Present: Ennis J. and De Sampayo J. 1915.

FERNANDO *v.* KURERA *et al.*

337—*D.C. Negombo*, 10,348.

Estoppel—Lessee present at Fiscal's sale—Not disclosing his lease to bidders—Is he estopped from asserting his lease as against purchaser?

Defendant, a lessee, was present at a Fiscal's sale held under a writ issued against his lessor, and did not announce the fact of his having a lease. The lease was duly registered. The purchaser at the Fiscal's sale was aware of the possession of the defendant under the lease.

Held, that the defendant was not estopped from asserting his lease as against the purchaser at the Fiscal's sale.

THE facts are stated in the judgment of De Sampayo J.

A. St. V. Jayewardene, for the plaintiff, appellant.—The defendants are estopped from claiming any benefit under the lease, as they were present at the Fiscal's sale and failed to notify then and there to the intending purchaser the existence of the lease. (See *Kartikesar v. Kandiya* [2] and *Caruppen Chetty v. Wijesinghe*.[3]) [DE SAMPAYO J.—There was no obligation on the part of the defendants to state their claim, because the Fiscal sold only the right, title, and interest of the judgment-debtor.] That was exactly what the Fiscal sold in the

[1] *No. 8 of 1904.* [2] *5 Bal. 103.*

[3] *(1910) 14 N. L. R. 182.*

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cases cited, but still it was held that the mortgagees were estopped. [De Sampayo J.—Apparently the point has not been raised in those cases. If the Fiscal had sold the property free from any incumbrance or lease, then it may have been the duty of the defendants to come forward and disclose their lease.] No such distinction has been drawn either in *Kartikesar v. Kandiya* [1] or *Caruppen Chetty v. Wijesinghe*.[2] Under any circumstances a mortgagee who fails to disclose his mortgage is estopped from setting it up as against a purchaser at the sale. [Ennis J.—According to your contention a person who is entitled to a right of way would be bound to notify his right.] Yes. How else can a purchaser know of the existence of such a right? [Ennis J.—That is not the test. According to that argument it is immaterial whether the person having the right is present or not.] No. When the person is present and he does not set up his right the purchaser is entitled to presume that he has no such right. [De Sampayo J.—Your client cannot say that he was misled, because the Judge has found that he was well aware of the defendants' possession under the lease.] The learned Judge was not justified in holding that the plaintiff was well aware of the lease. No issue was framed on the point at the trial.

E. G. P. Jayetilleke, for the defendants, respondents, was not called upon.

Cur. adv. vult.

October 28, 1915. ENNIS J.—

The appellant sued the respondents for a declaration of title to, and for possession of, a land called Kahatagahawatta.

It appears that the land had been awarded by a partition decree to one Soris. After the decree Soris leased the land for 25 years to the first respondent. The second respondent is the wife of the first. After the execution of the lease half of Soris's interest in the land was sold in execution against him, and later the other half of Soris's interest was also sold in execution. The appellant is the purchaser at these two sales, at both of which it is admitted the first respondent was present.

The appellant claims that the respondents are estopped from setting up the lease, as they did not disclose it at the Fiscal's sales.

The learned District Judge has, in my opinion, correctly stated the law: "to create an estoppel by acquiescence it is essential to show that the party against whom it is pleaded, knowing that a violation of his rights was in progress, stood by and so misled the other party." On the facts he has found that the sale of Soris's right, title, and interest in the land was not a violation of the

[1] 5 *Bal.* 108.

[2] (1910) 14 *N. L. R.* 152.

respondents' rights. Soris clearly had a salable interest, quite apart from the lease, and the conditions of sale did not purport to deal with more than Soris's interest. The learned Judge has further found, for good reasons, that the appellant was aware that the respondents were in possession under their lease. He has also found that the appellant never entered into possession. I see no reason to differ with this finding of fact, or with the conclusion that there was no estoppel. Whether or not there has been an estoppel is a question of fact, and depends on the circumstances of each case. In the case cited the circumstances are not the same as found in the present case.

I would dismiss the appeal, with costs.

DE SAMPAYO J.—

One Sebastian Soris was the owner of a certain allotment of land, and in execution against him there were two sales of the land, that is to say, an undivided half share at each sale, on December 19, 1912, and April 20, 1914, respectively. The plaintiff became the purchaser at the sales, and he obtained Fiscal's conveyances dated December 14, 1913, and October 21, 1914. But prior to these sales Sebastian Soris by deed of lease dated February 15, 1912, and registered on March 5, 1912, had leased the land for 25 years to the defendants, who entered into and have been in possession thereof as lessees. The plaintiff brought this action to eject the defendants, and his case is that the defendants were present at the Fiscal's sales and did not announce the fact of there being a lease, and that, the plaintiff having in these circumstances been led into the belief that there was no such lease, the defendants are now estopped from claiming any right to possession as against him. The District Judge has decided the issue thus arising against the plaintiff, and dismissed the action.

Counsel for the plaintiff relies on the decisions in *Kartikesar v. Kandiya* [1] and *Caruppen Chetty v. Wijesinghe*,[2] both of which related to the case of a sale of land on which there had been a subsisting mortgage. The principle enunciated in those decisions is well known and universally accepted, though I think, with deference, that some of the expressions therein are apt to be misunderstood. There is no doubt that where a person stands by and allows a land, which belongs to him or over which he has a mortgage or lease, to be sold under such circumstances that his conduct leads would-be purchasers to believe that it belongs to some other person or that it is free from any incumbrance or lease, he is estopped from setting up his title as owner, mortgagee, or lessee, as the case may be, against the actual purchaser. Indeed, this principle is embodied

[1] *5 Bal. 103.*

[2] *(1910) 14 N. L. R. 152.*

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in definite terms in section 115 of the Evidence Ordinance, No. 14 of 1895, which enacts:—

> "When one person has by his declaration, act, or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person and his representative to deny the truth of that thing."

There is no difficulty in cases of "declaration" or positive "act," but where it is a case of "omission" it is necessary to consider how far mere silence operates as an estoppel. In my opinion the silence must be under such circumstances that the law implies a duty to speak. As was pointed out by Parke B. in *Freeman v. Cooke*,[1] a duty to speak, which is the ground of liability, arises only where silence can be considered as having an active quality, that is to say, where the party at least means his representation by conduct to be acted upon. Referring to *Pickard v. Sears*,[2] which is the principal authority on the doctrine of estoppel, the learned Baron added: "In truth, in most cases to which the doctrine in *Pickard v. Sears* [2] is to be applied, the representation is such as to amount to the contract or license of the party making it." The question is one of fact in each case. Here the defendants were in actual possession of the land, where presumably the sales themselves took place, so that they would not help being present at the sales. They had registered their deed of lease, and did nothing to mislead the plaintiff or any other persons present at the sales. No one is bound to open the eyes of purchasers to what they with ordinary prudence ought to discover for themselves. An owner, whose land is being sold as the property of some one else, may under certain circumstances find it his duty to come forward and disillusion those who are invited to bid, for his interests are directly opposed to those of the supposed owner. But in the case of a mortgagee or lessee, the duty to notify his right is less apparent, seeing that notwithstanding the mortgage or lease the owner has still an interest which may be sold. As a matter of fact, what was sold by the Fiscal in this case, as the Fiscal's conveyances themselves disclose, was "the right, title, and interest" of the execution debtor. Why should a mortgagee or lessee, except under special circumstances, suppose that the bidders will not inform themselves of the state of the title which they are going to purchase? If they blindly make a purchase at a public sale, I do not see that a mortgagee or lessee, simply because he is such, is bound to protect them by making a public announcement of his right. If the argument on behalf of the plaintiff is sound, it does not matter whether the person having a right to the land is present at the sale or not; in every case he will

[1] *2 Exch. 654.* [2] *6 A. & E. 469.*

be bound, if he hears of the proposed sale, to disclose his right. I do not know how and when he may do this, but I think the argument goes further than is justified by any authority. In this case, however, it is unnecessary to decide how far the law goes in this respect, because the District Judge has found on the evidence that the plaintiff, who lives only a mile from the land, was well aware of the defendants' possession under the lease. This being so, he cannot be said in any event to have been misled by the defendants' failure to notify the existence of the lease. For these reasons, I think the plaintiff has failed to establish the issue of estoppel.

I am of opinion that the appeal should be dismissed, with costs.

Appeal dismissed.