1933 *Present:* **Dalton A.C.J. and Koch A.J.**

## CHETTIAR *v.* COONGHE.

*172—D. C. Negombo, 5,733.*

*Registration of seizure—Previous gift of land unregistered—Adverse interest for valuable consideration—Priority—Ordinance No. 23 of 1927, s. 7 (1).*

The registration of a notice of seizure does not create an adverse interest in land for valuable consideration within the meaning of section 7 (1) of the Registration of Documents Ordinance so as to avoid a previous unregistered deed of gift affecting the land.

THIS was an action under section 247 of the Civil Procedure Code. The plaintiff sued the administratrix of the estate of one Coonghe in D. C. Negombo, 5,058, and in execution of the judgment entered in his favour seized the property in suit. The second defendant-appellant claimed the property and his claim was upheld. The appellant's claim was based on a deed of gift from Coonghe dated October 19, 1928, a few days before his death. The deed of gift was not registered while the plaintiff's seizure was duly registered. The learned District Judge held that the registration of the seizure avoided the deed of gift.

*H. V. Perera* (with him *E. B. Wikramanayake* and *D. W. Fernando*), for second defendant, appellant.—It is true that a seizure is an instrument affecting land. But an instrument affecting land is not the same as an instrument on which one can claim title. Before the Registration Ordinance such a point could not have been taken. Under the Code if a seizure was registered only subsequent alienations were void. The attempt is to make a registered seizure affect not only subsequent alienations but also prior alienations. A seizure does not give a person an interest in the property. (*Jayawardene on Registration 177; Moti Lal v. Karrabuldin*[1]; *Peacock v. Madar Gopal*[2].) Nor is it an instrument for valuable consideration. There is a fallacy in the argument of Jayawardene A.J. in *Eminona v. Mohideen*[3] that there is valuable consideration because the creditor gets an advantage. The consideration must be given by the creditor. Section 7 (1) is operative in respect of a seizure. An earlier instrument need only affect land. But a later instrument must create an interest in land and for valuable consideration. Under the Code there was no question of a seizure being registered in the wrong folio. But now a seizure may be registered in the wrong folio. In such a case any subsequent private alienation registered in the right folio will be valid. At the date of seizure we had title. The deed conveyed title. Non-registration does not matter. Registration only comes in when there are competing deeds. (*Silva v. Nono Hamine*[4], *Abubucker v. Tikiri Banda*[5].)

*Hayley, K.C.* (with him *Weerasooria*), for respondent.—The legislature has expressly changed the law. One must give effect to the plain words of the legislature. The change was to remedy an important defect in the

[1] *25 Cal. 179.*
[2] *29 Cal. 428.*
[3] *32 N. L. R. 145.*
[4] *10 N. L. R. 44.*
[5] *29 N. L. R. 132.*

registration of seizures. Before the new Ordinance, when a creditor seized, made known and registered his seizure, the registration took effect as from the date of seizure. In the gap between seizure and registration an alienation by the judgment-debtor was possible but such alienation would be defeated by the registration of the seizure. That was a defect which needed a remedy. The new Ordinance was to cure that defect. It placed the seizure in the same position as a conveyance. The question then becomes purely a question of registration as between competing deeds. Even in the case of two competing deeds the vendor, when he sells the second time, has really not title to convey. But by the fiction of the law the prior registration by the second vendee gives him title. Section 6 gives priority by registration to any instrument affecting land. A notice of seizure is an instrument affecting land. (Sections 8 (b) and 9 (1).

[DALTON A.C.J.—Who is the party who on a seizure is a party claiming an adverse interest on valuable consideration?]

The judgment-creditor. The consideration is the debt due to him. Certainly he claims an adverse interest. The word interest here means an interest affecting land. (*Jayewardene on Registration 190.*) Under the term " deed " in Ordinance No. 3 of 1907 was included a notice of seizure.

July 26, 1933. DALTON A.C.J.—

This is an action under section 247 of the Civil Procedure Code. The administratrix of one Anthony Coonghe had been sued by the plaintiff in D. C. Negombo, No. 5,058, and judgment had been entered against her on January 23, 1931. Plaintiff took out a writ and seized the property the subject of this action. The second defendant (appellant) in the present action claimed the property, his claim was upheld, and the plaintiff instituted this action on August 10, 1931.

The appellant claimed the property on a deed of gift of October 19, 1928, executed by Anthony Coonghe a few days before his death. The learned Judge is satisfied that that was no alienation in fraud of creditors. The deed of gift however was not duly registered, whereas the seizure by the judgment-creditor was duly registered. Plaintiff on that ground asked for a declaration that the lands were liable to be sold under his writ by reason of the prior registration of his seizure notice. The decision of E. W. Jayewardene A.J., in *Eminona v. Mohideen,*[1] is cited in support of his contention.

Under the provisions of the Registration of Documents Ordinance, 1927, a notice of seizure issued under section 237 of the Code is an instrument affecting the land seized. In order, however, to make out a case that an unregistered instrument is void against a subsequent registered instrument, plaintiff must establish as provided by section 7 (1) of the Ordinance that the subsequent instrument is in respect of an interest in the land obtained on valuable consideration. It was held in the case relied upon, that a notice of seizure created an interest adverse to a previous transfer for valuable consideration, and that section 7 (1) applies to registered seizures, thus giving registered seizures priority over previous deeds that are not rgeistered. I regret I am quite unable to

[1] *32 N. L. R. 145.*

agree with that conclusion. Even accepting the correctness of the argument that a registered notice of seizure, as a document affecting land, is therefore a document creating an interest in land (with which argument, I would add, I do not feel able to agree) I am quite unable to see how that interest can be said to be created and claimed on valuable consideration. In that event it is impossible to bring a registered seizure within the provisions of section 7 (1).

The learned trial Judge, althought he was of opinion that the case cited had been in wrongly decided, was correct in holding that the decision was binding upon him. Following that decision, he held the interests of the deceased, with which he had parted by deed P 5 in 1928 were nevertheless subject to be seized and sold under the writ in D. C. No. 5,058. As I have stated, the decision which he was bound to follow cannot in my opinion be supported. The plaintiff's action should therefore, in view of his conclusions on the other issues, have been dismissed. The appeal is allowed. The decree entered will be set aside and plaintiff's action will be dismissed with costs. Appellant will have his costs of this appeal.

KOCH A.J.—

I am in entire agreement with the judgment of my Lord the Acting Chief Justice, and would wish to add that the fundamental fact that has to be ascertained in an action under section 247 of the Civil Procedure Code, when instituted by a judgment-creditor, is whether the property seized was liable to be sold under the writ of the plaintiff. This would depend on whether the judgment-debtor had a seizable interest in the property at the moment of seizure—section 247 of the Civil Procedure Code. The institution of an action under section 247 follows on the result of a claim inquiry under sections 242, 243, 244, and 245. The claim investigated under these sections is made under section 241, which provides for such "a claim being preferred against a seizure". The claim made is the "objection" to the seizure being effected; so that the rights of parties have to be ascertained at a period of time immediately anterior to the act of seizure.

This view is supported by the decisions of this Court in *Abubacker v. Tikiri Banda,*[1] which followed a judgment of a Bench of three Judges in *Silva v. Nono Hamine.*[2]

In this case the legal title to the property seized was by virtue of the deed of gift of October 19, 1928, clearly in the appellant (claimant) at the moment of seizure, and the judgment-debtor had no saleable interest in the property at that period of time.

I am therefore of opinion that for this additional reason also the appeal should succeed.

*Appeal allowed.*

[1] *29 N. L. R. 132.*

[2] *10 N. L. R. 44.*