[FULL BENCH.] 1913.

Present : Wood Renton A.C.J., Ennis J., and De Sampayo A.J.

JAMIS *v.* SUPPA UMMA *et al.*

295—D. C. Kandy, 21,941.

Sale of land by auction—Notarially attested conditions of sale signed by purchaser—Defect in title of vendor—May purchaser repudiate sale ?—Warranty—Vacant possession.

A purchaser of a land at an auction who signs notarially attested conditions of sale agreeing to complete the purchase is not entitled to withdraw from the sale on the ground of any defect of title of the vendor; in the absence of fraud on the part of the vendor, and of an express warranty of title, he is only entitled to get vacant possession.

The defendant caused a land to be put up for sale by public auction, and plaintiff became the purchaser, and signed notarial conditions of sale agreeing to complete the purchase. Thereafter plaintiff, alleging that the defendant's title was defective, claimed in this action a refund of the sum paid by him as auctioneer's charges and other expenses incurred by him in investigating the title.

Held (*per* WOOD RENTON A.C.J. and DE SAMPAYO A.J., ENNIS J. *dissentiente*), that plaintiff was not entitled to decline to accept vacant possession on the ground that his vendor's title was defective.

WOOD RENTON A.C.J.—In the absence of fraud or of an expreas warranty of title, the only primary obligations resting on the vendor of immovable property are to give the purchaser "vacant possession," that is to say, possession unmolested by the claim of any other person in possession of the property sold, and to warrant and defend the title which he conveys, after the purchaser, once placed in possession, has been judicially evicted.

APPEAL from a judgment of the District Judge, Kandy (F. R. Dias, Esq.).

The facts are set out in the judgment of Wood Renton A.C.J. and De Sampayo A.J.

The case was reserved for argument before three Judges by Ennis J. and De Sampayo A.J.

Bawa, K.C. (with him *E. W. Jayewardene*, *J. S. Jayewardene*, and *L. H. de Alwis*), for appellant.—The land sold is burdened with a *fidei commissum*. The first defendant had no title to sell. He is only entitled to a life interest at present. What the auctioneer sold

1913.

Jamis v. Suppa Umma

was the land itself, and not the life interest. It is open to the purchaser to withdraw from the sale on finding that the vendor has no title.

[De Sampayo A.J.—Is it clear that the land is burdened with a *fidei commissum* ?] It is on that footing that the case was argued and reserved for the consideration of three Judges. [Wood Renton A.C.J.—Let us assume that there is a defect of title for the purpose of this argument.]

There is no difference between the English law and the Roman-Dutch law as to the rights of parties in the case of sales by auctioneers. See *Marshall's Judgments 46.*

The first defendant was guilty of fraud, in that she did not disclose to the plaintiff all the information she possessed as to her title. See *Halsbury's Laws of England, vol. XXV., p. 302, ss. 510 and 511.*

Inasmuch as this sale was by auction, the English law applies. The rights and obligations of an auctioneer are governed by the English law, and not the Roman-Dutch law, if there is a conflict between the two laws.

Counsel cited *Carlisle v. Salt,*[1] *re Hædicke and Lipski's Contract,*[2] *Ellis v. Rogers,*[3] *re Gloag and Meller's Contract,*[4] *Chitty on Contracts 353.*

Even under the Roman-Dutch law the vendor must give possession and title. [Wood Renton A.C.J.—*Alagiawanna Gurunnanse v. Don Hendrick et al.*[5] is a Full Court judgment against you. The vendor's obligations are to give vacant possession and to give a warranty against eviction.] The facts of that case are different. In that case there was a completed lease. Here there is only an agreement to purchase. A would-be purchaser should not be forced to enter into a sale when he knows that the vendor has no title.

In *Ratwatte v. Dullewe*[6] the vendor gave title, but not possession. It was held that the purchaser was entitled to get back his money paid to the auctioneer (see *p. 309*). In this case the vendor is prepared to give possession, but not title. He cannot be forced to accept possession as sufficient. The land is burdened with a *fidei commissum.* When the *fidei commissary* comes forward the vendor would be dead, and he might have left no property. It is unreasonable to ask the appellant to pay money now for the land on the doubtful chance of getting back his money some twenty or thirty years hence.

Under the Roman-Dutch law a purchaser was given the right to rescind sales on the ground of mistake or for certain defects; the *actio quanti minoris* and the *actio redhibitoria* were available to purchasers for this purpose. See *3 Maasdorp 166 and 167.* There

[1] *(1906) 1 Ch. 335.*
[2] *(1901) 2 Ch. 666.*
[3] *(1885) 29 Ch. D. 661.*
[4] *(1883) 23 Ch. D. 320.*
[5] *(1910) 13 N. L. R. 225.*
[6] *(1907) 10 N. L. R. 304.*

is nothing in the Roman-Dutch law which restricts the redhibitory actions to movables.

It does not follow from the fact that a purchaser of land has the right to call upon a vendor to warrant and defend when sued in ejectment that the other actions are not available to him. Counsel cited *2 Nathan 761, Opinions of Grotius 566, 2 Maasdorp 59, Fernando v. Jayawardene.*[1]

A. St. V. Jayewardene, for the defendants, respondents.—The use of the word " assigns " in the habendum clause and in the clause containing the prohibition against alienation made the gift a free and unrestricted one. (*Dassanaike v. Dassanaike.*[2]) Even if it were otherwise the purchaser was bound to carry out his part of the contract, as the vendor was prepared to give vacant possession. [Ennis J.—But alienation of property subject to a *fidei commissum* is void. See *Walter Pereira's Laws of Ceylon, vol. II., p. 570.*] That refers to property the alienation of which is prohibited by last will. Here the prohibition is created by an act *inter vivos*, or deed of gift. Even otherwise the alienation is not wholly void, but may be set aside at the instance of the *fidei commissary*. In discussing this question the distinction between the obligation to guarantee against eviction and the obligation to guarantee against defects in the thing sold must be observed. Where the thing sold had a defect either in its quality or quantity, the vendor could obtain a cancellation of the contract by the *actio redhibitoria*, or obtain a reduction of the price by the *actio quanti minoris*. These remedies had no place where the defect was in the title. (*3 Maasdorp 166.*) The passages referred to by counsel for the appellant, beginning at *p. 167, Maasdorp, vol. III.*, refers to the conditions under which a sale may be rescinded or the price reduced by the actions *redhibitoria* or *quanti minoris*, and have no application to this case, where the dispute is as regards a defect in the title. The fact that the sale was by auction does not prevent the Roman-Dutch law from applying, so far as the rights of the vendor and vendee of immovable property are concerned. The English law only regulates the contractual rights between the auctioneer and his principal. Under the Roman-Dutch law, in sales by auction other than *ex decreto judicio*, there was an implied warranty against eviction. (*2 Burge 574; Matthaeus de Auctienibus, bk. I., ch. XIV., ss. 5 et seq.*) That being so, the question is whether the purchaser is entitled to ask for anything more than vacant possession of the property sold. Under the Roman-Dutch law sale of property belonging to a third party is valid if the vendor acted *bona fide* or in ignorance. (*Voet 21, 2, 31; 3 Maasdorp 163 and 164; Berwick's Trans. 537, 2nd ed.*) In the present case there is no fraud alleged or proved, and the deed under which the defendant claims title gives her the property without any restriction whatever. She has acted *bona fide*. She is

[1] *(1896) 2 N. L. R. 308.*

[2] *(1906) 8 N. L. R. 61.*

1913

Jamis v. Suppa Umma.

prepared to give vacant possession, and that is all the purchaser is entitled to in the circumstances. (*Voet 19, 1, 10 and 11; Berwick's Trans., 2nd ed., pp. 172 and 173; 2 Burge 540.*) The fact that the title is defective is immaterial so long as the purchaser can obtain such possession as he could maintain by a possessory suit. According to *Burge, vol. II., p. 540,* " The doctrine seems to have been..... that, if the vendor sold the property *bona fide* believing it to be his own, the purchaser was not at liberty if he discovered a defect in the title, to refuse payment of or recover back the purchase money unless he had been actually evicted." The same law is laid down by Pothier in his treatise *The Contract of Sale.* Burge cites the passage at length at page 541 of his second volume, and in that passage Pothier says that the law is that, " ..... though the buyer finds that the vendor was not the owner of the thing which he has sold, and consequently has not transferred the ownership to him, the buyer, so long as he is not disturbed in his possession, cannot for that reason plead that the vendor has not fulfilled his obligation." As regards the English cases cited, they are based on English Acts dealing with the transfer of land, and cannot be made applicable to the law of Ceylon. [Wood Renton A.C.J.—We do not wish to hear you on that point.]

Bawa, K.C., in reply.

Cur. adv. vult.

November 13, 1913. ENNIS J.—

This case raises the question of the respective obligations of vendor and purchaser, and the legal remedies available for relief. The question is governed, I consider, by Roman-Dutch law. It appears that the property is (or may be) burdened with a *fidei commissum.* The deed of gift, which forms the basis of the title offered, contains a prohibition on alienation for thirty years. The period has not yet expired, and one of the persons to be benefited, a minor, is named in the deed, is admittedly still alive, and did not join in the conveyance to the first defendant.

It was urged for the defendants that this *fidei commissum* clause was void on a true construction of the deed taken as a whole. It may or may not be so; it is a doubtful question of law, and turns on the construction of the terms of the deed. It would not, I consider, be proper to decide such a question as incidental to this action to which the person interested is not a party. It is necessary to consider its effect on the contract. If the *fidei commissum* is good, there can be no doubt it would affect the vendibility of the thing sold. *Voet 18, 1, 15* (*Berwick 20*). The prohibition is annexed to and inherent in the thing sold by virtue of the deed of gift, and renders it unsaleable (*Burge, bk. 2, p. 440*), except with the concurrence of all the persons who take an interest under it. (*Walter Pereira 570.*)

The contract of sale in this case merely specified certain lands in Kandy as the subject of the sale, and this must be construed to mean the full ownership (*Bower v. Cooper*,[1] *Hughes v. Parker*,[2] and *Maasdorp, vol. III., p. 72*), and not the life interest only, to which the vendors would be entitled if the *fidei commissum* is good.

It has been urged that in the absence of express agreement the vendor does not warrant the title of the thing sold, but only warrants against eviction, and that the purchaser may be compelled to accept delivery even though the property belongs to another. This proposition is based on the following passages in text books on Roman-Dutch law.

Referring to the obligations of a purchaser, Maasdorp says (*bk 2, p. 182*): "He is bound to accept the thing if tendered to him in accordance with the contract, even though the property may belong to a third party." This statement is made on the authority of *Voet 19, 1, 18*, and *Grotius 3, 25, 1*.

Burge (*bk. 2, p. 540*) says: "According to the civil law, the vendor, by the contract of sale, incurred the obligation to deliver the property, but not to make the purchaser the proprietor, so as to entitle the latter to insist that the title shall be made clear before he paid the price. . . . The doctrine, therefore, seems to have been, although this inference is controverted by Callet in his commentary on the title *ex exictionibus*, that, if the vendor sold the property, *bona fide* believing it to be his own, the purchaser was not at liberty, if he discovered a defect in the title, to refuse payment of or recover back the purchase money, unless he had been actually evicted."

As to the obligations of the vendor, Pothier says (in the passage cited in *Burge, vol. II., p. 541*), which I translate as follows: "The contract of sale is a contract by which one of the contracting parties, the vendor, binds himself to cause the other freely to hold a thing under a proprietary title in consideration of a sum of money which the buyer binds himself reciprocally to pay.

"I have said *de lui faire avoir a titre de proprietaire*. These terms, which correspond to *præstare emptori rem habere licere*, embody the obligation to deliver the thing to the buyer, and an undertaking to defend it, after it has been delivered to him, from all disturbances by which people could prevent him from possessing the thing, and from holding it as the proprietor; but they do not embody a definite obligation to transfer the ownership, for a vendor who sells a thing of which he believes in good faith himself to be the owner, although he may not be so, does not bind himself definitely to transfer the ownership. That is why, though the buyer finds that the vendor was not the owner of the thing which he has sold, and consequently has not transferred the ownership to him, the buyer, so long as he

[1] *2 Hare 408.* [2] *8 M. & W. 244.*

1918.

ENNIS J.

Jamis v. Suppa Umma

is not disturbed in his possession, cannot, for that reason, set up that the vendor has not fulfilled his obligation."

Voet 19, 1, 10 (Berwick 172), says: "The things sold are to be transferred . . . . to the purchaser that he shall acquire vacant possession of them, whether it has been expressly agreed or not." And further on he says (*Berwick 173*): "A vendor is understood to deliver vacant possession when he makes such delivery of the things sold that it cannot be reclaimed by another person, and when therefore the purchaser would be successful in a suit for possession."

It appears from these passages that if the vendor was in a position to give a possession which could not be disturbed by a possessory suit, the purchaser was under an obligation to accept the possession. This proposition was considered in coming to a decision in the cases *Alagiawanna Gurunnanse v. Don Hendrick et al.*[1] and *Ratwatte v. Dullewe*.[2] In the one case it was held that a lessee who had been given vacant possession had no cause of action until eviction, and in the other it was held that a vendor was not in a position to give vacant possession when a third party was actually in possession.

It is, however, one thing to say that by a contract of purchase and sale a purchaser is under an obligation to accept delivery of property which did not belong to the vendor, and a totally different thing to find that the Roman-Dutch law did not allow an action to set aside the sale when a vendor is in a position to give possession of property which does not belong to him. The obligation doubtless existed so long as the contract of sale existed. The passages cited show that after the purchaser has accepted delivery of property which did not belong to his vendor no action was available until he was evicted, provided his vendor sold *bona fide* believing the property to be his. Do they go any further than this? I think not. A series of actions were available in Roman-Dutch law to a purchaser by which he could obtain a recision of a contract (*Maasdorp, vol. III., pp. 57 et seq. and p. 196*); they were the same on a contract of sale as on any other contract.

No provision of the Roman-Dutch law has been cited to us, and I have been unable to find any, which definitely says that a purchaser could not get a recision of the contract where the title is found before delivery to be either bad or doubtful. It is an argument we are asked to hold by drawing an inference from the passages I have cited, passages which appear to me to apply more particularly to the position of the parties after delivery has been taken by the purchaser.

No fraud is alleged in this case, but the circumstances themselves have been urged as indicating a want of mutuality. The vendors must be deemed to have known of the existence of the prohibition on alienation contained in the deed of gift the source of their title,

[1] *(1910) 13 N. L. R. 225.*

[2] *(1907) 10 N. L. R. 304.*

and, notwithstanding that they may have had a *bona fide* belief it was invalid, there was not a fair disclosure of the position before the auction. The vendors were offering the full ownership of the property burdened with the strong possibility of a lawsuit. It has been urged that the purchaser might have found it out before bidding. It cost him Rs. 75 to find it out afterwards. Is it reasonable to say that every person bidding at an auction incurs such an expense before bidding, in order to make sure he is not buying prospective actions at law? I think that he was entitled to rely on the averments in the conditions of sale prior to the property being knocked down to him. The opportunity to examine the title was available after the contract of sale and before delivery of the property.

It would, it seems to me, be unsafe to adopt an inference which may have far-reaching and dangerous consequences, and the arguments of the respondents should not be accepted unless it is clearly shown to be a doctrine of Roman-Dutch law, by which we are bound. I find in a note in *Maasdorp* (*vol. III., p. 6*) that contracts of purchase and sale were regarded by the Roman-Dutch jurists as equitable or *bonæ fidei* contracts, and that they gave rise to *bonæ fidei* actions. The note says: "*Bonæ fidei* contracts were so called from the fact that, it being very difficult because of the infinite variety of circumstances to lay down all the terms of agreement so accurately in transactions binding on both sides that something might not be omitted, it was thought only right that what was omitted from the epress terms of a contract should be supplemented by the equity of the Court in agreement with what was fair and in accordance with good faith."

In Roman-Dutch law it would seem, therefore, that the degree of good faith by vendors and purchasers was a question of equity for the Court, adjustable to changing circumstances. The contract of purchase and sale contained reciprocal obligations, on the vendor to deliver, and on the purchaser to receive, the things sold, and, presumably, the measures of relief were also reciprocal. By the civil law it was a controverted question (*Burge II., p. 542*) whether a vendor who has been adjudged by sentence to deliver the property sold could be compelled to obey the sentence. It would seem that the civil law authorized a purchaser to sue before eviction, when the vendor sold what he knew did not belong to him (*ibid.*), and Pothier's explanation, which I have cited, clearly applies to a case where a vendor has *bona fide* sold, *i.e.*, when he did not know the thing did not belong to him, and where the defect was discovered after transfer. In the present case I doubt whether it is possible to hold that the vendors sold *bona fide*, as they must be deemed to have been aware of the *primâ facie* bad, and by construction doubtful, state of the title, and even if the sale by them could be deemed *bona fide*, Pothier would seem by implication to be an authority for the proposition

1913.

ENNIS J.

Jamis v. Suppa Umma

that the sale could be rescinded before delivery, the real obligation of the vendor to his purchaser being *de lui faire avoir librement a titre de proprietaire*.

This obligation is not merely to warrant the purchaser against eviction. It is primarily an obligation to transfer the ownership. The guarantee against eviction operates after transfer has been effected.

With reference to the transfer of ownership, Maasdorp (*bk. 2 p. 59*) says that to effect a valid transfer it is essential that the transferor be the owner of the thing; and referring to this essential, he adds (*p. 60*): "It is almost unnecessary to remark that a delivery made by a person who is not the owner, nor authorized by express mandate or authority to act for the owner, is void." Further on (*p. 64*) he says: "If there be any difference of opinion as to the thing which is being delivered and accepted, the delivery will be void for the want of the necessary consensus." Again (*p. 75*) he says: "As regards the general requisites of the transfer of ownership . . . . it may be stated that under our system of registration of land a transfer of immovable property by any other than the owner, except by means of forgery or fraud, which would make a transfer void, is impossible."

Speaking of the Cape system of registration of land, he says (*p. 71*): "Our law with respect to the registration and transfer of immovable property is derived, not from the Roman law, which drew no great distinction between the delivery of movable and the transfer of immovable property, but from the customs of the Netherlands."

The Ceylon law requires deeds of transfer of land to be registered, but it does not make unregistered deeds altogether void (Ordinance No. 4 of 1891, section 17); so it may be that in Ceylon the transfer of land by a person who is not the owner is not impossible in the absence of forgery or fraud.

In my opinion equity must decree relief against an obligation to take a void transfer—void on account of the vendor not being the owner, or void for the absence of the necessary consensus consequent upon the difference of opinion as to the thing which is being delivered. There is no good reason to assume that Roman-Dutch law would not decree a recision of the contract in such a case before delivery of possession; there is, on the contrary, reason to believe that it could and would so decree.

The customs of the Netherlands relaxed the strictness of the Roman law, and allowed contracts to be supplemented by the equity of the Court. These customs required something more than delivery of possession to effect a valid transfer of ownership; there was a "solemn cession" in the presence of a Judge, and it may well be that if the Judge kept a record of these transactions, the transfer of land by any other than the owner, except by forgery or fraud, was in the Netherlands, as in the Cape, an impossibility.

In Ceylon also the delivery of possession only does not operate as a valid transfer, for by Ordinance No. 7 of 1840, not only must the contract of sale be in writing notarially executed, but the transfer also must be in writing notarially executed before it has any force or avail in law. The deed transferring title and not the naked delivery of possession is now the essential act of transfer under a contract for the sale of land.

A passage in *Voet 18, 1, 5*, dealing with the effect of a mortgage of brass as gold, in my opinion indicates the position taken by the Roman-Dutch jurists, viz., that contracts void for want of the requisite consent acquired validity only when they were ratified. Voet says (*Berwick 10*): "For it must be considered that although the mortgage of brass as gold is, if we have regard to its inception, void for want of the requisite consent, it acquires validity when, on the fraud or mistake being discovered, the creditor nevertheless ratifies it, reckoning it better to have at least that rather than no security at all : very much in the same way as a purchase which once has been brought about by fraud, although null *ab initio*, may nevertheless be confirmed by the person who was fraudulently induced to enter into the contract if he considers it an advantageous one for himself in spite of the fraud."

Voet 18, 1, 24 (*Berwick 20*), again says: "The sale is complete as soon as the parties have agreed to the commodity and the price. . . . and it cannot then be receded from unless. . . . there still remains something to be done."

In this case a notarially executed transfer remained to be done, and prior to that the sale can apparently be receded from.

The authorities cited agree that—

(1) A person who unknowingly accepted a fraudulent transfer could take action before eviction.

(2) A person who knowingly accepted a fraudulent transfer could not take action before eviction.

(3) A person who knowingly accepted a *bona fide* transfer, which subsequently turns out to be bad, must wait till he is evicted before he can bring action.

(4) A person who accepts a *bona fide* transfer, knowing it to be bad, could not take action before eviction.

But no authority has been cited for the proposition that a person who discovers before accepting transfer that the proposed transfer is bad or doubtful has no alternative but to accept it and wait for eviction.

My view of the case is that the circumstances are such that it is only fair and in accordance with good faith that the appellant should have the relief he seeks, no conclusive authority having been shown that such relief was not open to him under the Roman-Dutch law.

I would allow the appeal.

1913.

Jamis v. Suppa Umma

WOOD RENTON A.C.J.—

The plaintiff, the appellant, sues in this action to recover from the defendants, the respondents, the auctioneer's charges and other expenses incurred by him in connection with the purchase of a property put up by the first defendant-respondent for sale by public auction. The second defendant-respondent is the husband of the first. The ground on which the plaintiff's action is based is an alleged defect in the title of the first defendant to the property in question. The land originally belonged to one Veloo. Veloo, by deed dated February 3, 1897, donated it to his brother "Alwaroo, his heirs, executors, administrators, and assigns, as a gift irrevocable, to have and to hold the said premises unto him, the said Alwaroo, his heirs, executors, administrators, and assigns, for ever. . . . and covenanted always to warrant and defend the same unto him and them against any person whomsoever."

The gift was, however, subject to a proviso that, during the next thirty years, the donee Alwaroo should not mortgage or sell the property, or lease it for any period beyond two years, and that if he died without legitimate issue before the thirty years elapsed, the property should pass absolutely to his children Muniamma and Aiyamperumal. By deed dated October 28, 1911, Alwaroo and Muniamma sold the property to the first defendant. Muniamma has died childless since the date of her deed, but Alwaroo and her brother Aiyamperumal are still alive. The latter is still a minor. There is nothing in the pleadings, or in the record of the proceedings in the District Court, to show that the first defendant, in putting up the property for sale, acted otherwise than in good faith. It was contended, however, that the deed of 1897 by Veloo created a *fidei commissum* in favour of Muniamma and Aiyamperumal, and that Alwaroo had no right to sell the land. The learned District Judge over-ruled that contention, held that the deed conferred on Alwaroo an absolute title, and dismissed the plaintiff's action with costs, reserving the right of the defendants to recover the unclaimed purchase money in a separate action, if the necessity for doing so arose.

It is, I think, neither necessary nor desirable that we should express in the present case any opinion as to the nature of Alwaroo's interest under the deed. It is conceded, as I have already indicated, for the purposes of these proceedings, that the first defendant acted in good faith. There is nothing to show bad faith on the part of Alwaroo and Muniamma, neither is there anything in the deed of 1897 to prevent them from conferring on the first defendant, or the first defendant from giving to the plaintiff, a possession of the property free from all adverse claims during Alwaroo's lifetime. The question that we have to decide is whether, in these circumstances, the plaintiff is entitled to decline to proceed further with his bargain, and to claim a refund of the expenses incurred by him in connection

with it, including his deposit of a quarter of the purchase money. This question must, in my opinion, be answered in the negative. The point is clearly governed by Roman-Dutch, and not by English, law. Whether the rules of Roman-Dutch law on the subject are reasonable or not is a matter with which we have no concern. If they are unreasonable, the Legislature can alter them. The duty of the Court is merely to ascertain what they are. Under the Roman-Dutch law a contract for the sale of immovable property is, in my opinion, fundamentally different from a similar contract under the law of England. The *actio redhibitoria* and the *actio quanti minoris* are competent only where there is a defect in the thing sold itself. They are not remedies for defect of title. In the absence of fraud or of an express warranty of title, the only primary obligations resting on the vendor of immovable property are to give the purchaser "vacant possession," that is to say, possession unmolested by the claim of any other person in possession of the property sold, and to warrant and defend the title which he conveys, after the purchaser, once placed in possession, has been judicially evicted. (See *Ratwatte v. Dullewe* [1] and *Alagiawanna Gurunnanse v. Don Hendrick et al* [2].) The purchaser cannot, in such circumstances as exist in the present case, decline to accept vacant possession on the ground that his vendor's title is defective. The defect, if it exists, may be cured by time. If the purchaser is ousted, he has his remedy. (See *Burge, 1st ed., vol. 11., pp. 540, 574; Berwick's Voet 173; Nathan, vol. 11., s. 880 and p. 669.*) I can find no ground for holding that a purchaser stands under Roman-Dutch law in a better position before the execution of a conveyance in his favour than he does after it. If he declined to accept such a conveyance on the ground that the vendor's title was defective, the vendor could meet his objection at once by saying, "I am able to give you vacant possession, and I will defend the title conveyed when it has been successfully attacked." The conditions of sale in the present case confer upon the purchaser no express rights, and contain no statement of the vendor's interest in the property sold. In these circumstances both parties must be regarded as having contracted under the provisions of the common law. I have already stated what I believe the common law to be.

I assent to the order proposed by my brother De Sampayo.

DE SAMPAYO A.J.—

On November 23, 1912, the first defendant, who is the wife of the second defendant, caused a certain land and premises to be put up for sale by public auction, and the plaintiff, as the highest bidder, became the purchaser of the property for a sum of Rs. 3,650, and signed notarial conditions of sale whereby he agreed to complete the

[1] *(1907) 10 N. L. R. 304.*

[2] *(1910) 13 N. L. R. 225.*

1913.

DE SAMPAYO A.J.

Jamis v. Suppa Umma

purchase according to the conditions. The plaintiff accordingly paid to the auctioneer a sum of Rs. 912.50, being a deposit of one-fourth of the purchase money, and a further sum of Rs. 299.50 as the auctioneer's charges, and agreed to pay the balance purchase money within one month of the sale. The conditions of sale provided that, should the purchaser fail to comply with the conditions, the money deposited and the charges paid should thereupon be forefeited to the vendor, who was to be at liberty to enforce the sale or to re-sell the property and recover from the purchaser any deficiency. The plaintiff stated in his plaint that after the sale he had the defendant's title to the property examined by his lawyers, and that " the said title was found to be defective and not a valid and marketable title, and that its validity was found to depend on doubtful questions of law, " and he claimed in this action a refund of the sum of Rs. 299.50 paid as auctioneer's charges, and a further sum of Rs. 75 as expenses incurred by him in investigating the title. Why he did not also claim a refund of the one-fourth purchase money deposited does not appear.

It appears that the first defendant holds an absolute grant for the premises dated October 28, 1911, from one Alwaroo, whose title was based on a deed of gift dated February 3, 1897, from his brother Veloo. By this deed of gift Veloo conveyed the property to Alwaroo, " his heirs, executors, administrators, and assigns, as a gift irrevocable, " with habendum to him, " his heirs, executors, administrators and assigns for ever," and with the usual covenant for title. The habendum was followed by a proviso in these terms : " That he, the said Alwaroo, his heirs, executors, or assigns, shall not have the power to sell or mortgage or lease for a period exceeding two years the said several lands and premises . . . . . for a period of thirty years commencing from the date hereof and to be fully completed and ended. That if my said brother, the said Alwaroo, shall die before the expiration of the said period of thirty years without leaving any legitimate issue, then and in such case the said several lands . . . . . shall devolve upon and become the absolute property of my said children Muniamma and Aiyamperumal. " According to the plaintiff, Alwaroo is still alive and is unmarried, and Muniamma (who joined in the deed of sale to first defendant) is now dead, and Aiyamperumal is alive and is still a minor.

At the trial no evidence was called, but both parties were content to have the case decided on the legal questions, whether in the circumstances above stated the first defendant was bound to disclose good title for the purpose of holding the plaintiff to his agreement to purchase, and if so, whether the first defendant's title was (as the plaint put it) " a valid and marketable title." The District Judge decided both these points in favour of the first defendant, and the plaintiff has appealed.

Mr. Bawa, for the appellant, first of all addressed to us an argument to the effect that the first defendant was guilty of fraud or misrepresentation, in that she had not given to plaintiff all the information she possessed as to her title to the property, and that his agreement was on that ground avoided. Even the English law, which was relied on, does not seem to go that length. It is summarized in the *Laws of England*, *vol. XXV.*, *s. 502*, as follows: "A contract for the sale of land is not a contract *uberrimæ fidei*, in which there is an absolute duty upon each party to make full disclosure to the other of all material facts of which he has knowledge, but the contract may be avoided on the ground of misrepresentation, fraud, or mistake in the same way as any other contract." Now, in this case no such fraud or misrepresentation was pleaded in the plaint or formulated in the issues, nor was any evidence put before the Court on that point. As a matter of fact, the first defendant had an absolute conveyance for the property in her favour, though this conveyance referred to the deed of gift in favour of her vendor. The vendor's deed of gift, even if she were in fact aware of its terms, would not necessarily inform her of the title being other than valid. She caused the property to be advertised for sale by public auction, thus giving would-be purchasers every opportunity to make due inquiry as to title. It was obvious in these circumstances that the appeal could not reasonably be sustained so far as the suggestion of fraud or misrepresentation was concerned; and counsel for the appellant, secondly, took up the position that, apart from fraud and misrepresentation, it was the duty of the first defendant as vendor to make out a good title in order to entitle her to performance by the plaintiff of his agreement to purchase.

I need not examine the English authorities relied on by appellant's counsel. It may be assumed that under the English law, in the case of a sale of real property, the vendor should deduce good title before the contract can be enforced, and for that purpose should furnish an abstract of title and do other things which are well known in the law of conveyancing. But these requirements are relevant to a system of law which, in regard to the mutual obligations of vendor and purchaser of immovable property and the consequences of the completion of a sale, is quite different from the Roman-Dutch law, by which we are governed. Under the English law, "after completion of the contract the transaction is at an end as between vendor and purchaser, and, as a general rule, no action, either at law or in equity, can be maintained by either party against the other for damages or compensation on account of errors as to quantity or quality of the property sold, unless such error amounts to a breach of some contract or warranty contained in the conveyance itself." (*Laws of England*, *vol. XXV.*, *s. 845.*) This appears to me to furnish the reason why, under the English law, before the purchase is completed by a conveyance, the vendor is required to satisfy the

1913.

DE SAMPAYO A.J.

Jamie v. Suppa Umma

purchaser on the question of title. Further, it seems to me that the English law is expressly excluded by the proviso to section 1 of the Ordinance No. 22 of 1866. That Ordinance introduces the English law with respect to certain subjects, but it is provided *inter alia* that nothing therein contained should be taken to introduce into this Colony any part of the law of England relating to the conveyance or assurance of any land or other immovable property. It is clear that this refers not to mere forms of conveyance, as was argued, but to the obligations of the vendor and purchaser of real property. Under the Roman-Dutch law there is in every sale an implied covenant to warrant and defend the title, and the nature of the remedies available to the purchaser is in accordance with the peculiar obligations of the vendor, even after the sale is completed by conveyance. The first obligation of the vendor is to afford vacant possession to the purchaser, and in default the purchaser has an immediate right of action *ex empto* against the vendor for recision of the sale. The second obligation is to warrant and defend the title against any trespasser, and if the purchaser is legally evicted in the *rei vindicatio* action, he can sue his vendor for compensation in the action *de evictione*, provided he has given him timely notice. Subject to these obligations of the vendor and the remedies of the purchaser, a person may even sell what does not belong to himself. *Voet 18, 1, 14*, says: "It matters little whether what is sold is the property of the vendor or not, inasmuch as he is bound to purchase the same thing elsewhere and fulfil his contract, unless he prefers to be condemned in damages if he knowingly sold another's property. For if he acted in good faith he is no farther bound than for the delivery of vacant possession, and is only liable in damages for the *id quod interest* in the case of the judicial eviction." (*Berwick's Trans. 19.*) Maasdorp in his *Institutes, vol. III., pp. 133 and 134*, says: "The thing sold need not necessarily be the property of the vendor, as there may be a valid sale of the property of a third party, provided it is made *bona fide*. The duty of the vendor in such a case, if he has made delivery to the purchaser, is to guarantee the latter against eviction, and if he has not yet given delivery, he is bound either to acquire the thing and deliver it to the purchaser or, in default, to pay the latter compensation in damages." Maasdorp in this passage adds: "If the vendor knowingly sells property which does not belong to him to a buyer who is ignorant of the fact, so as wilfully to expose the latter to the danger of eviction, the vendor's conduct will be regarded as fraudulent, and the buyer will in such a case be entitled to bring an action of damages against him even before he is himself evicted." The commentary in *2 Nathan 699* is to the same effect. In this case, as I have already observed, want of *bona fides* on the part of the first defendant was neither alleged nor proved, and the circumstances negative it. In my view the plaintiff's only remedy will be an action

for damages in case of default of delivery of possession or in case of eviction after such delivery, and in either case he must in the first instance fulfil his own agreement. His present action seems to me to be premature. These principles of the Roman-Dutch law are explained and accepted in *Alagiawanna Gurunnanse v. Don Hendrick et al.*[1] and *Babaihamy v. Danchihamy.*[2] See also *Voet 19, 1, 11,* and *2 Burge 540 and 541.* This passage in *Burge* is important, because it appears from it that, even if the purchaser discovers a defect in the title after the sale and before the execution of the conveyance, he is still bound to pay the purchase money and accept the conveyance. The case of *Ratwatte v. Dullewe,*[3] cited to us in this connection, will be found when examined not to be contrary to the principles above stated. For there a third party was in possession claiming title under the vendor's predecessor in title and resisted the purchaser, and this Court held that, the vendor manifestly not being in a position to deliver vacant possession, the purchaser, who had paid the full purchase money, and thus was entitled to receive the agreed consideration, viz., free possession of the property, was not bound to accept a conveyance and embark upon a litigation with the party in possession, but could resort at once to an action for recision of the sale. In the present case it is not alleged, and the circumstances do not show, that any third party is in possession of the property, or that the first defendant is not in a position to make delivery. I do not lose sight of the fact that by " vacant possession " is meant such possession as may be legally maintained against the claims of third parties. The plaintiff in this case does not deny that the first defendant is in actual possession, and is able to deliver possession to him in pursuance of the sale. The first defendant's vendor, Alwaroo, is still alive, and cannot dispute his own sale to first defendant. He may live for thirty years from the date of the gift to him, or he may die leaving legitimate children, and in either case the first defendant's possession can be maintained. The plaintiff cannot be allowed to proceed upon a speculative fear of a possible loss of possession upon contingencies which may never happen. Of course, if he be ultimately evicted at some time or other by some party claiming to be entitled after Alwaroo's death, he would still have his remedy by the action *de evictione* against the first defendant, founded on the covenant to warrant and defend. The Roman-Dutch law being such as I have here stated it, it will be seen that there is not the same necessity as in the English law for the vendor to make out a good title at the outset, unless he has expressly agreed to do so.

With regard to the *actio redhibitoria* and *actio quanti minoris*, which are available to purchasers under the Roman-Dutch law, and with which it was sought to identify this case, I need only remark that

[1] *(1910) 13 N. L. R. 225.* [2] *(1913) 16 N. L. R. 245.*
[3] *(1907) 10 N. L. R. 304.*

1918.

DE SAMPAYO A.J.

Jamis v. Suppa Umma

they relate to claims for latent defects of the thing sold, and not to defects in the vendor's title.

Mr. Bawa, however, referred us to *Marshall's Judgments 46*, where it is stated that " in matters of dispute between auctioneers and their employers, whether buyers or sellers, recourse may, generally speaking, be had for the guidance of litigants to the English or civil law indifferently," and he thereupon argued that this case might well be decided by the principles of the English law. I do not think this passage in *Marshall* is of assistance in this matter. The passage occurs in a chapter on the law relating to auctioneers, and discusses the rights and liabilities of auctioneers under the old Regulation No. 12 of 1825, and the learned author in that connection refers to a decision in a case where the defendant as auctioneer had sold a land and called upon the plaintiff to pay the purchase money to the vendor, promising that he, the auctioneer, would get the titles for the plaintiff in a month, and where the Court held that, as it turned out that the vendor had no right to the land, the defendant was personally liable to the plaintiff for what had been paid on the strength of the defendant's promise. The ruling of the Court turned upon the special circumstances of that case, and while the English law might be applied to a case between principal and agent, as indeed the later Ordinance of 1866 expressly provides, it is not applicable to a case between vendor and purchaser of land as such. For these reasons I am of opinion that the first defendant is not bound to satisfy the plaintiff in regard to her title to the land before the plaintiff performs his agreement to purchase. It might, of course, be different if the conditions of sale had stipulated to convey good title, but they do not.

The above judgment was written after the argument in appeal before me and my brother Ennis, and I would also have been prepared to deal with the question, which was argued before us, whether, assuming that the first defendant was bound to make out good title, her vendor's title was in fact defective by reason of its being burdened with a *fidei commissum*. But the argument before the Full Court was confined to the first point, inasmuch as, if that was held against the plaintiff, it would dispose of the plaintiff's whole case. It is, moreover, undesirable that the question of *fidei commissum* should be decided incidentally in this case in the absence of the parties claiming under the *fidei commissum*. It is therefore unnecessary for me to go into the question of the validity of the first defendant's title.

In my opinion the judgment appealed against is right, and this appeal cannot succeed on its merits. But Mr. Bawa, for the appellant, desired that, in the event of the Court being against him on this appeal, his client should at least be given relief against a forfeiture of the money paid by him, and be allowed now to complete his purchase. In all the circumstances of the case I think it is fair to

grant this relief. The order, therefore, will be that on payment by the plaintiff of the balance purchase money within such time as the District Judge may fix, the first defendant should grant a conveyance of the property in favour of the plaintiff in terms of the conditions of sale, and that in failure of payment the decree appealed against should stand. In any event the plaintiff should pay the costs of the action and of this appeal.

1916.

DE SAMPAYO A.J.

Jamis v. Suppa Umma

Varied.