

1901.
 March 18
 and 19.

ERAMANIS v. DANTU.

C. R., Galle, 5,592.

Fiscal's sale—Sale by execution-debtor to his son previous to Fiscal's sale—Possession by execution-debtor on behalf of his son not resident in the Island—Competing claims.

T., having sued out a writ of execution against the property of D., caused the Fiscal to seize a certain land as the property of D. At the sale held by the Fiscal, E. bought it, and it was conveyed to him on 29th October, 1897. The conveyance was registered on the 19th December, 1897. T. would not allow E. to take possession on the ground that he had sold it to his son by deed dated 31st August, 1897.

In an action brought by E. and his lessee against T., held that, as T. was not the recognized agent of his son, he could not hold possession in his name, but must yield it to E., without prejudice to whatsoever rights the son may have to the land.

THE plaintiff in case No. 3,690 of the Court of Requests of Galle sued one Thepanis for damages, and his action being dismissed with costs on the 18th August, 1897, the defendant took out writ of execution against him and pointed out certain property for seizure. It was sold by the Fiscal on the 29th October, 1897, and was purchased by one Eramanis. Thereupon he leased it to another person, but was not allowed to take possession of the property by the defendant in the said case on the plea that he had sold the property to his son by deed dated 31st August, 1897.

Eramanis and his lessee instituted the present action against the plaintiff in case No. 3,690 for ejection of the defendant and for a declaration of title in favour of the first plaintiff.

The Commissioner dismissed the plaintiff's action in these terms:—

“The property was seized and sold by the Fiscal on the 29th October, 1897. It had been transferred previous to this sale by the defendant on the 21st August, 1897. At the time of the Fiscal's sale the property did not belong to the defendant, who now holds it as the agent of the son and not in his own right.”

Plaintiff appealed:

Bawa, for appellant.—The Fiscal's transfer in favour of the plaintiff was made on the 29th October, 1897, and registered on the 19th December following. It is proved that on 5th November plaintiff was put into possession, and on the 6th of the same month first plaintiff leased the land to the second plaintiff, but defendant would not let the second plaintiff enter the premises,

on the ground that he holds the property for and on behalf of his son, who is now in Australia, upon a conveyance purported to be made by himself in favour of the son. This is a fraudulent transaction. The defendant holds no power of attorney from the son, and the defendant was insolvent at the time of this conveyance. It is further proved that there is no consideration for it. The notary who drew the deed says the son was not present. The deed was executed three days after the judgment condemning the defendant in costs, while the son was in Australia, where he had gone six years ago. The defendant's deed is clearly fraudulent. Even if it were not, defendant cannot act for the son without a power of attorney, and supposing judgment against the defendant in the present case, that will not affect the son at all.

E. W. Jayawardena, for the respondent.—Plaintiff, who claims as purchaser under the Fiscal, has no title because of the deed previously registered. The title to the property is in the son of the defendant. That is the only question in the case. [LAWRIE, J.—Defendant has no authority to be in possession. I am not prepared to say that the transaction between the father and son is fraudulent; but without proof that he is the recognized agent of his son, he cannot hold possession as against a person who had a deed under the Fiscal. I shall leave the rights of the son to be brought out by himself.]

Cur. adv. vult.

19th March, 1901. LAWRIE, J.—

The plaintiff was successful in an action against the defendant; writ was issued and a land was sold and purchased in execution by the plaintiff. When he proceeded to take possession he was opposed by his debtor, the former owner of the land, who produced a transfer by him to his own son, and said he was possessing for his son, who is not now in Ceylon, but he holds no power of attorney for him, nor is he in any way his recognized agent. He must yield possession.

In the absence of his son, it is impossible to decide whether the transfer was valid.

The defendant must be ejected and plaintiff declared entitled to possession. Set aside.

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