1940

Present : **Howard C.J. and Hearne J.**

TISSERA *et al. v.* TISSERA.

228—D. C. Chilaw, 11,280.

Accession—Fibre mills built on first defendant's land—Sale to second defendant —Fixture on land—Right of first defendant to sell—Roman-Dutch law.

A fibre mill consisting of a building and machinery was erected in 1925 on land belonging to the first defendant from funds contributed by the first and second plaintiffs, the father of the third, fourth, and fifth plaintiffs and the first defendant, who were brothers. The machinery consisted of an oil engine fixed with screws to the floor of the building on a concrete foundation, apart from the other appliances necessary for the working of the mill.

The mill was worked in turns by the various members of the partnership. A lease by the other partners was sometimes the authority, at other times there was no document of authority. The manner in which the venture started and the mode in which the mill was operated over a number of years indicated that the brothers intended that the mill should remain permanently fixed to the building in which it was installed.

On December 11, 1937, an agreement was signed leasting the mill to the first defendant.

The first defendant by bill of the sale dated April 20, 1938, sold to the second defendant the mill together with the bare land on which it stood.

Second defendant was given at the same time a lease of the surrounding area of the land.

Held, that the various structures which constituted the mill became part of the land on which they stood and that they passed to the second defendant by virtue of the bill of sale.

THIS is an action for the declaration of title to three-fourths of a mill. It was erected from funds contributed by the first and second plaintiffs, the father of the third, fourth and fifth plaintiffs, and the first defendant who were all brothers and was situated on land belonging to the first defendant. He sold, transferred, conveyed, granted, assigned and set over to the second defendant the mill and leased the land on which the mill stood to the second defendant. The learned District Judge declared the plaintiffs entitled to three-fourths of the mill. The second defendant appeals from that order.

N. Nadarajah (with him *G. E. Chitty*), for the second defendant, appellant.—There is evidence to show that the mill was so fixed to the land as to remain permanently on the land and therefore becomes the property of the owner of the land (*de Silva v. Harmanis*[1]). It is an immovable according to the principles laid down in *Olivier and others v. Haarhof & Co.*[2]; and *Victoria Falls Power Co., Ltd. v. Colonial Treasurer*[3]. This mill is erected on the land which originally belonged to the first defendant and the maxim *quicquid aedificatur solo, solo cedit* applies. The plaintiffs can ask for compensation only. They have not even the right of *jus retentionis*. See *Wille on South African Law, pages 118 and 119.* The criterion of "movable" or "immovable" is the removal without injury to the soil or land. A sausage machine fixed to an immovable table was held to be an immovable in *Pringle's Trustee v. Grobbelour*[4]. Buildings erected for the purposes of a dairy are immovables according to

[1] *3 N. L. R. 160.*
[2] *(1906) T. S. 497.*
[3] *(1909) T. S. 140.*
[4] *(1908) E. D. C. 284.*

Van Wezel v. Van Wezel's Trustee.[1] See also *Macdonald, Ltd. v. Radin, N. O., and the Potchefstroom Dairies and Industries Co., Ltd.*[2] See also *Brodie v. Attorney-General*[3].

L. A. Rajapakse (with him *P. A. Senaratne*), for the plaintiffs, respondents.—The second defendant claims the machinery on the deed and not as the owner of the soil. The transferor cannot give a better title than the one he possesses according to the maxim *nemo dat quod non habet.* Further this is a case of artificial accession and the intention of the parties must be looked into. The first defendant ought not to be allowed to enrich himself at the expense of the plaintiffs. See *2 Maasdorp, pages 48, 49.* A *bona fide* improver of the land has the right for compensation and the *jus retentionis* till it is paid as held in *Nugapitiya v. Joseph*[4].

The case for the plaintiff is that the machinery is detachable without injury to the land and therefore there is no question of compensation or *jus retentionis.* In a series of cases it has been held that in determining the question the elements to be considered are the nature of the thing annexed, the degree of annexation and the intention of the person annexing it. See *Wille on Landlord and Tenant (2nd ed.), page 264.* The mill which is movable property, the identity of which is preserved, which has not been physically incorporated in the land and is separable from the land to which it has been attached, cannot be considered as part of the land unless the owner intended that it should remain permanently annexed. See *Macdonald, Ltd. v. Radin, N. O. and the Potchefstroom Dairies & Industries Co., Ltd.*[5].

N. Nadarajah, in reply cited *Hobson v. Garringe*[6]; and *Reynolds v. Ashby & Son.*[7]

Cur. adv. vult.

September 25, 1940. HOWARD C.J.—

This is an appeal by the second defendant from the judgment of the District Judge of Chilaw declaring that the plaintiffs are entitled to a three-fourth share in a fibre mill named St. Joseph, and the engine, factory and other things appertaining thereto and further ordering that both defendants pay to the plaintiffs the sum of Rs. 60 per mensem as rent from April 29, 1938, till the plaintiffs are resorted to joint possession. The facts so far as material for the decision of this appeal are as follows :— The plaintiffs were the owners of three-fourths and the first defendant of one-fourth share of the fibre mill and other things appertaining thereto which in this judgment are referred to as the fibre mill. The fibre mill was erected in 1925 from funds contributed by the first and second plaintiffs, the father of the third, fourth, and fifth plaintiffs and the first defendant who were all brothers and was situated on land belonging to the first defendant. From 1925 onwards the mill was worked by one or more of the partners. From 1934-1936 it was worked by the first defendant alone. Thereafter the first plaintiff and the father of the third, fourth and fifth plaintiffs worked it until January, 1937, when the latter died. On June 22, 1937, the first defendant was charged by the first

[1] *(1924) A. D. 409.*
[2] *(1915) A. D. 454.*
[3] *7 N. L. R. 81.*
[4] *(1926) 28 N. L. R. 140.*
[5] *(1915) A. D. 454 at 469.*
[6] *(1897) 1 Ch. 182.*
[7] *(1904) A. C. 466.*

plaintiff, in P. C. Chilaw, No. 3,841 with theft of books and intimidation. The case was settled on August 17, 1937, on the first defendant undertaking not to interfere with the working of the mill for the next seven months and admitting the plaintiff had the right to work the mill for that period.

By agreement dated December 14, 1937, the fibre mill was leased by the plaintiffs and the first defendant to the first defendant for a term of two years from April 1, 1938, at a rental of Rs. 120 per mensem. The following conditions were contained in this agreement :—

(*a*) That a sum of Rs. 90 should be paid to the plaintiffs before the 15th of every month out of the rental of Rs. 120;

(*b*) That on failure to pay such rent as aforesaid a sum of Rs. 120 shall be paid before the 15th of the succeeding month and on failure to make such payment the lease shall become void in full. In such circumstances the remaining period of two years shall be auctioned amongst the owners of the three shares and assigned to the highest bidder on the same conditions :

(*c*) That the first defendant during the term of the lease in lieu of ground rent for the land on which the mill was situated should be paid the sum of Rs. 5 per mensem;

(*d*) That after the termination of the term of two years the first plaintiff shall possess on lease for two years and thereafter the third, fourth and fifth plaintiffs on lease for two years.

The fibre mill was handed over to the first defendant by the first plaintiff on April 1, 1938. On April 29, 1938, by bill of sale for the sum of Rs. 2,000 the first defendant sold, transferred, conveyed, granted, assigned and set over to the second defendant the fibre mill which was described in the schedule as purchased by the first defendant and fixed on the soil of the undivided three-fourth share of land called Lolugahagala. By indenture of lease of even date the first defendant leased to the second defendant for a period of five years at the rate of Rs. 100 per annum an undivided extent of one and a half acres on which the fibre mill is put up adjoining the western boundary of the remaining undivided three-fourth share of land called Lolugahagala.

No rent has been paid to the plaintiffs in respect of the agreement of December 14, 1937, and the second defendant since the date of the bill of sale and lease has been working the mill.

In the lower Court in reply to the case set up by the plaintiffs in proof of their ownership of the fibre mill the defendants relied on the proposition of law that whatever is fixed to the land becomes the property of the proprietor of the land. The learned Judge, in rejecting the application of this proposition so far as the case of the defendants is concerned, in the course of his judgment also held that the plaintiffs besides being co-owners were induced to be parties to the transaction embodied in the agreement of December 14, 1937, by the first defendant's admission of their rights and that he and the second defendant are clearly stopped from denying those rights. He was also not satisfied that the second defendant was an innocent purchaser.

The first defendant has not appealed against the judgment of the District Court, but the second defendant has raised in this Court the plea that was unsuccessfully raised before the District Judge. It has been conceded that, if the fibre mill retained its character as movable property, it would not pass to the second defendant by virtue of the bill of sale. In these circumstances, that part of the decree of the District Court declaring that three-fourths of the ownership of the fibre mill was vested in the plaintiffs cannot be assailed. The main problem, therefore, with which we are faced is the question as to whether the fibre mill on April 29, 1938, was movable or immovable property.

In the course of the argument our attention has been invited to passages from books of various authorities on Roman-Dutch Law. At page 300 in *Wille on Landlord and Tenant* the following passage occurs :—

> "Whether additions or improvements are movable or not depends on their nature and object, the way in which they are fixed and the intention of the person who erected them."

In *Paul Voet's* treatise *De Natura Bonorum Mobilium et Immobilium* in Cap. 3, paras 2 and 3; and Cap. 4, paras 1 and 2 he points out that the species of mill (*molendium Dwanakmolen*) is an immovable "for it is fixed to the soil by means of posts and earth, and it has been built in the position in which it is with the intention that it should remain there permanently". So also are windmills "for although for the most part they do not adhere to the soil they must be considered to be immovable because they are not easily removed". The same applies to wine and oil presses.

Burge also in vol. 2, page 15, states that "movables affixed to land or buildings acquire the quality of immovables by reason not alone of their being affixed, but of their being affixed with the intention of permanently remaining".

The principles formulated by the authorities I have mentioned are also supplemented by numerous decisions of the South African Courts.

In the case of *Olivier and others v. Haarhof & Co.*[1], Innes C.J. laid down the law as follows :—

> "The conclusion to which I have come is that it is impossible to lay down one general rule; each case must depend on its own circumstances. The points chiefly to be considered are the nature and object of the structure, the way in which it is fixed, and the intention of the person who erected it. And of these the last point is in some respects the most important."

In *Victoria Falls Power Co., Ltd. v. Colonial Treasurer*[2], Innes C.J. reaffirmed the principle he stated in *Olivier and others v. Haarhof & Co.* in holding that certain electric pole lines were erected for the purposes of the concession and not intended to remain permanently affixed to the soil and were not immovable property.

The question was exhaustively considered in the case of *MacDonald, Ltd. v. Radin, N. O. and the Potchefstroom Dairies & Industries Co., Ltd.*[3] The facts in that case were as follows :—The appellants had sold certain

[1] *(1906) T. S. 497.* [2] *(1909) T. S. 140.*
[3] *S. A. Law Rep. 1915 ; A. D. 454.*

machinery for £1,153 payable in instalments, it being a condition that the appellants should erect it on premises purchased by one Jacobson for the respondents, but that ownership in the machinery should remain in the appellants until Jacobson should have paid the total amount of the purchase price. Previously to the sale of the machinery the respondents sold the premises on which it was erected to Jacobson upon the terms that the purchase price should be paid in instalments and that upon failure of any one instalment the sellers should have the right to cancel the sale and claim all improvements made by the purchaser as forfeited. The machinery so obtained by Jacobson was erected by the appellants in terms of the agreement, and fastened down to beds of concrete and in part to the wall by bolts and nuts in such a way that it could be removed without injury to the premises. Subsequently on default of payment by Jacobson both the appellants and the respondents cancelled their agreements with him and Jacobson was thereafter declared insolvent. The appellants having demanded the return of the machinery it was held by a majority of the Court that, under all the circumstances of the case, the machinery had not become a fixture, but was the property of the appellants. The machinery erected by the appellants and the extent of its attachment to the building is described in the judgment of Innes C.J. as follows :—"Part of it is held in position by long bolts and nuts, the former embedded in a solid concrete foundation ; another part is attached to the wall also by bolts and nuts ; pipes connecting the various portions pass through holes in the walls and certain tanks and coil piping are supported and fixed in manner described". The new plant could be taken to pieces and removed without injury to the premises. The Chief Justice re-affirmed the principle laid down by him in *Olivier and others v. Haarhof, & Co.* and in doing so stated as follows :—"The elements to be considered in determining whether an article originally movable has become immovable through annexation by human agency to realty, are the nature of the particular article, the degree and manner of its annexation and the intention of the person annexing it. The things must be in its nature capable of acceding to reality, there must be some effective attachment (whether by mere weight or by physical connection) and there must be an intention that it should remain permanently attached. The importance of the first two factors is self-evident from the nature of the inquiry. But the importance of intention is for practical purposes greater still; for in many instances it is the determining element. Yet it is sometimes settled by the mere nature of the annexation. The article may be actually incorporated in the realty, or the attachment may be so secure that separation would involve substantial injury either to the immovable or its accessory. In such cases the intention as to permanency would be beyond dispute". The judgment then proceeds to discuss the fundamental principle formulated by various authorities that (subject to a few specific exceptions) *dominium* cannot be transferred or altered, save by the intent of the *dominus*. As an example of such an exception is the case of a house acceding to the soil in which it was built. The Chief Justice reaches the conclusion that movable property like the machinery in dispute, the identity of which has been fully preserved, which has not been physically incorporated in the realty

and which is separable from the building to which it has been attached, cannot be considered as part of the building unless the owner intended that it should remain permanently annexed. He then goes on to hold that inasmuch as Jacobson was not authorised by the appellants to attach the plaint in any way that would interfere with the latter's ownership, the *dominium* was not changed and the machinery remained movable property.

The principles formulated in this case were shortly afterwards reviewed in *Newcastle Collieries Co., Ltd. v. Borough of Newcastle* [1]. In this case a private railway line was built on land which had been leased for a period of 21 years with a right of renewal for further similar periods indefinitely. The lease was terminable by the lessee at six months' notice and by the lessor upon certain eventualities. At the expiration of the term or in case of earlier surrender the lessee was entitled to remove "all railways erected on the premises". The line so built was ballasted together. The rails were fixed to sleepers and coupled together by fish-plates, bolts and nuts and the sleepers were embedded in stone ballast. There were culverts and a bridge built in stone and cement. In some parts there were axcavations to a depth of six feet or more and in other parts the soil had been made up to a considerable height to obtain a better grade. The line had been worked for 25 years and was likely to continue to be so worked. It was held that the line was immovable property and rateable as such. In his judgment, Innes J. referred to the principles laid down in *Macdonald, Ltd. v. Radin, N. O.* and stated that the intention of permanency is to be presumed from the method of annexation, and though the builder may have reserved the right in a specified eventuality to remove the structure, still while it stands it remains a portion of the realty. That portion of the railway represented by culverts and bridges was undoubtedly immovable property. The remainder consisting of sleepers and rails could not be removed without considerable violence resulting in displacement of soil and ballast. Degree and manner of annexation, therefore, afforded strong evidence of an intention that the railway should remain permanently *in situ*. Moreover the intention of the lessee was an indefinitely extended currency and the line was so worked with no prospect of discontinuance. The Chief Justice, therefore, considering both the manner and degree of annexation and the intention of the lessee, came to the conclusion that the railway, fixed as it was, and intended to be worked during the operation of so long a lease, must be regarded as having been constructed with the intention that it should remain permanently annexed to the soil.

One more South African case deserves attention. In *Van Wezel v. Van Wezel's Trustee* [2], the facts were as follows:—W. leased three stands from the D. Company. The leases were monthly, but in practice were regarded as renewable in perpetuity and the evidence showed that valuable houses were built upon stands so leased. One of the clauses of each lease required the lessee to remove all structures before the expiry of the lease under penalty that otherwise such structure should be the property of the Company without compensation. Upon one of the

[1] *S. A. Law Rep. 1916, A.D. 561.* [2] *S. A Law Rep. 1924, A.D. 409.*

stands a dairy was erected when W took it over and he built upon it a house, a windmill and a tank. From the windmill a pipe ran to the tank which stood upon a masonry structure and from which pipes led to the house and dairy. The foot of the windmill was made of iron rails which were embedded in the earth and to this foot the tower was bolted. In 1913 W transferred the stand on which stood the windmill and tank to a Bank as security for a debt and in July, 1920, the son of W, the appellant, bought from his father the windmill and tank together with a cowshed, enclosures and fence erected on another of the stands and continued to use them *in situ* in connection with the dairy business. In March, 1923, the estate of W was sequestrated and respondent appointed trustee. In an action in which the appellant claimed from respondent delivery of the windmill and other structures purchased by him from W it was held as follows :—

(1) That as the evidence showed that the structures claimed had been erected on the stands with the intention that they should remain permanently they should in law be regarded as immovable property ;

(2) That the clause in the lease requiring the lessee to remove buildings and improvements did not alter the juridical character of the structures and convert them from immovable into movable property.

In his judgment Wessels J.A. considered the juridical character of the various structures. The evidence was that the windmill was erected with the intention that it should remain there permanently in order to supply the house and dairy with water. It was intended to be an appurtenance to the house and dairy. The tank was necessary to distribute the water. The dairy was not claimed. The cowshed was constructed of brick, wood and iron on a foundation. The enclosures and fences were accessories thereto. All these structures were in the view of the Judge *prima facie* to be regarded as immovable. A structure built into the soil by a lessee becomes part of the soil as soon as it is fixed to the soil and thereafter the *dominium* in it lies in the owner and not the lessee. The windmill and tank, therefore, never became the property of W but their *dominium* was in the D Company, and they could not be transferred by W to the appellant. Nor could the appellant for similar reasons become the owner of the cowshed. During the currency of the lease W could have broken down the cowshed and as each part became detached it became his property, and he could sell it to the appellant. This right, however, expired when the control over the leased property passed to W's trustee.

Cases from the Ceylon Law Reports are few in number and are not particularly helpful. In *de Silva v. Harmanis,*[1] it was held by Lawrie J. that the builder of a house on another man's land does not acquire a saleable right to the house, but the house becomes the property of the owner of the soil. In *Brodie v. Attorney-General*[2] it was held that fixtures are articles which by being affixed or let into the ground or annexed or attached to buildings acquire the character of immovables

[1] *3 N. L. R. 160.* [2] *7 N. L. R. 81.*

and pass into the building. When a "land and building" were put up for sale and purchased by the Crown through its agent, who some days after sale was alleged by the owner of the land and building to have agreed with him to take certain fixtures therein at a valuation, it was held that even if such an agreement was entered into the Crown could not be made liable to pay for what was already its own.

We have in the course of the argument been referred to the English law and certain English authorities. In this connection the dictum of Innes C.J. in *Oliver and others v. Haarhof & Co.* that the law of England appears to be the same is of considerable interest. He proceeds to cite with approval the judgment of Lord Blackburn in *Holland v. Hodgson*[1]. This was a dispute between the mortgagee to whom the realty had been mortgaged, and the assignee, to whom the movable property had been assigned. It was held that certain looms attached to the stone floors of the rooms of the mill by nails driven through holes in the feet of the looms and which could not be removed without drawing the nails, passed by the mortgage of the mill as part of the realty even though the looms could be removed easily and without serious damage to the flooring. Innes C.J. referring to the judgment of Lord Blackburn, states that the following language might have been taken from *Paul Voet* :—

> "There is no doubt that the general maxim of the law is, that what is annexed to the land becomes part of the land; but it is very difficult, if not impossible, to say with precision what constitutes an annexation sufficient for this purpose. It is a question which must depend on the circumstances of each case, and mainly on two circumstances, as indicating the intention, viz., the degree of annexation and the object of the annexation".

We were also referred to *Hobson v. Gorringe*[2], in which it was held that in determining whether or not a chattel has become a fixture, the intention of the person affixing it to the soil is material only so far as it can be presumed from the degree and object of the annexation. A gas engine affixed to freehold land of the hirer by bolts and screws to prevent it from rocking, and to be used by him for purposes of trade, was let out on the hire and purchase system under an agreement in writing that it should not become the property of the hirer until the payment of all the instalments, and should be removable by the owner on the failure of the hirer to pay any instalment. Default having been made in the payment of the instalments, the engine was claimed by the owner and also by a mortgagee of the land who took the mortgage after the hiring agreement and without notice of it and had entered into possession while the engine was still on the land. It was held that the engine was sufficiently annexed to the land to become a fixture and that any intention to be inferred from the terms of the hiring agreement that it should remain a chattel did not prevent it from becoming a fixture, and consequently that it passed to the mortgagee as part of the freehold. This decision was followed in *Reynolds v. Ashby & Son*[3], where machinery fastened down to a building and which could be removed without injury to the premises was held to pass to the mortgagee though it had been supplied

[1] *L. R. 7, C. P. 328.*

[2] *(1897) 1 Ch. 182.*

[3] *(1904) A. C. 466.*

by the owner to the lessee of the building on the hire purchase system. Innes C.J. in *MacDonald, Ltd. v. Radin, N. O.* makes reference to these two decisions and distinguishes them from *Holland v. Hodgson* (*supra*) on the ground that in that case the person who annexed was the owner of the movable. With regard to *Hobson v. Gorringe* he reaches the conclusion that the South African Courts would not under similar circumstances have deprived the owner of the engine of his property.

In the various English and South African cases I have been impressed by the minute and careful examination by the Judges of the character of the structures concerned. It is obvious that such an examination is necessary if the correct principles are to be applied. The learned District Judge has given very perfunctory treatment to this aspect of the question. The only indication of an appreciation of its importance is a passage in his judgment in which he states that the evidence shows that the mill can be removed without causing damage. In this case the structures as described in the bill of sale given by the first to the second defendant consist of a mill together with the engine, factory, buildings, and all other buildings, the five pairs of machinery boxes, the sieve screen, belting, axle and so forth, waterpump and baling press appertaining thereto. In his evidence the first plaintiff states that the mill consists of a building and machinery. The oil engine is fixed with screws to the floor of the building on a concrete foundation. To remove the engine the foundation must be broken. The engine can be removed in parts but the whole engine cannot be removed without breaking up the foundation. Other machinery can be removed. Although this description of the various structures is not very satisfactory nor helpful so far as elucidates their relationship to each other and the manner of their annexation to the soil, certain features stand out. The plaintiffs claim the building in which the engine is housed. But applying the principle laid down by the South African authorities, both text-book writers and cases, buildings become part of the land on which they are built. The description does not specify the number of buildings nor when they were erected. Presumably they were erected in 1925 when the brothers embarked on this venture. They must, however, all have become part of the soil when erected. It would appear that the oil engine which is attached to the floor of the building on a concrete foundation by screws can be removed by breaking the foundation. One cannot in the case of the oil engine say that it is incorporated in the realty or that the attachment is so secure that separation would involve substantial injury either to the building or the engine itself. The nature of the article, the manner and degree of annexation do not, therefore, in the case of the oil engine determine the intention that it should remain permanently attached. Other evidence of intention must in these circumstances be sought. The brothers embarked on their venture in 1925 when it must be presumed the buildings were erected and the mill installed. The land on which the buildings were erected had passed into the ownership of the first defendant by virtue of deed of gift in 1915. The mill was worked in turns by various members of the partnership. A lease by the other partners was sometimes the authority for such working. At other times there seems to

have been no document of authorisation. On December 14, 1937, an agreement was signed leasing the mill to the first defendant. The manner in which the venture started and the mode in which the mill was operated over a number of years indicated only too clearly that the brothers intended that the mill should remain permanently affixed to the building in which it was installed. There is no evidence to indicate that its removal was ever contemplated by the partners. In these circumstances I am of opinion that it became permanently fixed to the soil in 1925. The waterpump, baling press, machinery boxes, belting and other articles must be considered as accessories to the engine and, as in the case of the accessories in *Van Wezel v. Van Wezel's Trustee*[1] be regarded as part of the structure. The so-called lease of December 14, 1937, cannot affect the question as to whether the engine became affixed to the soil and must be regarded as sanction to the first defendant to work the mill. It cannot affect the rights of the appellant. There may, as was pointed out in *de Silva v. Harmanis*, exist equities, such as a right to compensation as between the plaintiffs and the first defendant. In my opinion, therefore, the various structures which constituted the fibre mill became part of the soil on which they stood. In these circumstances they passed to the second defendant by virtue of the bill of sale dated April 29, 1938. It is not really necessary to decide the full effect of this document. The *dominium* in the mill and the land on which it stood was in the first defendant. It was open to the latter to sever the ownership of the various structures from that of the land. The right and effect of such severance is discussed in *Van Wezel v. Van Wezel's Trustee*. On the other hand the fact that the second defendant entered upon the land and worked the mill indicates that no such severance was intended. The effect of the bill of sale, read in conjunction with the lease of the same date, was to convey to the appellant the mill together with the bare land on which it stood whilst at the same time he was given a lease of the surrounding area as specified in the lease.

In the circumstances, it is not necessary to consider whether the appellant was aware of the precise relations that existed between the plaintiffs and the first defendant with regard to the ownership of the mill. In my opinion the appellant was not estopped from denying the plaintiffs' rights. There is no evidence to justify a finding that he was anything but an innocent purchaser. The claim of the plaintiffs that they are entitled to a three-fourths share in the fibre mill, therefore, fails.

In their plaint the plaintiffs claimed on the basis of the agreement of December 14, 1937, rent at Rs. 90 per mensem. The learned Judge has awarded a sum of Rs. 60 per mensem as damages and not as rent. The decree, however, awards this sum as rent. Whether the sum awarded is for rent or damages it is based on the agreement. The appellant was not a party to this agreement. Nor is there any real evidence that when he took possession of the mill he was aware of this agreement. Hence their claim for rent or damages as against him must fail.

For the reasons mentioned herein the appeal is allowed with costs.

HEARNE J.—I agree.

Appeal allowed.

[1] *S. A. Law Rep. 1924; A. D. 409.*