

ALLIS v. MENDIS *et al.*

D. C., Galle, 3,490.

1897.

*August 20 &
September 2.*

Mortgage by executor—Title derived from executor—Sale by sole devisee of joint will—Competing titles.

Under the joint last will of S and his wife, C the survivor was to be the sole devisee. After the death of S the executors proved the will, and O, one of those executors, mortgaged certain property belonging to the joint estate to raise money for testamentary expenses. The mortgage bond was put in suit, judgment recovered, and the mortgaged property sold and purchased by first defendant, who sold it to second defendant. C, who was well aware of the sale in execution, purported to convey the whole property to S, to whose title plaintiff ultimately succeeded—*Held*, that the second defendant's title was superior to that of the plaintiff.

THIS was an appeal by plaintiff against the judgment of the Court below upholding the claim of the defendants to a certain land by prescriptive possession. The facts of the case, as

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regards the title of the parties, are fully recited in the judgment of WITHERS, J.

Dornhorst, for appellant.

Wendt, for respondent.

September 2, 1897. WITHERS, J.—

On the whole, I think it right to affirm this judgment. The question which of the two parties had the better documentary title is not decided, because the Judge found his way to hold that the defendant had succeeded on the question of possession. Orelias was one of the proving executors of the joint will of Don Samuel Silva and Clara Hamine, which was made on the 11th February, 1869. Under that will the survivor was to be the sole residuary devisee. Shortly after he entered upon the administration Orelias mortgaged certain property belonging to the estate to raise money for testamentary expenses. He recited that fact in the mortgage, but signed the instrument simply in his own name Orelias. It was not necessary that his co-executor should join in this mortgage.

The mortgage was ultimately put in suit in the District Court of Galle, and the creditor had the property mortgaged judicially sold. The sale took place on the 13th December, 1875. One-third of the land was released from seizure and only two-thirds bought up by the judgment-creditor, excluding planter's share of the second plantation. The decree-holder was the first defendant, and he delayed to take his transfer till July, 1884, which he registered on the 24th January, 1886. Clara Hamine in February, 1876, brought an action against first defendant and the executor Orelias to set aside the sale of those two-thirds, but the action for some reason or another was discontinued. In January, 1882, Clara Hamine, who was well aware of this sale in execution, purported to convey to one Don Simon de Silva the whole of the garden. In 1885 a creditor of the first defendant seized in execution the first defendant's interest in the garden, and Don Simon de Silva successfully opposed the sale, which was stayed on his giving security. Simon de Silva then mortgaged the land to one Endoris, who put the bond in suit in the Court of Requests of Balapitiya. The entire land was seized, and in January, 1887, sold by the Fiscal, who conveyed to Endoris in October, 1887, and the latter sold to the plaintiff. That was in March, 1894. In 1891 the first defendant sold his interest to the second defendant, between whom and the plaintiff arose a dispute about this land, which was the cause of this action. On these facts I am inclined

to hold that second defendant has the better title. The District Judge, as I said before, has found on the evidence that first defendant and the second defendant have enjoyed their two-thirds since 1876. In the conflict of evidence on this point I am not prepared to hold that that was a wrong finding of fact. I would therefore affirm the judgment.

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WITHERS, J.

BROWNE, A.J.—

I agree with my brother that defendants taking from the executor have a preferent paper title for the two-thirds which they claim. The consequence thereof would be that plaintiffs and their predecessors may have had residence on the land and possession of one-third, so that there would be in their evidence only an exaggeration of possession of one-third into that of the entirety. I do not see the District Judge was wrong in holding defendants' possession was in accord with what we find was their preferent title.

