[PRIVY COUNCIL.] 1921.

Present: Viscount Haldane, Lord Atkinson, and Lord Phillimore.

GUNATILLEKE *v.* FERNANDO.

265—D. C. Colombo, 51,907.

Exceptio rei venditæ et traditæ—*Sale by a person who has no title—Subsequent acquisition of title—Distinction between the English law and the Roman-Dutch law—Is delivery necessary for consummation of sale of immovable property?—Sale of a contingent interest*—Spes—Res judicata—*Land Acquisition Ordinance, No. 44 of 1917.*

Under the doctrine of the Roman-Dutch law, *exceptio rei venditæ et traditæ*, the purchaser who had got possession from a vendor, who at the time had no title, could rely upon a title subsequently acquired by the vendor, not only against the vendor, but against any one claiming under the vendor; and though delivery was a part of the defence, if the purchaser had acquired possession without force or fraud, he could use the exception, though he had never received actual delivery from the vendor. If he had once been in possession without force or fraud, and had since lost possession, he could recover it by the Publician action, using the exception as a replication to any defence set up by the vendor or those claiming title under him.

Under the English doctrine of conveyance by estoppel, the estoppel is derived from the recitals of title contained in the conveyance, and it is these recitals, and these only, which the grantor has to make good, so that if he subsequently acquires the ownership of the property by some other title, the subsequently acquired interest does not feed the estoppel so as to make the original conveyance effective as against a third party.

Though there is a considerable analogy between the doctrine of the English law and the Roman-Dutch law, the two doctrines are not identical. The Roman-Dutch principle does not rest upon estoppel by recital, and is broader in its effect than the English rule.

Under our law there need not be actual delivery, *traditio*, in the Roman or Roman-Dutch sense for the consummation of the sale of immovable property. If, therefore, the earlier sale is accompanied, followed, or evidenced by certain acts which may be deemed equivalent to the Roman *traditio*, that sale will prevail, though the first purchaser may never have been in possession.

Section 48 of the Land Acquisition Ordinance, No. 44 of 1917, has no retrospective action.

Under the Roman-Dutch law a vested interest in remainder can be alienated. Similarly, an alienation of a contingent interest is not prohibited, and an instrument purporting to alienate such an interest is not null and void.

30

1921.

Gunatilleke v. Fernando

THE judgment of the Supreme Court is reported in *21 N. L. R. 257*.

June 28, 1921. Delivered by LORD PHILLIMORE :—

The suit out of which the present appeal arises concerns the title to certain properties in Colombo. It was brought by the present respondent seeking to acquire possession as against the appellant.

One Maria Felsinger, by a notarial instrument or deed poll, dated September 23, 1882, instituted a *fidei commissum*, which so far as is material is in the following terms :—

Know all men by these presents that I, Maria Felsinger of Colpetty in Colombo, widow of Swarisge Marsalinoe Swaris, in consideration of the natural love and affection which I have and bear unto my son, Swarisge Palis Swaris, otherwise called Punchimahatmaya, also residing at Colpetty in Colombo, of the same age of 16 years, and for divers other good causes and considerations, me hereunto specially moving, do hereby give, grant, and assign, transfer, and set over unto the said Swarisge Palis Swaris, his heirs, executors, administrators, and assigns as a gift absolute and irrevocable, under and subject to the conditions and reservations hereinafter mentioned, all my share, right, title, and interest in and to (*then the property is described*), together with all deeds and writings relating thereto, and with all my right, title, and interest therein and thereto.

To have and to hold the said premises with the easements, right, and appurtenances thereunto belonging, or used or enjoyed therewith, or known as part and parcel thereof unto him, the said Swarisge Palis Swaris, his heirs, executors, administrators, and assigns for ever, subject, however, to the following conditions and reservations that the said Maria Felsinger shall have the right of possessing and enjoying the rents, income, produce, and issues of the said lands and premises until the said Swarisge Palis Swaris shall have arrived the age of 25 years, and that after the said Swarisge Palis Swaris shall have arrived the said age of 25 years, if I, the said Maria Felsinger, shall be then living, then the said Swarisge Palis Swaris shall not be at liberty to sell, mortgage, or alienate the said lands and premises during my lifetime, but shall only possess and enjoy the rents, income, and produce thereof, but that if I, the said Maria Felsinger, shall die before the said Swarisge Palis Swaris shall have arrived at the said age of 25 years, then the said Swarisge Palis Swaris shall only possess and enjoy the rents, produce, and income of the said land and premises, but shall not be at liberty to sell, mortgage, or alienate the same until he shall have arrived the said age of 25 years, and that if the said Swarisge Palis Swaris should die without lawful issues, then the said lands and premises shall devolve and go to his two brothers, Swarisge Stephen Swaris and Swarisge Nicholas Swaris, or to their lawful issues, provided that I, the said Maria Felsinger, shall have the right to possess and enjoy the rents, produce, and income of the said lands and premises during my lifetime, but if the said Swarisge Stephen Swaris and Swarisge Nicholas Swaris . . . . should die without any issues, then the said land and premises shall revert and devolve on me or my lawful heirs, but if one of them shall die without issues, then both the said lands and premises shall devolve on the surviving brother, whether he shall have any issue or not, and if he shall also die without issue, then the said land and premises shall devolve on me or my heirs . . . .

And I, Elias Perera Senewiratne, do hereby thankfully accept and receive the above gift and on behalf of the said Swarisge Palis Swaris, subject to the aforesaid conditions and reservations.

The instrument was duly registered. Its construction and effect has given rise to much litigation, both parties to the present suit claiming titles under it.

The narrative of what has since happened is as follows: The son, Palis, attained the age of 25 in 1891, but died without issue in 1896. His mother married a second husband, Daniel John Fernando, and died in 1916. The other sons, Stephen and Nicholas, are assumed to be still living. Palis, on October 23, 1893, purported to mortgage the property to Francis Perera Wanigeratne. The mortgagee put up the property for sale, and it was bought by Charles Perera, who obtained a transfer from the Fiscal on July 24, 1903.

On December 5, 1893, Palis, with the consent of Maria, purported to sell the property to Daniel John Fernando. On May 23, 1895, Stephen and Nicholas made a deed of transfer, either of the whole property or of their interest in it, or of some interest in it, to one Don Cornelis Appuhamy, for the sum of Rs. 1,000. The nature of the interest transferred will be discussed later. Don Cornelis, on February 2, 1905, transferred his interest in the property to Charles Perera. Lastly, on December 17, 1913, Stephen and Nicholas, by a deed of gift, transferred the property, subject to a reservation for the benefit of Maria during her life, to the defendant-appellant, Lionel Oswin Fernando, who is a son of Daniel John Fernando. Under certain dispositions then made, Lionel Oswin's interest passed to other members of the family and then came back to him. It is unnecessary to deal with these dispositions. The result is that the defendant-appellant has two lines of asserted title to the property. The plaintiff-respondent has also two lines of asserted title. She claims as executrix of James Perera, who was executor of Charles Perera.

On August 31, 1909, Daniel John Fernando sued James Perera as the executor of Charles for the possession of the property. He relied on the deed of December 5, 1893, by which Palis, with the consent of Maria, purported to transfer the property to him. The defendant traversed the plaintiff's claim, and further relied upon the mortgage, made two months earlier on October 23, 1893, and the purchase by his testator Charles Perera at the auction sale and the transfer from the Fiscal. The case was decided in favour of the defendant by the District Judge, but his decision was reversed by the Court of Appeal, and this reversal was sustained when the case came before their Lordships' Board. The decision of their Lordships established that the mortgage of October 23, 1893, was ineffectual, because Palis was prohibited from alienating the property, at any rate during the lifetime of Maria, and thereby the first line of title by which the plaintiff might claim is destroyed. With regard

1921.

LORD PHILLIMORE

Gunatilleke v. Fernando

to the claim of Daniel John Fernando, the Supreme Court of Ceylon and the Privy Council held that the deed of December 5, 1893, was effectual to transfer Maria's life interest, and that by virtue of that transferred life interest he could claim possession. As their Lordships observed no ulterior rights were brought into the case.

The next thing that happened was that in 1909 the Crown acquired under a Land Acquisition Ordinance a small part of the land in question and paid the compensation money for it into Court. Thereupon, both Daniel John Fernando and James Perera claimed the money, and the District Court again decided in favour of James Perera. The Supreme Court set aside this judgment, and declared, as in the previous case, that Daniel John Fernando was entitled to the interest during the lifetime of Maria. But the Court proceeded to decree and declare that, on the death of Maria, James Perera would be entitled to the sum. The learned Judges decided the question left open in the previous case, as to the ulterior rights of the parties after the death of Maria. They held that the restriction of alienation in the original *fidei commissum* did not operate merely to protect the life interest of Maria, but also to protect the contingent gift to Stephen and Nicholas, and that the deed of December 5, 1893, was only effectual in so far as it transferred the life interest of Maria, and that Palis could not, even with the consent of Maria, make an effectual transfer of the property out and out. This judgment was not appealed from, and is relied upon by the plaintiff as constituting a *res judicata ;* and, subject to one observation, it would so operate and bind Daniel John Fernando and all persons claiming under him, and thus would destroy the first line of title of the defendant-appellant. But it would not bind Stephen and Nicholas, who were not parties to the proceedings, and therefore would not bind the defendant so far, as he claims through his second line of title.

A contention was, however, raised on behalf of the defendant, which would have the effect of taking this decision out of the category of *res judicatæ*. It was said that by an Amending Land Acquisition Ordinance of 1917 decisions as to the title to small sums of money paid into Court by the Government are not to operate as decisions effecting the title to the remaining bulk of the property, and that the effect of this Ordinance was retrospective, and that the sum paid into Court in this particular case being within the protected limit, this particular decision did not operate as a *res judicata*. Their Lordships cannot take this view. The effect of the Amending Ordinance was not merely to establish this provision. The provision was part of a scheme under which the decision as to title to small sums was taken away from the District Courts with an appeal to the Supreme Court and sent to the Court of Requests, and it is probably for this reason that these decisions are not to bind the bulk of the property. The two provisions cannot be separated ;

and even supposing that in other circumstances the Ordinance of 1917 might have been construed as retrospective, these circumstances make it clear that it was prospective, and accordingly the rule of *res judicata* applies.

This leaves the parties each so far in possession of their second lines of title. As to the defendant, his title under the transfer of December 17, 1913, effected by Stephen and Nicholas, is not questioned. If Stephen and Nicholas had any interest left to transfer, they effectually transferred it by that deed.

But if the deed of May 23, 1895, executed between Stephen and Nicholas as transferors and Don Cornelis as transferee, was effectual, that transfer, being long prior to the transfer to the defendant, must prevail for the purposes of the present suit; and the main argument before their Lordships' Board has turned upon the validity and the effect of the deed of May 23, 1895.

The District Judge decided against it in a very careful judgment. He held that Stephen and Nicholas had at the time no title to convey. He then inquired whether the plaintiff was entitled to rely upon the title acquired by Stephen and Nicholas after the death of Palis, although she had not got a conveyance after the title had been acquired, and although she was out of possession. He held that she could not, and dismissed the action.

On appeal equally careful and very learned judgments were given in the Supreme Court, which came ultimately to the conclusion that the plaintiff could rely without more upon the two facts that her predecessor in title had had a conveyance from Stephen and Nicholas, and that, though Stephen and Nicholas had nothing which at the time they could convey, their subsequent acquisition without more enured to the benefit of their transferee and made the original transfer operative as from its date, and consequently that the title of the plaintiff prevailed over that of the defendant. In the argument before their Lordships' Board these points have been elaborately discussed, and their Lordships have derived great benefit from the arguments on both sides. The matter has also been presented on a somewhat different line. Counsel for the defendant submitted that Stephen and Nicholas, by the deed of May 23, 1895, had not purported to convey this property, or purported to convey the contingent interest to which they were entitled under the *fidei commissum*, but imagined that they had certain present particular shares or interests derived another title and had conveyed these non-existent shares and interest only.

During the course of the argument much reliance was placed on certain English decisions regarding the law of estoppel and on the decision of this Board in the case of *Rajapakse v. Fernando*.[1] By the English law of estoppel, which was a good deal relied upon in the

[1] (*1920*) *A. C., page 192.*

1921.

LORD PHILLIMORE

Gunatilleke v. Fernando

Courts below, and which is referred to in the case of *Rajapakse v. Fernando*,[1] " where a grantor has purported to grant an interest in land which he did not at the time possess, but subsequently acquires, the benefit of his subsequent acquisition goes automatically to the earlier grantee, or, as it is usually expressed, ' feeds the estoppel.'" By this doctrine the estoppel is derived from the recitals of title contained in the conveyance, and it is these recitals, and these only, which the grantor has to make good, so that if he subsequently acquires the ownership of the property by some other title, the subsequently acquired interest does not feed the estoppel so as to make the original conveyance effective as against a third party. If, therefore, the provisions of English law were to be applied to this case, there would be much to be said in favour of the defendant, as the recitals in the transfer of 1895 stated a title which the transferors never acquired.

It appears, however, to their Lordships that, though there is a considerable analogy between the doctrine of English law as to conveyance by estoppel, as this Board thought in the case of *Rajapakse v. Fernando*,[1] the doctrine of the Roman-Dutch law which prevails in Ceylon is not identical with that of the English law. The mode of reasoning by which it is reached is different, and the conclusions are not necessarily the same. In all civilized systems of jurisprudence there are many common principles and many historical processes of development which are very similar, and light may often be thrown from one system upon another, but when this is done, the comparison must be handled with care. There is, perhaps, a special danger with a Court constituted mainly of Judges trained under the English system of a too hasty assumption that some foreign system is in a particular matter identical. Their Lordships, therefore, while not neglecting the benefit afforded by English decisions, have considered that their attention must principally be directed to the Roman-Dutch law as governing this case.

This law admitted what was called the *exceptio rei venditæ et traditæ* (*Dig., lib. XXI., tit. 3*). Under this exception the purchaser who had got possession from a vendor, who at the time had no title, could rely upon a title subsequently acquired by the vendor, not only against the vendor, but against any one claiming under the vendor; and though delivery (*traditio*) was, as the title shows, a part of the defence, if the purchaser had acquired possession without force or fraud, he could use the exception, though he had never received actual delivery from the vendor. Also, if he had once been in possession without force or fraud, and had since lost possession, he could recover it by the Publician action, using the exception as a replication to any defence set up by the vendor or those claiming title under him. (See *Voet, Commentary on the Pandects, LXXI., tit. 3.* The principal passages are given in translation in a note to

[1] *(1920) A. C., page 192.*

Rajapakse v. Fernando.[1]) The principle does not rest upon estoppel by recital, and is broader in its effect than the English rule.

Still the *exceptio* given by the Roman law required the double condition, not only that the property should be sold, but that it should be delivered, though the delivery might in the case mentioned be presumed by a fiction; and here there was no delivery of the property, and the plaintiff is not and never has been in possession. This objection is that which impressed itself upon the mind of the District Judge. The Supreme Court, however, have thought that in this particular the Roman-Dutch law as administered in Ceylon has made a further stride.

The early Roman law, with its simpler methods of business, might be expected to receive modification under a system according to which conveyance of land is no longer effected by mere delivery, *traditio*, the place of which is supplied or which is itself supplemented by writings such as deeds or notarial instruments, particularly if in addition to these there is a public registration of such documents. Accordingly the Supreme Court in Ceylon has held and apparently in conformity with earlier authority that what took place in this case is equivalent to *traditio*. The Chief Justice in his judgment thus expresses himself: " . . . . *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*,[2] 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 law will give to a person who has completed his title by securing the delivery of a deed."

Perhaps the matter may be put in this way. A sale made by a vendor without title cannot be relied upon as against a purchaser from that vendor after he has acquired title, if and so long as the earlier sale remains in contract only; but if the earlier sale is accompanied, followed, or evidenced by certain acts which may be deemed equivalent to the Roman *traditio*, that sale will prevail.

The deed of 1893 was attested by witnesses and a notary so as to satisfy the conditions required by the Ceylon Ordinance for effectual transfer of land, and it was registered as another Ceylon Ordinance directs. In *Rajapakse v. Fernando*[1] their Lordships laid stress upon the fact that the conveyance on which reliance was placed had been duly registered, though it should be added that in that case the successful party was in possession.

Their Lordships think that the view of the Chief Justice, in which the other learned Judges concurred, was right, at any rate, as applied to the circumstances of the present case. The learned Chief Justice reserved his opinion as to what might be the case if the other party was, as he expressed it, "a *bona fide* purchaser for value without

[1] (*1920*) *A. C., page 192.* [2] *3 S. C. C. 61.*

1921.

LORD PHILLIMORE

Gunatilleke v. Fernando

notice." As he truly said, the defendant was a donee and not a purchaser, and he unquestionably had notice in 1913 of the transaction in 1895. Whether the idea expressed in the words " a *bona fide* purchaser for value without notice " is one which is exactly appropriate to the system of Roman-Dutch law may be a question. Whether the point can ever arise as regards land where the previous transfer has been duly registered may also be a question. Their Lordships make no pronouncement on these points. They are content to say that in the circumstances of this case and as against this defendant there was a sufficiency of material to satisfy the requirements of *traditio* under the Roman law.

There remains a point much insisted upon by counsel for the defendant as to the effect of the deed of 1895. The material parts of it are as follows :—

Whereas our father Swarisge Marthelis *alias* Marselino Swaris was seized and possessed of several lands, money, and other movable property, and departed this life intestate at Colombo on or about January 24, 1871, leaving him surviving his widow, our mother, Maria Felsinger, otherwise called Sophia Felsinger, and three children, namely, ourselves, the said Swarisge Stephen Swaris and Swarisge Nicholas and our eldest brother Swarisge Palis Swaris, otherwise called Punchimahatmaya; and from the date of the death of the said Marthelis *alias* Marselino Swaris, our mother, the said Maria Felsinger, had been in possession of all our shares in the said properties and in the premises in the schedule hereto fully described, and enjoying the rents and profits thereof for and on our behalf as our guardian.

And whereas we, the said Swarisge Stephen Swaris and Swarisge Nicholas Swaris, are entitled by right of paternal inheritance, and by other rights acquired by certain title deeds (which are not in our possession) among other properties, to certain undivided shares in the premises in the schedule hereto fully described.

And whereas we have now attained our respective ages of majority, and have agreed with Gammaduwawattagey Don Cornelis Appuhamy of Colombo to sell and convey unto him all our undivided shares, right, title, interest, claim, and demand whatsoever of, in, and to the said premises in the said schedule hereto fully described for the price or sum of Rs. 1,000.

Now know all men by these presents that we, the said Swarisge Stephen Swaris and Swarisge Nicholas Swaris, in consideration of the said sum of Rs. 1,000, lawful money of Ceylon, well and truly paid to us by the said Gammaduwawattagey Don Cornelis Appuhamy (the receipt whereof we do hereby jointly and each of us doth respectively admit and acknowledge), do hereby give, grant, sell, assign, convey, transfer, set over, and assure unto him, the said Gammaduwawattage Don Cornelis Appuhamy, his heirs, executors, administrators, and assigns all our said undivided shares, right, title, interest, claim, and demand whatsoever of, in, and to the said premises in the said schedule hereto fully described, together with all the buildings, erections, fixtures, ditches, trees, ways, rights, easements, advantages, and appurtenances whatsoever to the said premises belonging or appertaining or usually held or enjoyed therewith or reputed to belong or be appurtenant thereto.

To have and to hold the said shares, right, title, and interest in and to the said several premises hereby conveyed or intended so to be unto him, the said Gammaduwawattagey Don Cornelis Appuhamy, his heirs, executors, administrators, and assigns.

The property is fully described in the schedule, and is the property mentioned in the *fidei commissum*. The recitals, however, are incorrect. The property had not been the father's property; it had been acquired by Maria under a different title. Stephen and Nicholas had no present shares. Maria was not enjoying the rents and profits as their guardian. If it was a case of the English law of estoppel, much might be said about this. But for the Roman-Dutch law the question is what was the property purported to be conveyed; and on all principles of construction the recitals can only be looked at for the purpose of assisting the Court to arrive at the determination of the actual effect of the conveyance. Stephen and Nicholas purported to assign all their undivided shares, right, title, interest, claim, and demand whatsoever of, in, and to the property in the schedule. Had they any right, title, or interest at the time? Supposing that they had none, under the Roman-Dutch law their subsequent acquisition would make this transfer effective. Another way of looking at it is that they did not know what interest they had, but purported to assign all that they had got, and they had a contingent interest, which ultimately vested and is now vested in possession. This seems sufficient.

It was suggested that if the Courts in Ceylon had taken this view, all the discussion about the *exceptio rei judicatæ*, &c., might have been dispensed with. It would seem that the Judges in the Supreme Court considered the case as if Nicholas and Stephen had no title which they could convey in 1895, and also that they thought that Stephen and Nicholas had purported to transfer the whole property: and that they so construed the deed of 1895 cannot be questioned. It would, however, certainly look as if the Judges in the Supreme Court had thought that the deed of 1895 was at the time it was made ineffective thus differing from a conveyance of a contingent remainder under English law, which since the enabling Statute would effectually pass all the interest which the grantor possessed and automatically transfer the property to the grantee when the contingency happened and the remainder vested in possession.

That under the Roman-Dutch law a vested interest in remainder can be alienated must be admitted. Both sides claim title under transfers made during the lifetime of Maria. The Roman law saw no objection in principle to the transfer of things not yet come into existence (*Dig., lib. XVIII., tit. 1, sections 8 and 34*). But as to the alienability of a contingent interest, there appears to be a dearth of authority. None has been brought to their Lordships' notice. No doubt the *spes* which such a remainder-man can alienate is a very shadowy one, for if he predeceases the fiduciary, his heirs take

1921.

LORD PHILLIMORE

Gunatilleke v. Fernando

nothing (Pereira, *Laws of Ceylon, ed. 2, p. 467*), and therefore the alienee could take nothing. But there is, at any rate, no indication either that such an alienation is prohibited by the policy of the law, or that an instrument purporting to alienate is so null and void that it cannot be looked at for any purpose.

In the Maltese case of *Gera v. Ciantar*,[1] where much inquiry was made into the general law relating to *fidei commissa*, the work of Cardinal de Luca, Lib. X., *De fidei commissis* was relied upon as an authority. Nothing specific on this subject has been found in his book; but in his summary of the law he has a title *De Alienationibus* (*pp. 564, 565*).

The alienations of which he treats are alienations by the *gravatus* or fiduciary, and his general observations therefore do not touch the point under consideration, but he does recognize (Art. 308) the consent of the owner of the contingent interest as sufficient to validate a transfer made by the fiduciary; and when he allows the fiduciary to alienate his own life interest, he expresses it in this way (Art. 315): "*Procedunt hæc ut dictum est in alienatione, quæ fiat de ipsa substantia, seu bonorum proprietate. Secus autem, ubi gravatus, vel fidei commissi possessor alienet solum jus suum, ipsorumque bonorum fructus, seu commoditatem ejus vita durante, cum id non accedente expressa ac speciali prohibitione, non sit in jure prohibitum. cum hæc alienationis species non percutiat bonorum substantiam. neque jus vel dominium in emptorem transferat, ita considerandum loco procuratoris in rem propriam fidei commissarii alienantis, cujus vice ac nomine ad propriam utilitatem fructus, ac emolumenta percipere dicitur.*"

It may, therefore, be that a transfer of a contingent interest is effective to put the transferee *in loco procuratoris*. If it is not so, then the worst that can be said of the deed of 1895 is that the purchaser under it took from vendors who had some interest, which, however, was not transferable. But the purchaser is not in a worse case than he would be if they had no interest at all.

Their Lordships, therefore, think that the plaintiff can avail herself of the title which she gets under the deed of 1895 in preference to the title of the defendant, and that the decree of the Supreme Court was right; and they will humbly recommend His Majesty that this appeal should be dismissed, with costs.

Appeal dismissed.

[1] *12 A. C., page 557.*