WIMALESEKERA *v.* SILVA.

1897.
October 26 and November 3.

D. C., Galle, 3,883.

Crown grant—Action rei vindicatio *against grantee—Ordinance No. 12 of 1840—Estoppel.*

Per BROWNE, A.J.—Under our law there is no more sanctity attaching to a Crown grant than the presumption accorded to it under Ordinance No. 12 of 1840, and a person who claims title to a parcel of land is not precluded from instituting an action *rei vindicatio* in respect of it, merely by reason of the Crown having made a grant of such parcel to a third party.

A Crown grant is unavailing to pass title, unless the land granted be, at the date of the grant, the land belonging to and at the disposal of the Crown.

De Silva v. Mandorisa (*8 S. C. C. 58*) commented upon.

IN this case the plaintiff sought to recover a parcel of land which the defendant had possession of, and which he claimed under a grant of the Crown in his favour. At the trial the defendant contended that it was not open to the plaintiff to institute an action *rei vindicatio* in respect of land of which the Crown had made a grant to the defendant. The Court below decided against his contention, and on the evidence gave judgment in the plaintiff's favour. The defendant appealed.

Dornhorst, for appellant.

Wendt, for respondent.

3rd November, 1897. LAWRIE, A.C.J.—

In this action the burden of proof lay on the plaintiff.

It is proved that the predecessors of the plaintiff have held written titles to this land, and have possessed it for more than a third of a century. It seems very clear that when the Governor of Ceylon, in the name of the Queen, professed to sell a part of it in 1890 as waste land belonging to the Crown, the grant must have been made under a mistake of fact. It is proved that the land was then planted and was not waste, and that it was land belonging to one of Her Majesty's subjects.

BROWNE, A.J.—

The parties are litigating for the portion B in the figure of survey (filed p. 99) of Mr. Goonesekera, which is the portion contained in the figure of survey 151,196, numbered D 112, attached to the Crown grant of 30th June, 1890 (page 49), to defendant's execution-debtor, G. M. Owen de Silva.

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BROWNE, A.J.

The land therein depicted is part of 9 acres of the high ground represented in the figure of survey B (page 21) filed by plaintiff. The learned District Judge has rightly held it has been proved that this land was possessed by the plaintiff and his vendor in and since 1850, *i.e.*, for forty years prior to execution of the Crown grant in favour of defendant's execution-debtor.

In his plaint of September, 1895, plaintiff claimed title to two-thirds thereof, but at the trial it transpired plaintiff had on the 8th August, 1895, gifted the land to his three children, one of whom had since died childless, leaving as her heirs her husband, her father, and her two brothers. The gift gave her one-third of two-thirds, equal to two-ninths. Her husband would take a moiety thereof or one-ninth, plaintiff a moiety of the other one-ninth or one-eighteenth, and each brother one-thirty-sixth. The learned District Judge held plaintiff entitled to one-sixth by one-eighth, equal to seven-twenty-fourths of *inter alia*, lot B (the only one in dispute), but I do not see he would be entitled to more than one-ninth thereof.

In the Court below, however, counsel for the defendant raised an objection that the action *rei vindicatio* will not lie for land which has been granted by the Crown, but that the action is not open to those who have bought *rem alienam a fisco aut a principis vel augustæ domo eo quod hi statim securi sunt* (*Voet, 6, 1, 23*), *Lorenz Civ. Prac. 68*. Even the one indication of the opinion upon a question of evidence only that the onus of proof rests upon a person setting up title against a Crown grant (*8 S. C. C. 58*) has not, so far as I know, been upheld in any action instituted by a Crown grantee. In that and many other cases (*2 S. C. C. 189 ; 3 S. C. C. 80 ; 5 S. C. C. 194 ; 2 S. C. R. 12, Sella Naide v. Christie ; 2 C. L. R. 49*, &c.), the right of a party like the plaintiff here to come forward and show that the land granted by the Crown was never the property of the Crown, for it to be granted was never disputed, and the grantees never yet have stood secure from all claim.

Assuming that action to lie against the Crown to the extent indicated in *2 N. L. R. 361*, I do not know it ever has been suggested ere now that a Crown grantee takes an absolutely safe title. On the contrary, I believe my Lord truly in the *Ivies* case expressed the state of the law to be " that a Crown grant is unavail-" ing to pass title unless the land granted be at the date of " the grant land belonging to, and at the disposal of, the Crown," and that under our law there is no more sanctity attaching to a Crown grant than the presumption accorded to it under Ordinance No. 12 of 1840, when it conveyed land of the character

therein particularized. The Crown has in practice limited its rights and powers by both that Ordinance and the Ordinance relating to its powers to acquire land into the contingencies out of which the powers so given to it arise. It has never yet in Ceylon claimed right absolute over all lands, or guaranteed absolute security to its vendors in words or in practice.

This issue, however, was not raised in this action, save in argument by defendant's counsel after the close of the plaintiff's case; and when the precedents and practice thereto have never regarded such an immunity to exist with a corresponding liability upon the Crown, I cannot say the learned District Judge was wrong in declining to accede to the contention.