

[FULL BENCH.]

Sept. 5, 1911

Present : Lascelles C.J., Middleton J., and Grenier J.

BASTIAN v. ANDRIS *et al.*

117—*D. C. Matara*, 4,873.

Conveyance by the Fiscal in favour of a purchaser after his death—No title passed—Civil Procedure Code, ss. 286 and 289.

A Fiscal's transfer in the name of a purchaser after his death passes no title. In such a case the proper course is for the representative of the deceased purchaser to apply to the Court for an order directing the Fiscal to make out the conveyance in his favour.

THE facts appear sufficiently from the judgment.

This case was reserved for a Full Bench by Lascelles C.J. and Middleton J.

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H. A. Jayewardene (with him *Rosairo*), for the eighth defendant appellant.—A Fiscal's conveyance in favour of a deceased person is good, as the conveyance relates back to the date of sale. The principles that apply to private sales are not applicable to sales by the Fiscal. A private conveyance in favour of a dead person is invalid, but a Fiscal's conveyance is valid. Under section 286 of the Civil Procedure Code the Fiscal has no power to execute a conveyance in favour of any one but the purchaser.

If the Fiscal conveys to the administrator of the deceased purchaser, there would be this anomaly—the administrator would be vested with title under the doctrine of relation back even in the lifetime of the purchaser. *Buchchi Appu v. Abeyasuriya* was wrongly decided. Counsel also referred to *Ukku Menika et al. v. Lape*.²

Prins, for ninth, twelfth, thirteenth, and fourteenth defendants, respondents.—The point is covered by authority. (*Jaldin v. Nurma*,³ *Buchchi Appu v. Abeyasuriya*,¹ *Ukku Menika et al. v. Lape*,² *Ponnamma v. Weerasuriya*.⁴)

The fact that section 286 of the Civil Procedure Code does not empower a sale to the legal representative is not a good argument. The section says that the deed shall be delivered to the purchaser; how could it be delivered if he be dead? The procedure in such cases was clearly indicated in *Jaldin v. Nurma*.³

Jayewardene, in reply.

Cur. adv. vult.

September 5, 1911. LASCELLES C.J.—

This appeal raises the question whether a Fiscal's transfer executed after the death of the purchaser, in favour of the purchaser, "his heirs, executors, administrators, and assigns," passes a valid title to the administrator of the purchaser's estate.

The eighth defendant is the administrator of the estate of one Siman Perera, who on July 8, 1903, purchased at a Fiscal's sale a share in the property; the sale was confirmed in 1905; Siman Perera died, it is stated, about 1908; and the eighth defendant, the administrator of his estate, on August 10, 1910, obtained a Fiscal's transfer in the form I have mentioned.

It has hitherto been uniformly held that a Fiscal's transfer in favour of a purchaser after his death passes no title. In *Annamale Chetty v. Rawter*,⁵ Bonser C.J. considered the fact that the Fiscal's conveyance was in favour of a man who was dead to be a serious obstacle to the plaintiff's success. In *Buchchi Appu v. Abeyasuriya*,¹ Mr. Justice Wendt and Mr. Justice Grenier decided against the validity of such a conveyance. The former learned Judge, in delivering the judgment of the Court, stated, "sale and purchase of land is a contract which is not completed until a conveyance from the

¹ (1905) 2 A. C. R. 127.

² (1903) 6 N. L. R. 361.

³ (1892) 1 S. C. R. 187.

⁴ (1908) 11 N. L. R. 217.

⁵ (1896) 2 A. C. R. 128.

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vendor has assured the property to the purchaser. If before that has been done the purchaser died, the contract cannot possibly be completed by the execution of a conveyance to the dead man. In this respect I see no distinction between a private sale and one carried out by the Fiscal." In *Ukku Menika et al. v. Lape*,¹ Mr. Justice Grenier held that a Fiscal's transfer in favour of a dead man is invalid and inoperative. A similar view as to the value of such a conveyance was taken in *Ponnamma v. Weerasuriya*.² In *Jaldin v. Nurma*,³ Lawrie J. held that in such a case the proper course was for the representative of the deceased purchaser to apply to the Court for an order directing the Fiscal to make out the conveyance in his favour, and this appears to be the practice which is usually followed in such cases. We are now asked to over-rule these decisions, mainly on the ground that the decisions to which I have referred are based on a mere *obiter dictum* of Bonser C.J., and that section 289 of the Civil Procedure Code, which provides that the title of the grantee under a Fiscal's conveyance is deemed to have been vested with the legal estate from the time of the sale, may be construed so as to authorize the execution of a transfer after the purchaser's death *nunc pro tunc*. I cannot agree that the principle now under discussion is one which is founded only upon a passing observation of a Judge. As Wendt J. pointed out in the passage which I have cited, the objection to making a conveyance to a dead person rests on very substantial grounds.

Personally, I entirely agree with the ruling, which, I think, is founded on fundamental principles. A conveyance in the name of a dead person would be a legal anomaly. A dead man in the eye of the law is no longer a person. He does not possess the attributes of a legal person; he has no proprietary capacity, and is incapable of holding property or of having rights or liabilities.

It is conceivable that the Legislature, for purposes of convenience, might have sanctioned such a form of conveyance. But that is not the case here, and there is nothing in the Civil Procedure Code from which such an intention can fairly be deduced. In my opinion the previous rulings of this Court on this point have been founded on sound reason, and should not be disturbed.

The appeal therefore fails, and must be dismissed with costs. I think, however, that the appellant, as a matter of indulgence, might be allowed to move the District Court for an order directing the Fiscal to make a conveyance in favour of the legal representative of Siman Perera. For this purpose I would set aside the decree, and declare that eighth defendant shall be at liberty within twenty-one days from the receipt of the record to move the Court for an order directing a Fiscal's conveyance in the name of the administrator of Siman Perera, and that on such conveyance being made the shares of the parties be adjusted accordingly.

¹ (1903) 6 N. L. R. 361.² (1908) 11 N. L. R. 217.³ (1892) 1 S. O. R. 187.

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The only question to be decided on the reference of this case to the Full Court was whether a Fiscal's conveyance in the name of a dead person is valid to convey title. The dictum of Bonser C.J. in 2 *Appeal Court Reports* 127, followed by Mr. Justice Wendt and Mr. Justice Grenier, as reported in the same place, is to the contrary effect, and we are now asked to over-rule it.

It is conceivable that a Fiscal, unaware of the death of a purchaser, might convey the property in his name, but such a conveyance would confer title on a non-existent person ; therefore, practically, on no one, and it would be necessary to apply to the Court for directions. If the Fiscal knew, or had reason to know, of the death of the purchaser, section 286, by its provisions as to the terms of the conveyance being such as the Court deems expedient, enables him to apply to the Court for directions as to whose name the conveyance should be drawn in.

The doctrine of relation back applied to a Fiscal's conveyance by section 289 is designed to give a starting point to the title in the purchaser, and I think must be deemed rather to do this than to imply the necessity of beginning it in the name of such purchaser if a non-existent being. A further consideration of Mr. Justice Wendt's reasoning in his judgment has dispelled the doubts I had on the subject, and I think that the dictum of Bonser C.J. is founded both on reason and common sense.

The Legislature might, if it had chosen to do so, have enabled the Fiscal to convey in the name of a dead purchaser, but as it has not done so, the Court must be resorted to for directions, as I think is provided. The appeal must, therefore, be dismissed on this point.

In the case, however, under consideration, I think the Court ought to have allowed the alternative application to make good the defect of title, and I would now permit the appellant to apply to the Court with a view to the correction of the transfer by inserting the name of the legal representative of the deceased as the grantee. The appellants must bear the costs of the appeal.

GRENIER J.—

I agree that a conveyance in favour of a purchaser at a Fiscal's sale is void in law, if at the date of the conveyance he is dead. It was so held by Bonser C.J., and Mr. Justice Wendt and myself followed his ruling in several subsequent cases.

I agree to the order proposed by the rest of the Court, and I may add that the procedure suggested was adopted by me when I was on the Colombo District Court Bench.

Appeal dismissed.