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RAMEN CHETTY *v.* CAMPBELL.

Between Ramen Chetty, Plaintiff, and Fernando, Claimant.

D. C., Colombo, C/8,178.

Mortgage of movables—Sale after mortgage—Registration—Delivery of possession—Priority—Ordinances Nos. 8 and 21 of 1871—Sequestration—Claim to property sequestered—Question at issue in such case—Civil Procedure Code, ss. 645 and 648.

C, by a writing dated 9th January, 1895, and duly registered, hypothecated with plaintiff a billiard table and certain articles of household furniture to secure the payment of a debt. On 5th August, C, by a notarial instrument, also duly registered, sold to F a just half share of the said property, and on 1st September, by oral agreement, the other half; and subsequently F, who on each occasion of sale had paid the price of the property purchased, assumed possession of the entirety of such property. Thereafter, to wit, on 13th November, plaintiff commenced his action against C to realize his security, and obtained under section 645 of the Civil Procedure Code a sequestration of the property hypothecated. Under the sequestration the Fiscal seized the goods in the possession of F, and F applied to the District Court to have the sequestration dissolved—.

Held, that at the time of the sequestration F was the owner of the property, and plaintiff could not follow it and make it liable for his mortgage debt.

Held further by BONSER, C.J.—(1) That the Fiscal had, in the circumstances, no right to seize the goods. All that he had power to do was to give written notice to the possessor of the sequestration having been issued.

(2) The only question to be decided by the Court in the above proceeding was whether F was the owner of the property sequestered or not.

THE facts of the case sufficiently appear in the judgments.

Dornhorst and *Jayewardena*, for appellant.

Wendt and *Sampayo*, for respondent.

Cur. adv. vult.

2nd July, 1896. BONSER, C.J.—

In this case the plaintiff is the holder of a registered mortgage of certain movable property granted on the 9th January, 1895, by one Campbell, who was the owner of the property, to secure a sum of money and interest.

It was proved that at that date Campbell was carrying on the business of a hotel-keeper at "The Retreat Hotel" in Kollupitiya. Some time afterwards he removed, taking with him the articles enumerated in a schedule to the mortgage, to "The Australia Hotel" in the Fort. Being in want of money he induced the appellant, one Fernando, who was the Sinhalese manager of a European business firm, to advance him some money and enter into partnership with him.

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On the 5th August, 1895, a notarial deed was executed by Campbell and the appellant, whereby Campbell sold a half share of his furniture and stock-in-trade in "The Australia Hotel" and its goodwill, which included all these articles, to Fernando, and it was thereby also agreed that they should enter into a partnership at will in the business.

On the 1st September following Campbell, according to appellant's story, being in want of money, sold the other moiety of the business and business effects to the appellant, who took him on as manager on a monthly salary. On the 29th October Campbell left the Island, and has never returned.

On the 13th November the mortgagee commenced an action to realize his security, and on 4th December obtained under section 645 of the Civil Procedure Code a sequestration of the property subject to the mortgage.

Under this sequestration the Fiscal seized the goods, the subject of this appeal, in "The Australia Hotel" in the possession of the appellant. The appellant applied to the District Court of Colombo to have the sequestration removed. I may here observe that the Fiscal had no right to seize those goods, which were, according to the return of his own officer, in the possession of the appellant. All that he had power to do was to give a written notice to the possessor of the sequestration having been issued.

Now, as I understand the procedure, the only question to be decided in this proceeding was as to whether Fernando was the owner of the property or not. (See section 648, Civil Procedure Code.)

The District Judge, however, instead of deciding that question, dismissed the appellant's claim on the ground that the registered mortgage prevailed against the subsequent purchase. He did not decide the question as to whether the appellant was the owner of this property or not. He merely says that if he had to decide that question, he should have been constrained to hold that the proofs of sale were insufficient; that it might be very true that Campbell pretended to sell to the appellant who found the finances for "The Australia Hotel," but that if one of two persons was to suffer by Campbell's conduct, he must regard with preferrent favour the mortgagee, who obtained his bond and registered it.

With regard to the question of law decided by the learned Judge, I am of opinion that the view he takes of the effect of Ordinance No. 8 of 1871 is incorrect. He appears to be of opinion that that Ordinance conferred on mortgagees rights which they did not before possess.

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Now the law as to mortgages of movable chattels at the date of the passing of Oridnance No. 8 of 1871 is stated in a judgment of the Privy Council delivered by Lord Kingsdown in Ledward's case (*2 New Rep. 554*).

The general rule of the Civil Law is, that possession of movables is not necessary to the validity of a lien whether created by contract or act of law, and that such lien will attach upon movable property, even in the hands of a *bonâ fide* purchaser without notice. This rule has been modified by the Roman-Dutch Law to this extent: that if the goods left in the possession of the mortgagor are sold or mortgaged by him to another person, they cannot be followed into the hands of such transferree for value, but the contract is binding on the debtor, and the goods themselves may be taken if they remain in his hands. This is the law as collected by Mr. Burge from the authorities to which he refers, and which these authorities fully seem to warrant.

Therefore, unless Ordinance No. 8 of 1871 gives some new rights to a mortgagee, it is clear that the mortgagee in this case cannot seize this property in the possession of the appellant if he has purchased and paid for it.

Now, the object of that Ordinance appears to me to be, not to confer a benefit on mortgagees and purchasers, but rather to impose restrictions and disabilities on them by requiring certain formalities to be complied with as necessary to the validity of their mortgages and purchasing deeds. Indeed, one class of mortgage is altogether forbidden.

I can find nothing in the Ordinance which shows any intention of conferring any greater validity than it before possessed on a mortgage which complies with the conditions of the Ordinance.

It is impossible to believe that the Legislature could have intended to make, without express words, such a serious change in the law as was contended for by the respondent's counsel. So much for the question of law. Then, the real question in this proceeding arises for determination: Was the appellant the owner of the property at the date of the sequestration? It was contended by the respondent that the purchase and sale by the appellant was not proved. There was a long argument based on the assumption that the deed by which the half share of the goods was transferred to the purchaser was not registered as required by Ordinance No. 8 of 1871, and it was contended on the one side that a purchase deed of movables without delivery of possession was not valid by reason of Ordinance No. 8 of 1871 unless registered as required by that Ordinance; and on the other, that a transfer or a sale and purchase of movables was not within that

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Ordinance. In my opinion there can be no possible doubt that the Ordinance, like the English Act of which it is a copy, applies to purchase deeds. But in the present case it has been ascertained that the purchase deed was duly registered.

In my opinion there is no reason to disbelieve the appellant when he swears, as he does, that he purchased and paid for these articles. It was further urged that these goods, when they were seized, were in the possession of Campbell, but the appellant swears that on the 1st September he took possession of them, Campbell being employed by him as his paid servant to manage the business as from that date. If that be true, Campbell at that date ceased to possess for himself and his possession became that of the appellant.

His statement is borne out by the fact that from that date Campbell ceased to pay rent for the hotel premises, and that the rent was thenceforward paid by the appellant, and the receipts were given in his name, whereas previously to that date they had been made out in the name of Campbell. Moreover, as I have pointed out above, the Fiscal's officer reported that the goods were in the appellant's possession at the time of seizure.

Further, it would appear that at the time the property was sequestered the appellant had taken out a license for the hotel in his own name, the license having been originally taken out in the name of Campbell. The plaintiff was not shaken in cross-examination, and I see no reason for disbelieving his account of what took place. If he is to be believed, he was at the time of the sequestration in possession of this property, and was at the same time its owner by a legal and onerous title, and that being so the maxim *Mobilia non habent sequelam* applies, and the mortgagee cannot follow it and make it liable for his mortgage debt. No doubt part of the consideration consisted of money already owing by Campbell to the appellant; but I know of no law which invalidates a sale made partly in consideration of an antecedent debt.

The appeal must be allowed with costs.

LAWRIE, J.—

Campbell had been carrying on business for some time as an hotel-keeper. His stock-in-trade, so to speak, consisted of furniture including a billiard table. He had borrowed a considerable sum of money from the plaintiff and had given a mortgage over the furniture and billiard table, which mortgage was duly registered under Ordinance No. 8. of 1871. In August, 1895, Campbell assumed Fernando as a partner. An instrument of

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partnership and sale was executed by both. By that Campbell, in consideration of a price acknowledged to have been received, sold to Fernando one-half of the furniture, &c. When the case was argued before us it was assumed (I know not how) that this indenture with its included sale of the furniture had not been registered, but it has since been discovered that the indenture was duly registered under Ordinance No. 8 of 1871, and the chief difficulty which I felt is now removed. That registration made the sale of one-half of the movables complete, and the mortgagee thereby lost hypothecary rights over that half, because the half had been acquired by Fernando under a valid title. It is true that the assumption of Fernando was not publicly notified; he did not enter on active management of the hotel. No ostensible change of possession took place—possession remained as before in Campbell, but the registration was in law a sufficient notification and perfected the contract of sale. Fernando says that the partnership was dissolved by mutual consent on the 1st September by an agreement that Campbell should sell his interest in the hotel and in the furniture to Fernando; that Fernando should thus become the sole owner for a price fixed; and that Campbell should remain manager with a salary and free board for himself and his wife. Fernando swears that the full price agreed on was paid by him; he did not produce receipts from Campbell, but he proved that he had paid Campbell considerable sums of money on account of the hotel; and although the proof of payment does not seem to me to be as complete as I should have wished it to be, still I see no reason why Fernando's uncontradicted evidence should not be believed. After the sale of the remaining half of the furniture and of the goodwill, &c., of the hotel, there was still no ostensible change. To the world (at least to those who had not searched the register of bills of sale) Campbell was still the owner. He continued the tenant of the building, the license was in his name. He and his wife continued to live in and to manage the hotel. Fernando, the new owner, did not live there—he only went occasionally. I do not doubt that these arrangements were honest, but they were not intimated to the mortgagee over the furniture. The question is, Has that mortgagee lost the benefit of his security? I think he did when Fernando concluded the contract of sale by paying the price. It was argued that by our law delivery is essential to a perfect sale. I do not agree to that. But it is not necessary to give that opinion, because here Fernando got delivery before the mortgagee sought to enforce his hypothec. Campbell left Ceylon in October, and has not returned. He gave over to Fernando, and Fernando then entered into possession; he paid the

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arrears of rent and took out a new license in his own name. On taking possession of the furniture which he had agreed to buy and which he had paid for, the contract (if till then imperfect) then became perfect. My doubts as to the validity of Fernando's title in competition with the plaintiff mortgagee have been removed by the discovery that the indenture was registered, and by fuller argument. I agree to set aside the order appealed from and to sustain the claim and the sequestration.

WITHERS, J.—

This appeal is from a judgment of the District Judge of Colombo in an incidental action arising between a pledgee and the party in whose custody the property sought to be realized by the plaintiff has been sequestrated under section 645 of the Civil Procedure Code. The appellant having claimed the property so sequestrated, his right has been tried in these proceedings in the manner provided by section 648. By the decree the sequestration is sustained, and the appellant's claim of right to the property is rejected. The property sequestrated consists of a billiard table and certain articles of household furniture which at the time of sequestration were in a house in the Fort of Colombo known as "The Australia Hotel." The respondent's debtors, one Norman and Minnie Campbell, by a writing bearing date 9th January, 1895, and duly registered, hypothecated with the respondent a billiard table and numerous pieces of furniture to secure the payment of a debt. At that date the hypothecated articles were in a house in Kollupitiya. It was not conceded by Mr. Dornhorst that the chattels sequestrated in the Fort are identical with the chattels mentioned in the contract of hypothec. Of course, if they are not the same, this incidental action must be decided in favour of the defendant. If they are the same, it is for the defendant, in face of plaintiff's contract of hypothec, to show cause why he should not be required to reserve and retain the chattels to abide the further order of the Court in the original action of the respondent against his joint debtors. The appellant resists the maintenance of sequestration on the ground that the chattels are in his possession and are his property. His right of property he rests on a *bonâ fide* purchase from the respondent's debtor, Norman Campbell, after the plaintiff's alleged contract of hypothec, but before the institution of the action to realize the hypothec—that is, the 13th November, 1895. The judgment contains no precise decision as to the identity of the articles or as to the contract of purchase and sale pleaded by the appellant. The sequestration has been upheld because, in the

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learned Judge's opinion, the registered contract of hypothec is entitled to prevail over the subsequent purchase and sale, even if the purchased chattels have passed from the possession of the pledgor to that of the purchaser. In the opinion of the learned District Judge, the Ordinances Nos. 8 and 22 of 1871 give such efficacy as this to a written and registered contract of hypothec. This I conceive to be a mistake. Ordinance No. 8 of 1871, in requiring certain written contracts to be registered, does not increase the value of those contracts. Their value is what it was before the Ordinance came into operation. What then was the value of a written contract of hypothec at that date? So long as the chattel remained with the pledgor, the contract created a lien over it and gave the pledgee a priority over it, so that as creditor he was enabled to have it judicially sold and appropriate the proceeds in payment of the debt for which the chattel was secured. But the pledgor was free to dispose of the chattel; and if it was *bonâ fide* sold and delivered to a third party, it became the property of the latter, and was no longer tied to the debt for which it had been secured. Then comes the question, Were these chattels in the appellant's possession under a *bonâ fide* contract of purchase and sale at the time of the institution of the respondent's action? Still asuming the identity of the chattels, it appears that in May, 1895, they were removed from a house called "The Retreat" in Kollupitiya to a house in the Fort known as "The Australia Hotel." The plaintiff's pledgor, Campbell, had been keeping an hotel at "The Retreat," and after May he kept "The Australia Hotel." On the 5th August, 1895, Fernando, the appellant, and Campbell joined in executing a notarially attested document called an indenture, which was duly registered. This document recites that Campbell was keeping an hotel called "The Australia Hotel" in No. 27, Upper Chatham street; that up to the 31st July, 1895, he was the sole proprietor of the business and assets on the premises; that in consideration of the sum of Rs. 200 paid to him by Fernando he transferred a half share in the goodwill and custom of the business, and in consideration of two-thirds of Rs. 900 he transferred to Fernando a just half share of the stock, assets, and property belonging to the business, according to the annexed inventory. He further agreed to admit Fernando from the 1st August as a partner in the business, subject to the provisions in the indenture, and in consideration of Fernando uniting his half of the stock with Campbell's undisposed of share Campbell agreed to take Fernando as his partner in equal shares. The partnership was to be dissolved by six months' notice on either side. According to the appellant, however,

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this partnership was mutually dissolved on the 10th September following by an agreement between him and Campbell that he should take over Campbell's half share of the stock for a sum of Rs. 2,000. This was an oral contract, and the price was paid by the end of that month. After the purchase Fernando allowed Campbell and his wife to remain in the hotel, and made Campbell manager of the hotel with a salary of Rs. 200 a month and free board and lodging. Campbell left the island about the 29th October, 1895, and has not returned. Up to that date the license for the hotel premises was in Campbell's name. A month after Campbell's departure the appellant was required to take out a license, in his own name, and he did so. When Campbell left in October the rent for September was due to the landlord of the premises, and Fernando has paid the rent for September and for the subsequent months, so that since the departure of Campbell Fernando has been acknowledged as the tenant of the premises. I have no doubt that when this action was instituted Fernando was in actual possession of " The Australia Hotel " and its effects, including these chattels if identical. His claim to them as owner by purchase is a *bonâ fide* one. But the question still remains, Has he such a property in the chattels as will defeat the plaintiff's claim to sequestration and sale under his contract of hypothec ? To determine this question, one must consider the law relating to the purchase and sale of movable property. The contract of purchase and sale is completed as soon as the contracting parties are agreed upon the thing to be sold and the price to be paid for that thing. *Emptio venditio, est contractus mutuæ præstationis de re pro certo pretio tradendâ*, and the substantial elements of this contract are *consensus, merx, et pretium. (Van L. Cens. Fors. Bk. IV. chap. XIX. sc. I).* The contract—I am speaking of the Roman Dutch Law—need not be in writing. Of course, if the parties stipulated for a writing, the contract of purchase and sale would not be complete without one. Our local laws have, however, modified the Roman-Dutch Law relating to the sale of movables. The Ordinance No. 7 of 1840 (section 21) requires as an additional element to complete the contract either a writing, signed by the party making it, or, if there is no writing, part payment of the price or part delivery of the thing sold. A contract complying with that requirement becomes complete, but the *nexus* of the contracting parties is not dissolved until both the article has been delivered and the price for it has been paid or satisfied. It is true that the risk of the article is with the purchaser as soon as the contract is complete, but the article does not become the purchaser's own till he has secured the *vacua possessio* of it by

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delivery and has paid the price, or, if the contract is in writing, has granted the payment of the price. It is clear that unless the buyer has the *vacua possessio* of the article he has not the full *dominium* over it (see *Berwick's Voet, p. 19 note, p. 30 note, p. 112, and notes pp. 136, 174, and 179*). Tradition is the effective way of giving *vacua possessio*, and that may be literal or symbolical and fictitious. It is literal if the thing is given into the hand of the purchaser. It is symbolical or fictitious if the key of the room in which the sold articles are kept is handed to the purchaser; if the purchaser puts his mark on things very heavy of draught; if the things are pointed out to the purchaser in his sight (*traditio longæ manus*); or if the purchaser has the things in his custody and control at the time of the completion of the contract by leave or authority of the vendor. (*Van L. Cens. For. II 7, 1; IV. 19, 1; Voet XLI. 1, 34; Berwick's Voet, p. 141 note.*) There must, however, be a delivery which transfers the *vacua possessio*, if the purchaser is to acquire a better right to the thing than a pledgee of the same article under a registered contract in writing without possession. A contract of pledge creates a *jus in re* which a contract of purchase and sale does not. The Ordinance No. 8 of 1871 has added a further requirement to a written contract of sale of movables, and that is the requirement of registration. That has been introduced in the interests of commerce to prevent false credit being given to a person in ostensible possession of goods with which he has parted by contract of pledge or sale. Unless tradition can be fairly inferred from the stipulation in the "indenture" that Fernando shall unite his half share of the stock with Campbell's undisposed of half share in order to be admitted as a partner in equal shares, I can find no evidence of tradition before Campbell was brought into and became Fernando's manager. After the sale of Campbell's remaining half share and before the institution of this claim there can be no doubt in my mind that the appellant Fernando was given possession of the entire stock. Why cannot that possession be considered as implementing the written contract of sale in August and the verbal contract of sale in September? Fernando had fulfilled his part of the contracts by payment of the stipulated price. Why should not the tradition of the whole stock by Campbell to Fernando be considered a fulfilment of his obligations as a vendor in August and in September? I can see no objection on principle to the tradition of the whole stock being regarded as an effective tradition of the successive contracts in August and September. If this view of the case is right and just, then I think the appellant is better entitled to judgment than the respondent, and I should support the appeal with costs.