opinion as he has so plainly hinted what his opinion is. Inasmuch, however, as what we have now to consider is not the question of fraud, but the question of constructive notice, we need not concern ourselves with this aspect of the case.

We are equally relieved from the necessity of giving an opinion on the most difficult question in the whole case, namely, the second question referred to the Full Court. As, however, the question has

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been formally referred and has been fully discussed, I think it would be better that we should express our opinion. The facts briefly stated are these. In 1893 Kovindar Sinnetamby took from Arunasalam what, for the consideration of this question, must be taken to have been a fraudulent or collusive mortgage deed. Twenty-five years later his heir, to whom his interest under the deed has passed, put the mortgage deed in suit, recovered judgment, bought in the property at the Fiscal's sale, obtained a Fiscal's transfer, and duly registered it. Did he, by the registration of this transfer, obtain priority over the deed of trust which it was the object of the original fraudulent mortgage to defeat? We have not here to consider the general principle of the law relating to fraud. We have to interpret the words of a particular statutory enactment, namely, section 17 of Ordinance No. 14 of 1981. There are two points which arise on the interpretation of that section. The first is, by virtue of what deed are the petitioners really claiming an interest adverse to the trust? In a previous case in which a question somewhat akin to this arose, namely, *Ferdinando v. Ferdinando*[1] there are certain observations of my own which seem to suggest that where there is a series of deeds each dependent upon the other and each registered, the fact of fraud or collusion in one of them would destroy the priority which might otherwise be claimed on behalf of the subsequent deeds by virtue of registration. I think it must be admitted that those observations require qualification. A party claiming the benefit of prior registration can ordinarily rely on any one of the deeds in such a series. As a matter of fact, in the case in question, the District Judge found as a fact that both the successive deeds were collusive, and this Court would, I have no doubt, have so held if it had expressed its opinion.

But this principle, I think only applies to successive deeds which are, in fact, independent transactions. A mortgage deed, a sale to the mortgagee in execution of that mortgage, and a Fiscal's transfer in pursuance of that sale are circumstances so closely connected that it would be extraordinary if fraud in the first should be held not to affect the last for the purpose of priority. If Kovindar Sinnetamby immediately on obtaining the mortgage had put it in suit, bought in the property, and obtained a Fiscal's transfer, this would, I think, have seemed incontestable. The position is not really affected by the two circumstances that Sinnetamby's interest in the mortgage has passed to his heir, and that twenty-five years have elapsed between the date of the mortgage and its enforcement. There is a previous decison of this Court in which the relation between a mortgage and a Fiscal's transfer is commented upon. (See *Mutturaman v. Masilamany* (*supra*).) Lascelles C.J. there said: "What is the registered deed by virtue of which an interest adverse to the lease is claimed? Surely, it is the mortgage bond, and not the

[1] (*1921*) *23 N. L. R. 143.* [2] (*1913*) *16 N. L. R. 289.*

Fiscal's transfer. Taking the transactions in chronological order, it is clear that as soon as the mortgage bond was executed and registered, an interest adverse to the lessee was claimable under that. The subsequent sale and conveyance by the Fiscal are merely stages in the procedure by which the mortgagee is allowed by law to realize his interest under the mortgage bond." In such a case as the present, I think it may well be held that the deed by virtue of which the petitioners actually claim the adverse interest is the mortgage bond and not the Fiscal's transfer, and that, therefore, the registration of the Fiscal's transfer would not avail them.

There is, however, another point on the interpretation of this section. Was the Fiscal's transfer given for valuable consideration? As between the parties to the suit it might well be argued that this was the case. The obligation of Arunasalam on the mortgage deed had been reduced to a judgment, and the judgment was enforceable against him. The plaintiffs in obtaining the Fiscal's transfer gave credit for a proportion of the judgment debt. They thus relinquished a legally enforceable debt, and this it may be said was valuable consideration. But the person affected by the priority thus claimed would be entitled to show the real nature of the transaction. If the mortgage was a bogus debt, the judgment to which it was reduced was infected by the same vice. If there was no real debt to support the mortgage, there would be equally no real debt to support the judgment. It would be competent to those supporting the trust to go behind the judgment and show that it really represented a collusive debt, and that, consequently, there was no genuine valuable consideration for the transfer. As was said in a work cited by Mr. Jayawardene (*Black on Judgments, vol. I., paragraphs 292-293*): "Fraud is not a thing that can stand even when robed in a judgment."

I have considered this question simply from the point of view of the interpretation of section 17 of Ordinance No. 14 of 1891. It is satisfactory to find that the conclusions arrived at are in harmony with the general principles of the law relating to fraud which are expressed in the judgment of my brother Schneider. I would, therefore, dismiss the appeal, with costs.

There are two questions which I should like to bring to the notice of those interested in these trusts. The first is that under present circumstances the trust property is not properly vested. The third respondent has, no doubt, since the institution of these proceedings been appointed a trustee in pursuance of the instrument of trust (see D 4). That appointment took place since the enactment of the Trusts Ordinance (No. 9 of 1917), and, consequently, no doubt section 75 would be held to apply. The document was notarially executed, and it would appear that under section 77 on the appointment of the third respondent as a new trustee by a notarial instrument, in pursuance of the instrument of trust, all the trust property

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for the time being vested in the continuing trustee became vested in the new trustee jointly with the continuing trustee. Unfortunately, it does not appear that the trust property was ever vested in the continuing trustee or in any of the previous trustees. It may well be considered if this is not a case in which it is uncertain in whom the title to the trust property is vested, and whether, therefore, application might not be made for a vesting order under section 112 of the Trusts Ordinance.

There is a further point. It has been suggested in the course of the argument that some of those who now purport to uphold the trust are doing so with a view to their own advantage and with the hope of using the revenues of the property for their own purposes. It is further said that owing to local developments the charity requires reconstitution and adaptation. With a view to making such reproaches impossible, and with a view to the adaptation of the charity, if any such adaptation is necessary, it may be worth while to consider whether an application should not be made to the Court under section 102, and whether a scheme should not be drawn up under which there should be some regular system of accounting for the revenues of the charity and a verification of accounts. Any scheme authorized under this section could provide for the necessary adaptation of the charity, could put it on a regular footing, and could provide for its future management. The vesting order under section 112 might possibly be made as part of the general relief authorized under paragraph (*j*) of section 102.

PORTER J.—

This appeal was argued before Bertram C.J. and myself on March 20, 1922, and for reasons fully set out in the judgment of Bertram C.J., the appeal was referred to a Full Bench. At that time it has been assumed that the documents D 1 and D 2, which are the documents which create the trust, were such instruments as required registration under the Land Registration Ordinance of 1891. There was, in fact, no suggestion to the contrary throughout the appeal before Bertram C.J. and myself. On this assumption it was argued that although D 1 and D 2 were of earlier date than the mortgage deed of 1893 they had lost their priority by reason of lack of registration over the mortgage deed of 1893, which had been registered.

On the hearing of the appeal before the Full Bench, Mr. A. St. V. Jayawardene has submitted that documents D 1 and D 2 are not documents which require registration.

The submission is I think a sound one, and goes to the root of this action. D 1 and D 2 certainly do establish an interest affecting land, but they are not "deeds of promise, bargain, contract, or agreement for that purpose." They are merely unilateral agreements. It has been contended that D 1 was executed by the first

trustee Suppramaniam. I do not think that this is so. He appears to have merely signified his willingness to act as a trustee.

The question, therefore, as to fraud and collusion does not arise. I do not consider it necessary, in view of the comprehensive manner with which Bertram C.J. has examined and dealt with the question, to do more than to say that I agree with him on this question.

I would, therefore, dismiss this appeal, with costs.

SCHNEIDER J.—

The argument before us resolved itself into two broad questions which I would state to be :—

1. Are the documents D 1 and D 2, which create the trust, instruments which must be registered under the provisions of section 16 of " The Land Registration Ordinance, 1891 " (No. 14 of 1891).

2. If they are such instruments, does the priority claimed by reason of the registration of the *otty* bond P 1 and of the Fiscal's transfers P 20 and P 21 not come into existence for want of " valuable consideration," or is it defeated by the existence of " fraud or collusion " (section 17, No. 14 of 1891). It is evident that if the first of these questions be decided in the negative, the second need not be considered. By the close of the argument we were agreed that it should be held in regard to the first question that D 1 and D 2 are not instruments which are required to be registered. Those documents are the oldest in point of time of all the documents which are in competition. They must, therefore, prevail upon the maxim " *qui prior est tempore potior est jure* " to the extent of impressing the trust upon the lands in dispute. Upon this question and aspect of the case I feel I need say no more than that I have had the advantage of perusing the judgment of my Lord the Chief Justice, and that I agree, not only with his holding, but also with the reasons given by him.

But although there is no real necessity to consider the second question for the purpose of deciding the appeal, yet, in view of the fact that the matters involved in it were argued at great length, I would express my opinion in respect of those matters, but not at any length.

The several matters raised by the second question were formulated into two questions by my Lord the Chief Justice in his earlier judgment. I will adopt the questions as formulated by him with a small addition to cover the further ground which has been opened by the turn which the appeal took in argument before the Full Bench. The two questions are : (1) Did Kovindar Sinnetamby by taking the mortgage of the year 1893 from Arunasalam and by registering the deed obtain priority as against the deeds of trust to the extent of the title which was vested in the mortgagor at the date

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of the mortgage as being a party claiming an adverse interest on valuable consideration, or, if he was such a party, was he precluded from obtaining that priority through fraud or collusion in obtaining the deed; (2) assuming that the mortgage deed was tainted with fraud or collusion, and that there was no valuable consideration for it given by Kovindar Sinnetamby, so that priority could not be claimed by him in respect of it, are the petitioners as against the trust deeds entitled to rely upon the Fiscal's transfers as parties claiming an adverse interest on valuable consideration by virtue of a subsequent deed and as parties untouched by the fraud and collusion of Kovindar Sinnetamby.

The first of these questions is a pure question of fact. To my mind it presents no difficulty. The evidence, in the view I take of it, points just as unmistakably to the fact that Kovindar Sinnetamby participated in the fraud of Arunasalam and Muttucumaru and the children of Sinnetamby who had predeceased Visuvanather, as it leads one to the inevitable conclusion that shortly after the death of Visuvanather, Arunasalam, Muttucumaru, and the children of Sinnetamby entered into a conspiracy to defeat the trust created by Visuvanather. The opinion of the learned District Judge, who has had large judicial experience of the people of the Jaffna District to which the parties in this case belong, and also the opinion of the Chief Justice in both his judgments upon the evidence on record, are to the effect that Kovindar Sinnetamby, in accepting the *otty* bond P 1, acted in collusion with Arunasalam and Muttucumaru in the fraud they were then engaged in to defeat the object of the trust and to establish a claim to the trust property. But the Chief Justice in his earlier judgment stated that he would leave open for the consideration of the Full Bench the question of the fact whether Kovindar Sinnetamby was implicated in the fraud. The observations of the Chief Justice in his earlier judgment, and the effect of the learned District Judge's judgment, afford to my mind good reasons for the conclusion that Kovindar Sinnetamby must be regarded as having become a party to the fraud in which his father-in-law to be, and the brother of that father-in-law were engaged in at the time of the execution of the *otty* bond P 1. There seems to me one reason which I might characterize as conclusive on this point, and, that is, that in the state of facts as they existed at the date of the execution of the *otty* bond, it was not possible for Kovindar Sinnetamby to be ignorant of the true history of the lands now in dispute. The dedication of these lands for the charities he intended was effected by Visuvanather in 1881. He died in 1887 or six years after that dedication. It is proved that in the lifetime of the donor, Visuvanather, the buildings necessary for the use of the garden of 11½ lachams as a *madam* and temple were in existence. The District Judge finds, as a fact, that so long as Visuvanather was alive, the *madam* and the temple were

maintained in the manner intended by the declaration of trust in D 1, and that the produce of the land of 92 lachams was used for the maintenance of the *madam* as contemplated in the trust deed D 2. On the evidence he holds that certain ceremonies continued to be performed in the temple publicly, and certain people to be feasted in the *madam* even after the death of the donor and despite the interference of his brothers. He holds that Hindus were initiated into the Hindu religion, and children taught free in the *madam* after the death of the donor. He accepts the evidence of a witness who deposes that a free school was held in the *madam* as of right, and as a place to which the public had right of access; that in the gateway at the entrance to the *madam* are to be found even at the present day images of certain deities which are not to be found except at entrances to public places like *madams* or temples. He also accepts the evidence that the garden is known as *Vellikkilamai madam*. The deed D 1 enumerates a number of *pujas* or ceremonies which should be performed in the garden of 11½ lachams. The *madam* which was in the same garden is, as I understand it, a resting and lodging place for pilgrims and religious persons. D 1 directs that rice and other things necessary for a day's meal were to be given to every Brahmin who sought shelter, and all pilgrims from India and all wayfarers who desired to cook their meals and to have a shelter, were to be allowed within the *madam*.

Considering the history of the litigation before the year 1893 when the *otty* bond was executed, in regard to these lands, the fact that the figures on the gateway must arrest the most casual eye and proclaim to every Hindu the character of the land and the buildings on it, that the name by which the land was known left no room for mistake as to its character, that the uses to which it was put publicly were such as could not but be seen by all people, and could not but convey the fact that the land was subject to a trust; taking all these facts, together with the circumstances immediately connected with the execution of the *otty* bond, it is almost impossible to accept the position that Kovindar Sinnetamby was unaware of the existence of the trust, or that he was not a participator by the very acceptance of the *otty* bond in the conspiracy to defeat the trust. Nor is it possible upon these facts to believe that he paid any "valuable consideration" for that deed.

I would, therefore, hold that the *otty* bond was tainted with fraud and executed with the object of furthering the fraud to which Arunasalam and Muttucumaru and Kovindar Sinnetamby were parties with others. I would also hold upon the evidence that Kovinder Sinnetamby had actual notice of the trust before and at the time he accepted the *otty* bond, and that he paid no consideration whatever for that deed.

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I shall now proceed to consider the second question, viz., whether upon the assumption that the *otty* bond was fraudulent and collusive, and without valuable consideration on the part of Kovindar Sinnetamby, the petitioners are precluded from claiming priority as against the trust deeds upon the Fiscal's transfers as being " parties claiming an adverse interest on valuable consideration by virtue of a subsequent deed and who are not guilty of any fraud or collusion " within the meaning of section 17 of Ordinance No. 14 of 1891. What are the facts upon which the decision of this question rests ? In 1893 Kovindar Sinnetamby accepted the *otty* deed P 1 in furtherance of a fraud. He paid no consideration for it. He dies intestate, and by operation of the law of intestate succession his heir succeeded to his rights under that bond. That heir and her husband put the bond in suit about twenty-five years after its execution, obtained a decree, and at the sale in execution purchased the lands mortgaged, and obtained the Fiscal's transfers P 20 and P 21. Two distinct points arise upon these facts : (1) Is the fraud and collusion of Kovindar Sinnetamby to be imputed to the second petitioner, his heir ; and (2) can that heir be deemed to be a party claiming an adverse interest on valuable consideration.

If the priority was claimed by Kovindar Sinnetamby upon the ground of the prior registration of the *otty* bond, it is quite evident that the claim would have failed for two good reasons—the existence of fraud and collusion and the absence of valuable consideration. Do the events which have happened since his death, and which I have already mentioned, operate to grant a priority to the second petitioner who is the heir of Visuvanather, to which Visuvanather himself was not entitled.

There is no evidence to support a finding that the second petitioner was in any manner a party to the fraud of her father. It must, therefore, be assumed that so far as her own acts are concerned, she is innocent of any fraud. But her innocence does not help her. She is a mere volunteer so far as the devolution of the right under the *otty* deed is concerned, for she acquired those rights by operation of the law of intestate succession, and was therefore not a purchaser for value. This view of the law is expressed by Spencer-Bower in his book on *Actionable Misrepresentation* : " Thus, it is to be observed that, for this purpose, any person to whom property is assigned by operation of law, or by force of some statutory provision, such as a trustee in bankruptcy, is a volunteer and not a purchaser for value, and a representee may exercise as against him any right of avoidance or recission (and thereby recover property otherwise distributable amongst the creditors) which he might have exercised against the bankrupt."

In the same paragraph the same author proceeds to say : " that the property may be taken out of the hands of an assignee who is a mere volunteer, or the recipient of bounty, whether he acted in good

faith and without notice or not, has been established from the earliest times. The rule is forcibly stated in a celebrated case (*c*), where the question arose whether the innocent donees, of portions of the property acquired by imposition could retain what they had been so given, and where Wilmot C.J., one of the Lords Commissioners of the Great Seal, delivered himself thus: 'there is no pretence that Green's brother or his wife was party to an imposition, or had any due or undue influence over the plaintiff; but does it follow from thence that they must keep the money? No; whoever receives it must take it tainted and infected with the undue influence and imposition of the person procuring the gift. His partitioning and cantoning it out amongst his relations and friends will not purify the gift and protect it against the equity of the person imposed upon. Let the hand receiving it be ever so chaste, yet, if it comes through a corrupt, polluted channel, the obligation of restitution will follow it (*d*).' And in numerous subsequent decisions, both of misrepresentation and of undue influence, unconscionable dealing, and non-disclosure, this doctrine, which is common to all cases of imposition and oppression, has been consistently and rigorously applied (*e*)."

So Kerr on *Fraud and Mistake:* "If a transaction has been originally founded on fraud, the original vice will continue to taint it, however long the negotiation may continue, or into whatever ramifications it may extend (*q*). Not only is the person who has committed the fraud precluded from deriving any benefit under it, but an innocent person is so likewise, unless there has been some consideration moving from himself (*r*)."

The same conclusion is arrived at by the reasoning in the Full Bench decision in the case of *James et al. v. Carolis* [1] where Lascelles C.J. held in regard to the competition of deeds executed by "A," and after his death by "A's" heir that the estate of the heir must be regarded as that of his intestate.

The lapse of twenty-five years between the execution of the fraudulent *otty* bond and the date of the action for its realization makes no difference.

To quote, again, from Kerr and the same book: "In equity no length of time will run to protect or screen fraud (*s*). The right of the party defrauded to have the transaction set aside is not affected by lapse of time, so long as he remains, without any fault of his own in ignorance of the fraud which has been committed (*t*)." No question of the limitation of this action by lapse of time arises. The *otty* bond accordingly passed into the possession and ownership of the second petitioner tainted with the fraud attached to it in the hands of Kovindar Sinnetamby and as an instrument not obtained "on valuable consideration." It cannot be successfully contented that the fraud was terminated by the conversion of the rights under

[1] (*1914*) *17 N. L. R. 76.*

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the bond to these under the decree obtained in the action upon the bond. In the case of *Khan v. Khan*[1] where certain transactions were attacked upon the ground of collusion and fraud in the judgment of the Privy Council, the following dictum of Chief Justice de Gray in the Duchess of Kingston's case is cited with approval: "Fraud is an extrinsic collateral act, which vitiates the most solemn proceedings of Courts of Justice." And the judgment refers to the case of *Collins v. Blantern* as "an authority to show, if any were needed, that a Court will strip off all disguises from a case of fraud and look at the transaction as it really is." In the case of *Bhat v. Bhat* (*supra*) West J. said: "if the ostensible sale or mortgage was really a mere colourable transaction, the vendee from the mortgagor can claim that it be disregarded, even though the fraud has been carried a stage farther, so as to give to the sham mortgage the corroboration of a decree."

Again, the local case of *Mutturaman v. Masilamany* (*supra*) may be cited as an authority for the proposition that in a competition between a purchaser at a sale by the Fiscal under a mortgage decree and a transfer from the mortgagor, it is the mortgage and not the Fiscal's transfer on the one hand and the transfer from the mortgagor on the other which should be regarded as competing. Lascelles C.J. said: "the Fiscal's transfer under a mortgage decree cannot, in my opinion, be regarded as a source of title. It is the formal instrument legalizing a sale under a mortgage decree which declares the property to be bound and executable in satisfaction of the mortgage bond. The mortgage bond, I should have thought, was the root of the purchaser's title."

It may, therefore, be taken that the second petitioner was in no better position than Kovindar Sinnetamby in regard to any claim for preference which might have been put forward as arising under the provisions of the Registration Ordinance.

I agree with the order the Chief Justice proposes should be made in regard to this appeal.

Appeal dismissed.

[1] *10 Moore's Ind. App. Cases 540 at p. 556.*