

Feb. 11, 1910 Present: The Hon. Mr. J. P. Middleton, Acting Chief Justice,
and the Hon. Mr. Justice Grenier.

MOHOTTE v. DISSANAYAKA et al.

D. C., Tangalla, 942.

ni. mortgage—Seizure of mortgaged land under money decree—Prior registration of seizure—Mortgage unaffected—Form of mortgage decree.

A registration of a seizure of land under a money decree, in terms of section 237, Civil Procedure Code, does not affect a mortgage of the same land which was executed by the judgment-debtor prior to the seizure, and which was registered after the registration of the seizure.

A decree ordering specially mortgaged property to be sold in default of payment of the money decreed to be due under the mortgage renders the mortgaged property "bound and executable."

A PPEAL from a judgment of the District Judge of Tangalla. The facts are fully set out in the judgment of Middleton J.

H. A. Jayewardene, for first defendant, appellant.—Section 17 of Ordinance No. 14 of 1891 does not apply to seizures. The effect of registration of a seizure is merely to render void, as against all claims enforceable under the seizure, all private alienations, &c., after the seizure (Civil Procedure Code, section 238). Registration of a seizure under a writ does not affect mortgages executed prior to the seizure, though unregistered at the time of seizure. Counsel cited *Fernando v. Fernando*,¹ *In re Carter*.²

De Sampayo, K.C., for respondent.—Ordinance No. 14 of 1891 contemplates the registration of seizures as well. That Ordinance makes provision for the registration of judgments and orders. Seizures may be classed among "orders". The decree in this action is not a mortgage decree. It does not declare the mortgaged property "bound and executable".

Counsel cited 2 *Maasdorp* 298, 2 *Nathan* 970, *Berwick's Voet* 442 (20, 5, 3).

Cur. adv. vult.

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In this case the first defendant obtained a mortgage from Dona Cornelia of a half share of the property in question by deed No. 4,008 dated May 23, 1895, registered only on December 1, 1902. On October 12, 1902, a one-third share plus one-fourth of one-sixth share of the property in question was seized for a judgment debt of Dona Cornelia and her husband under a writ dated October 12, 1902, but registered on November 12, 1902. Upon this writ a sale took

(1906) 9 N. L. R. 1.

¹(1837) 2 *Menzies' Reports* 335.

place to the second defendant, and a Fiscal's transfer dated May 1, 1903, and registered May 6, 1903, was issued in second defendant's name. The first defendant brought an action on his mortgage bond on December 18, 1902, and obtaining a decree on January 16, 1903, seized the property on August 31, 1903. It was sold on December 21, 1903, to one Don Andris, and a Fiscal's transfer dated January 14, 1904, was issued, registered on June 15, 1904. Don Andris sold it to the first defendant on May 7, 1905, the sale being registered on December 4, 1907. The first defendant sold to the plaintiff on May 14, 1905, the sale being registered on May 4, 1907.

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This action was brought by the plaintiff to obtain a declaration of his title as against the second defendant, and the first defendant was brought in to warrant and defend the same, or to refund the purchase money. The issues settled were as follows:—

- (1) Is the title of first defendant based on his Fiscal's transfer to be preferred to that of the second defendant based on his Fiscal's transfer?
- (2) Is second defendant estopped by reason of steps taken in C. R., Matara, 2,474, from disputing first defendant's title?
- (3) Was decree obtained in C. R., Matara, 2,474, valid in respect of premises conveyed?
- (4) Has second defendant been in possession since November 15, 1902 (date of Fiscal's sale to him)?
- (5) Damages agreed at Rs. 20 a year.

The District Judge on the first issue held that the second defendant's title was to be preferred. He answered the 2nd and 3rd issues in the negative, and held on the 4th issue that the second defendant had been in possession since August, 1903, at least, and gave judgment against the first defendant for the refund of the purchase money. The first defendant appealed, and for him it was contended that the ruling of the District Judge that the registration of the second defendant's seizure before the registration of first defendant's mortgage would render the first defendant's mortgage void and give a superiority in title to the second defendant could not be supported. I think that as the second defendant's interest in the land on the seizure was not adverse to the first defendant's interest in the mortgage on the land (Ordinance No. 14 of 1891, section 17), the interests of mortgagor and mortgagee are concurrent till mortgage decree. I think it is clear this is so, and the learned counsel for the second defendant did not very seriously contest it.

The first defendant's mortgage was also *ante litem motam*, and would not, therefore, be affected by the registration of second defendant's seizure under sections 237 and 238 of the Civil Procedure Code, which refer to incumbrances after seizure. It was admitted that the second defendant's decree was a money decree. The main

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point taken by the second defendant's counsel was, however, that the first defendant's decree did not render the property in question bound and executable, and he cited *Voet 20, 5, 3, Berwick's translation 442; 2 Maasdorp 298; and 2 Nathan 970*, in support of his contention, that as the *pignus* was under the form of the decree not declared bound and executable, the second defendant's title to the land must prevail. My brother, however, assures me that the form of the decree is that generally in use, and in my opinion it does in effect as it is drawn, declare the property bound and executable. The decree orders the specially mortgaged property to be sold in default of payment of the money decreed to be due under the mortgage, and I think, therefore, renders the mortgaged property bound and executable. It is true it does not completely fulfil the directions in section 201 of the Civil Procedure Code by specifying a day on or before which the money decreed to be due on the mortgage is to be paid, but I think it fulfils the requirements as to which the objection has been taken. The second defendant, therefore, bought the land subject to the mortgage. Don Andris bought it as bound and executable under the mortgage, and so conveyed it to the first defendant, and then to the plaintiff, and his title must prevail. I would therefore allow the appeal.

The judgment of the District Court must be set aside and judgment entered for the plaintiff declaring him the owner of a half share of the land in question, with the damages as agreed and with costs in the Court below. The first defendant will have his costs of the appeal paid by the second defendant.

GRENIER J.—

The District Judge was in error in holding that the registration by the second defendant of his seizure on a simple money decree on November 12, 1902, before the registration of first defendant's mortgage on December 1, 1902, had the effect of practically wiping out the mortgage and giving the second defendant a clean title upon the Fiscal's transfer in his favour. If I understand the District Judge aright, he was of opinion that the registration of a seizure within fourteen days would render any alienation even prior to registration, but subsequent to seizure, void. The sections (237 and 238, Civil Procedure Code) relating to seizure of immovable property do not support this view, for section 237 provides for a seizure being made by a notice signed by the Fiscal prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from receiving the same from him by purchase, gift, or otherwise, and section 238 is clear in its terms, that it is when a seizure has been effected and made known and registered as provided for in section 237 that any private alienation of the property seized by any mode whatever shall be void as against all claims enforceable under the seizure.

It seems to me on a fair construction of these two sections that it is only in the event of there being a concurrence of the two conditions mentioned in them, viz., seizure and registration, that any private alienation, &c., shall be void. Here there was no question of any private alienation, because the sale under the decree in first defendant's favour was a forced sale by the Fiscal, and I fail to see how registration of the second defendant's seizure, whether within fourteen days as provided for in section 237 or after eighteen days as found by the District Judge to have been the case here, could affect the title which has now come to plaintiff founded originally upon a Fiscal's transfer executed in pursuance of a mortgage decree obtained by the first defendant. All the mesne conveyances have been registered, as also the conveyance in favour of plaintiff, and it is difficult to see how there can be any conflict between the title of the plaintiff and that of second defendant. The first defendant's mortgage action was instituted on December 18, 1902, and a decree was obtained on January 16, 1903, declaring the mortgaged property bound and executable for the judgment therein. The second defendant's transfer from the Fiscal founded upon a simple money decree was registered on July 6, 1903, the first defendant's mortgage having been registered on December 1, 1902. So that if the conflict is as between first defendant's mortgage and the second defendant's transfer, the former by reason of prior registration would prevail over the latter, and the second defendant's purchase would be subject to the mortgage. The plaintiff's position as far as the title to the land in question is concerned is in law the same as that of the first purchaser, Don Andris, under the mortgage decree in favour of the first defendant. To put the matter shortly, the conflict is as between a title obtained under a mortgage decree, the mortgage being a registered one, and a title obtained under a simple money decree.

The case would have presented no real difficulties were it not for the introduction into it of the question of registration of the second defendant's seizure on November 12, 1902. That seizure was apparently given such an effect, mainly retrospective, by the District Judge that it extinguished the first defendant's mortgage, and rendered void all the conveyances relied upon by the plaintiff. I think the District Judge was clearly wrong in his ruling on this point. Mr. Sampayo, for the respondent, argued that there was no mortgage decree entered in favour of the first defendant. The form may be slightly defective, but it has been in general use for many years, and was always understood to substantially embody a hypothecary decree, and in fact it does contain such a decree. I think, therefore, that there is no substance in the objection. I agree to allow the appeal with costs, as indicated by my brother's judgment.

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