[Full Bench.]

Present: Sir Joseph T. Hutchinson, Chief Justice, Mr. Justice Wendt, and Mr. Justice Wood Renton.

1906.
November 27.

MARIE CANGANY *v.* KARUPPASAMY CANGANY.

D. C., Kandy, 16,483.

Mortgage by wife without written consent of husband—Presence of husband at execution and subsequent recognition of its validity by him—Invalidity—Estoppel—Obligation to repay—Ordinance No. 15 *of* 1876, *s.* 9—*Evidence Ordinance.* (14 *of* 1895), *s.* 115.

Where the defendant was present at the execution of a mortgage bond by his wife, and by his subsequent conduct recognized its validity, and where, after the death of his wife, he was sued as administrator of her estate on the said bond, and he pleaded that it was invalid as it was executed without his written consent,—

Held, that the plea was good and that the defendant, who was sued as administrator, was not estopped by conduct from questioning the validity of the bond.

Where it appeared that the money borrowed by the wife went in payment of a prior mortgage executed by the wife with the knowledge and consent of the husband,—

Held, that the defendant (husband), as his wife's administrator, was liable to repay the said sum, as her estate was benefited by the transaction.

Semble (per WOOD RENTON J.).—The written consent of the husband must be previous to the execution of the mortgage, as the words "but not otherwise" appear to invest it with the character of a condition precedent.

THE facts sufficiently appear in the following judgment of the District Judge (J. H. de Saram, Esq.):—

"This is an action on a mortgage executed by one Sundaram on the 2nd September, 1899, in favour of the plaintiff for Rs. 4,500

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payable with interest. The claim is for Rs. 6,157.66, which the defendant admits is due.

" Sundaram was a married woman—the wife of the defendant—at the date of mortgage. It is proved they were married according to Tamil custom in the year 1880, prior to the execution of the mortgage. She is dead. The defendant is the administrator of her estate.

" The action is contested on the ground that the mortgage is void, the defendant not having given his written consent to it. The objection is founded on the enactment contained in section 9 of ' The Matrimonial Rights and Inheritance Ordinance, 1876,' which is that any woman married after the proclamation of that Ordinance shall, subject and without prejudice to the trusts of any will or settlement affecting any immovable property to which she may be entitled at the time of her marriage, or may become entitled during her marriage, have as full power of disposing of and dealing with such property by any lawful act *inter vivos* with the written consent of her husband, but not otherwise, or by last will without such consent, as if she were married.

" The property mortgaged was purchased by Sundaram on the 5th July, 1890. The transfer, I understand, is in her favour. The defendant admits the money lent by the plaintiff went in payment of a prior mortgage executed by his wife, with his knowledge and in his presence, in favour of one Mayappa Chetty.

" After the mortgage to the plaintiff tea leaf from the property mortgaged was sold to the superintendent of a neighbouring estate, who, at the defendant's request, sent the plaintiff cheques for the amounts due, and the plaintiff appropriated the proceeds in repayment of advances he made Sundaram, also with defendant's consent, for the upkeep of the property and in payment of interest due on the mortgage. It has been proved, though denied by the defendant, that this mode of payment continued after his wife's death.

" Under these circumstances, it would have been honest for the defendant to have consented to judgment in favour of the plaintiff.

" It was conceded by Mr. Beven, appearing for the plaintiff, that the mortgage is invalid for want of the defendant's written consent, but he argued that, as the defendant was present at the execution of the mortgage, and consented to it, though not in writing, he is estopped from denying its validity.

" The case must be decided on this question of estoppel, respecting which the second issue was framed, viz., whether the defendant is estopped from denying the validity of the mortgage, he having been present at its execution, and raised no objection thereto, and paid interest thereon.

" This issue admits the defendant's presence at the execution of the mortgage. He denied it when he gave evidence, but he cannot be heard to say that, for his answer—paragraph 4—merely denies the materiality of the allegations in paragraph 4 of the plaint, where the defendant's presence and his raising no objection are pleaded.

" On this question of estoppel Mr. Beven cited the dictum of Bonser C.J. in *Nicholas de Silva v. Shaik Ali* (1). It was argued that the Chief Justice's dictum is not binding on me, but it is a dictum which I may safely follow, especially as I am in accord with it.

" The subject of estoppel is dealt with in section 115 of the Ceylon Evidence Ordinance, which enacts as follows:—

" ' When one person has, by his declaration, act, or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative to deny the truth of that thing.'

" It was argued that this proposition as to estoppel does not arise, because the defendant was not guilty of any neglect of duty, it being no part of his duty to warn the plaintiff that the mortgage was about to be executed by a married woman, without the written consent of her husband. This was, at most, according to the defendant, a mere acquiescence, as distinguished from a breach of duty to speak.

" Amir Ali and Woodroffe, in their *Law of Evidence* (page 736, edition of 1898), say: ' The case must be such that it would be fair to interpret the silence into a declaration of the party that he has, *e.g.*, no interest in the subject of the transaction. Indeed silence, when resulting in an estoppel, may not improperly be said to have left something like a representation upon the mind. '

" I have not been able to see the cases cited by them, but in the note 5 on the same page it is said the subject of silence is illustrated by the case of *Pickard v. Sears* (2) and *Gregg v. Wells* (3), in the latter of which cases Lord Denman said: ' A party who negligently or culpably stands by and allows another to contract on the faith and understanding of a fact *which he can contradict*, cannot afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving.'

" ' If a person having a right, and seeing another person about to commit, or in the course of committing, an act infringing upon that

(1) (1895) 1 *N. L. R.* 228. (2) 6 *A. & E.* 469.
(3) 10 *A. & E.* 90.

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right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act' (page 737). Then, in note 1 in page 738, it is said, citing an Indian case, " when, however the doctrine of estoppel is alone invoked, there may be an estoppel by conduct of acquiescence when there is no fraud, and where the person estopped has acted *bonâ fide* and unaware of his legal rights."

" On page 748 and 749 Amir Ali and Woodroffe say: " A person who by his declaration, act, or omission has caused another to believe a thing to be true and to act upon that belief must be held to have done so ' intentionally ' within the meaning of the statute, if a reasonable man would take the representation to be true, and believe it was meant that he should act upon it. It is not necessary, however, to prove an intention to deceive in order to make a case of estoppel, nor is it necessary to an estoppel that the person whose acts or declarations induced another to act must have been under no mistake or misapprehension himself. Section 115 does not make it a condition of estoppel resulting that such person was either committing or seeking to commit a fraud, or that he was acting with a full knowledge of the circumstances and under no mistake or misapprehension. What the section mainly regards is the *position of the person who was induced to act*, and not the motive or state of knowledge of the party upon whose representation the action took place. If the person who made the statements did so without full knowledge, or under error, *sibi imputet*. It may, in the result, be unfortunate for him, but it would be unjust, even though he acted under error, to throw the consequences on the person who believed his statement and acted on it as it was intended he should do.'

" In the present case I believe the defendant was unaware of his legal rights, and that he had, at the time of the execution of the mortgage, no intention to defraud the plaintiff, but he is by his acquiescence estopped from denying the validity of the mortgage. It would be inequitable to hold otherwise.

" I answer the second issue in the affirmative and the third in the negative; the defendant cannot repudiate the act of his intestate.

" I give the plaintiff judgment for Rs. 6,157.66, with interest on Rs. 4,500 at the rate of 16½ per cent. per annum from the 31st March, 1904, to this date, and with further interest on the aggregate amount made up of the principal and interest at the rate of 9

per cent. per annum from this date to the date of payment, and costs."

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The defendant appealed.

Walter Pereira, K.C., S.G. (*Balasingham* with him), for defendant, appellant.—The mortgage of land was altogether inoperative, as it was effected by a married woman. Under our Matrimonial Rights and Inheritance Ordinance (No. 15 of 1876, section 9) it is only with the written consent of the husband, "and not otherwise," that a wife can dispose of or deal with her immovable property. Here, there was no such consent given. True, that after the execution of the bond certain cheques—possibly endorsed by the defendant, as contended by the other side—were sent to the plaintiff in payment of interest, but that cannot be construed to mean written consent. The consent under the Ordinance should not be *ex post facto*. The words are "with the written consent of her husband, *and not otherwise.*" These last words are significant. Then, it is said that the husband was present at the execution of the bond, and is estopped from denying its validity. The question is not whether the husband personally is estopped. The question is whether the defendant is estopped, and the defendant is the husband, not in his personal capacity, but as the administrator of the deceased. Besides, the question of estoppel does not come into play at all. A deed invalid because certain requirements of the law have not been complied with cannot be rendered valid by estoppel. If I stand by while my property is being sold by another, I may be estopped from questioning that person's title, and may thus lose my property, but that contingency is always subject to the provision that a valid deed has been executed. Here, the property admittedly did not belong to the husband, but his written consent was necessary to the execution of a valid deed by the wife, and his standing by cannot, by operation of the doctrine of estoppel, be said to be a sufficient substitute for the legal element of written consent.

Bawa (*Van Langenberg* with him), for plaintiff, respondent.—The defendant is estopped from disputing the validity of the mortgage as, being present, he stood by and acquiesced in its execution. [HUTCHINSON C.J.: The defendant is administrator, and there is no estoppel unless it can be said the intestate was estopped.] The intestate was estopped by her conduct and that of the husband, which taken together amounted (1) to a representation either that she was a *feme sole*, or a widow, or not lawfully married; or (2) that if married the husband's conduct had been given. [WOOD RENTON J.: Must the consent not have been given previously and in writing?]. Even if

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so, the plaintiff was entitled to suppose that everything had been done which the law requires to give validity to the mortgage. *Nicholas de Silva v. Shaik Ali* (1) is in point. There, a similar question arose. Though the instrument in that case was executed prior to the Ordinance No. 15 of 1876, yet the same principles apply with greater force, for under the common law the property vested in the husband, and not merely written consent, but a deed from him, was required to pass title. Bonser C.J. said: "Had it been proved that the husband knew of the sale by his wife and raised no objection to its completion, I should have been prepared to hold that he was estopped from denying its validity;" and further: "As it would have been inequitable for the wife to have repudiated her own sale and conveyance, so also it is inequitable for her heirs and representatives to do so. He is bound to make good the act of his *auctor* and the defendant may oppose to the claim the *exceptio rei venditæ et traditæ.*" Withers J. agreed. If written consent was necessary, section 9 of Ordinance No. 15 of 1876 does not require that it should be previous to the execution of the instrument. The evidence shows that the husband signed various documents—orders and receipts—implying consent after the mortgage had been signed. In any event the wife's estate is liable for the debt, even though no mortgage decree may pass. The evidence shows that the money raised by the mortgage enriched the wife's estate and discharged previous mortgages (*Nathan's Common Law of South Africa, vol. I.*, §386).

29th November, 1906. HUTCHINSON C.J.—

The appellant is sued in this action as administrator of the estate of Sundaram. The plaintiff alleges that Sundaram, by a bond dated in 1899, bound herself to pay the plaintiff Rs. 4,500 with interest, and mortgaged to him the property mentioned in the plaint to secure payment of the debt; that she is dead, and that the defendant is her administrator; and that money is due on the bond; and he asks the Court to order the defendant, as such administrator, to pay the amount due, and that in default the property may be sold.

The defendant says that at the date of the bond Sundaram was his wife, and that the mortgage was executed without his written consent, and is therefore bad and invalid.

The plaintiff denied that the defendant was Sundaram's husband, and pleaded that the defendant was present at the execution of

(1) (1895) 1 *N. L. R.* 228.

the bond and raised no objection to its execution, and thereafter paid interest on it, and is estopped from denying its validity.

It was proved that the defendant was Sundaram's husband at the date of the bond, and that the mortgaged property was Sundaram's, and that the defendant was present at the execution of the mortgage. The defendant admitted that the debt is due. He said that the income from the property is just enough to support his three children, and that is why he will not pay. He admitted that the money lent by the plaintiff went in payment of a prior mortgage executed by his wife with his knowledge and in his presence. After the mortgage to the plaintiff tea leaf from the mortgaged property was sold to a man who, at the defendant's request, sent the plaintiff cheques for the amount due, and the plaintiff appropriated the proceeds in repayment of advances he made to Sundaram, also at the defendant's request, for the upkeep of the property, and in payment of interest due on the mortgage; and the District Judge finds that this mode of payment continued after Sundaram's death.

The mortgage was invalid by reason of the enactment in section 9 of Ordinance No. 15 of 1876, that " a woman married after the proclamation of the Ordinance shall.....have as full power of disposing of and dealing with any immovable property to which she may become entitled during her marriage by any lawful act *inter vivos* with the written consent of her husband, but not otherwise, as if she were unmarried. " Sundaram was married after the proclamation of the Ordinance, and she acquired this property during her marriage.

The plaintiff, however, contends that the defendant is estopped from denying the validity of the mortgage by reason of his having been present and making no objection to it at its execution and by his subsequent conduct recognizing the obligation.

But the defendant is not sued personally, but only as administrator. It is therefore necessary for the plaintiff to show that Sundaram would have been so estopped. He cannot do that. So far as regards the mortgage, therefore, this action must fail.

The plaintiff urges that nevertheless the claim for the debt can be sustained, and in that I think he is right. A married woman is liable to repay money which she borrowed with her husband's consent, and of which her estate had had the benefit. I think that the judgment under appeal should be set aside, and judgment entered for the plaintiff against the defendant, as administrator of Sundaram, for the amount claimed with costs in both Courts.

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WENDT J.—

I have had the advantage of perusing the judgments of my Lord and my brother Wood Renton, and I agree entirely with them in holding (1) that the mortgage was invalid for want of the husband's written consent; and (2) that the husband, sued solely as his wife's administrator, is not estopped (because the wife, if alive, would not have been estopped) from setting up that invalidity. As for the contention that, apart from the mortgage security, the plaintiff is entitled to recover the debt on the wife's obligation, I think it is not sustainable, inasmuch, as a married woman is incapable of binding herself [see *Silva v. Disanayaka* (1)]. But it seems to me that, apart from express obligation, her estate in defendant's hands is liable to make good to plaintiff the money he advanced, it having been admitted in the Court below that that money went to pay off a previous encumbrance on the mortgaged land. To that extent the intestate's estate was benefited, and the ordinary principle applies that defendant shall not retain that benefit without compensating plaintiff. I think therefore that defendant, as administrator, should repay to plaintiff the sum lent, with interest at 9 per cent., the legal rate, up to date of District Court decree, and further interest thereafter on the aggregate sum until payment in full, with costs in both Courts.

WOOD RENTON J.—

The appellant is sued as administrator of the estate of his wife Sundaram on a mortgage executed by her in favour of the respondent. The appellant and Sundaram were married after "The Matrimonial Rights and Inheritance Ordinance, 1876" (No. 15 of 1876) came into operation, and therefore, under section 9 of that Ordinance, the wife has power to mortgage her immovable property "with the written consent of her husband, but not otherwise." Although the points do not seem to be covered by authority, I incline to the view that the written consent of the husband must be previous to the execution of the mortgage, as the words "but not otherwise" appear to invest it with the character of a condition precedent, and, in any event, it must be an express consent to the particular transaction. I do not think that an implication of the husband's consent from subsequent documents, in which he had recognized the existence of the mortgage, would satisfy the requirements of the law. In the present case there is no suggestion of any consent in writing by the appellant to his wife's mortgage prior to

(1) (1892) 2 *C. L. R.* 123.

its execution. There is evidence that, after its execution, the appellant sent cheques to the respondent in payment of amounts due by way of principal and interest under the mortgage. But that is not enough. It follows (1) that the mortgage has not been executed in the mode prescribed by section 9 of Ordinance No. 15 of 1876, and as the words " but not otherwise " are clearly imperative and not merely directory; (2) that it is invalid at law [see *Hunt v. Wimbledon Local Board* (1); *Young v. Royal Leamington Spa (Mayor of)* (2)]. Under English Law, to which, in the construction of a statute based on English legislation and considered, with reference to a marriage contracted after it had come into force, we are, I suppose, bound to have regard [*Meideen v. Banda* (3)], the wife would have been, and the appellant *qua* her administrator is, entitled to take advantage of this invalidity, in the absence of any circumstances amounting to an equitable estoppel [*Cannam v. Farmer* (4); *Liverpool Adelphi Loan Association v. Fairhurst* (5); *Wright v. Leonard* (6); *Earle v. Kingscote* (7)]. Two alleged grounds of equitable estoppel are relied upon by the respondent here; (1) that the appellant held her out as a *feme sole;* (2) that, in any case, he represented her to the respondents as possessing the requisite statutory authority. In my opinion both grounds are bad.

(1) The marriage of the appellant with Sundaram is sufficiently proved by evidence of its actual celebration, followed by twenty years' cohabitation [(cf. *Sastry Valaider Aronegary v. Sembecutty Vaigalie* (8)]. Moreover, there is positive evidence in the present case to show that the respondent was aware that Sundaram was a married woman; and there is not a vestige of proof of any representation by the appellant to the contrary. (2) It appears that the appellant accompanied Sundaram, and was beside her, when the mortgage was executed. But I do not think that any implied representation can fairly be deduced from this circumstance. Probably neither the appellant nor the respondent was aware of the necessity for a written consent of the husband to his wife's mortgage. I agree, however, that the wife—having had the benefit of the money borrowed—would be liable, under Roman-Dutch Law, to make it good. That liability can be enforced against her estate.

I concur in the order proposed by my Lord the Chief Justice and my brother Wendt.

Judgment varied: money decree entered.

(1) (1878) 4 *C. P. D.* 48.
(2) (1883) 8 *A. C.* 517.
(3) (1895) 1 *N. L. R.* 51.
(4) (1849) 3 *Ex.* 698.
(5) (1854) 9 *Ex.* 422.
(6) (1861) 30 *L. J. C. P.* 365.
(7) (1900) 2 *Ch.* 585.
(8) (1881) 2 *N. L. R.* 322.