Present : Hutchinson C.J. and Grenier J. *Jan. 6, 1911*

GOONATILLEKE *v.* JAYASEKERA *et al.*

385—*C. R. Galle*, 6,074.

Mortgage of immovables—Subsequent acquisition of title by mortgagor—Mortgage to another person after acquisition of title—Land purchased by prior mortgagee at Fiscal's sale—Third mortgage before Fiscal's conveyance to prior mortgagee by owner, to pay off puisne mortgagee's decree—Legal subrogation—Priority.

A, who acquired title to a land in December, 1903, specially mortgaged it to B in April, 1903. In May, 1904, A mortgaged the same land to C. In April, 1905, B obtained a mortgage decree on his bond, and at the Fiscal's sale bought the land in December, 1905, and obtained a Fiscal's transfer in December, 1906. In March, 1906, A, in order to pay off C, who had obtained a mortgage decree against him, mortgaged the land to D. In November, 1906, D sued A on his bond and bought the land himself. In an action for declaration of title by B against D, *held* that B had a superior title.

GRENIER J.—Under the Roman-Dutch Law a person may mortgage property of which he is not the owner at the date of the mortgage, whether that property consists of movables or immovables. When such a mortgage is effected, the first mortgage is preferential to any subsequent mortgage after the mortgagor had acquired ownership.

THE facts are set out by Hutchinson C.J. in his judgment as follows :—

This is an action for declaration of title to land. The plaintiff claims under a Fiscal's conveyance to him on a sale of the mortgagor's interest under a mortgage decree ; the first defendant claims under a Fiscal's conveyance to him on sale under another mortgage decree ; the other defendants are lessees under the first. On April 8, 1903, H.W. Disanayake purported to mortgage the land to the plaintiff ; the deed was registered on April 20, 1903. Disanayake had no title then, but he acquired title to the land in December, 1903. March 1, 1904, Disanayake mortgaged the same land to Gunasekera; the deed, which contains no reference to the prior mortgage, was registered on November 3, 1904. April 20, 1905, the plaintiff, in an action on his bond against the mortgagor, obtained a mortgage decree. December 14, 1905, the land was sold in execution under that decree and was bought by the plaintiff, who obtained a Fiscal's transfer December 11, 1906, registered December 14, 1906. March 30, 1906, Disanayake, in order to pay off Gunasekera, who obtained

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a mortgage decree against him, mortgaged the land to the first defendant. November 13, 1906, the first defendant sued Disanayake on his bond ; he obtained a mortgaged decree, under which the land was sold in execution and bought by him, and he duly obtained a Fiscal's transfer. The Commissioner of Requests held that the plaintiff had priority, and gave judgment for him.

The defendants appealed.

The case first came on for argument before Wood Renton J., who reserved it for argument before a Bench of two Judges.

A. St. V. Jayewardene, for the defendants, appellants.—The learned Judge is wrong in holding that the title acquired by Disanayake in December 1903, accrued to the benefit of the plaintiff, whose mortgage was executed in April, 1903. Voet says (20, 3, 6) that where a person specially mortgages another's immovables as his own and afterwards acquires title to the same, they are only bound to the creditor by the tie of mortgage in so far as future property has also been included in a clause of general hypothec, and if the mortgagor after having acquired the ownership specially mortgage the immovables to another, the latter creditor would be preferent. By Ordinance No. 7 of 1871 general conventional mortgages have been abolished, so that by our law a mortgage by a person of another's property c eates no charge at all over it. The principle that the subsequent acquisition of title relates back to render a previous mortgage valid applies only to movables, [Grenier J., referred counsel to *Voet* 20, 4, 31 ; *Berwick* 424.] The principle there laid down is the principle of the Roman Law. Voet states what the Roman-Dutch Law is in 20, 3, 6, for he begins the section with the words " by our usages." *Don Carolis v. Jamis*[1] is an authority in favour of the appellant.

If the title acquired by Disanayake in December, 1903, does not accrue to the benefit of the plaintiff, it follows that what plaintiff bought at the Fiscal's sale under his writ was the land subject to the mortgage in favour of Gunasekera. The land was mortgaged to first defendant for the purpose of paying off the mortgage decree in favour of Gunasekera ; the mortgage bond in favour of first defendant was executed before plaintiff obtained a Fiscal's transfer, and therefore before Disanayake was divested of his title. There being no proof of the registration of the seizure under plaintiff's writ, the mortgage in favour of first defendant is valid as against plaintiff.

The first defendant is entitled to stand in Gunasekera's place by right of legal subrogation. This right of subrogation is known to the Roman and Roman-Dutch Law. (*Voet* 20, 4, 34, 35 ; *Digest* 20, 5, 1, 5.) Our law on the point is similar to the Roman Law and different from the Roman-Dutch Law (see *Jayawardene's Mortgage*,

[1] *(1909) 1 Cur. L. R. 224.*

pp. 85–87) ; according to our law, although the posterior mortgagee can bring the property to sale, such sale would not affect the rights of the prior mortgagee.

The principle of legal subrogation is recognized in most legal systems. It was held in *Bisseswar Prosad v. Lala Sarman Singh* [1] that " when money due upon a mortgage is paid, it shall operate as a discharge of the mortgage or in the nature of an assignment of it, as may best serve for the purposes of justice and the just intent of the parties." It was held in *Bhanaya Lal v. Chidda Singh*[2] that where a prior mortgagee obtains a decree upon his prior mortgage, and in lieu of the amount of that decree he takes a subsequent mortgage of the same property from the mortgagor, the prior mortgage enures to his benefit, and he can hold it up as a shield against a puisne mortgagee whose mortgage is of a date subsequent to the prior mortgage.

H. Jayewardene, for the plaintiff, respondent.—Both the reasons given by the Commissioner are correct. According to Voet, where a person who has no title mortgages property and subsequently acquires title, the mortgage becomes at once confirmed, and is preferential to any mortgage created by the mortgagor subsequent to acquisition of title (20, 4, 31). This principle has been recognized and acted upon in Ceylon until quite recently, whether the mortgage is a special or general one. General mortgages having been abolished in Ceylon, the usage referred to in *Voet* 20, 3, 6 does not apply.

On the second ground, too, it is submitted that the judgment is right. Whether there was a valid mortgage in favour of plaintiff or not is immaterial, inasmuch as his Fiscal's purchase was before the mortgage to first defendant. Even assuming that the mortgage to first defendant was created in order to pay off a pre-existing mortgage, that fact does not avail the first defendant at all. A person who advances money to pay off an existing mortgage does not acquire the preferential rights of such mortgagee except by special assignment. Here there was no such assignment ; and the first defendant's mortgage must stand on its own merits.

A. St. V. Jayewardene, in reply.

Cur. adv. vult.

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His Lordship set out the facts, and continued :—

The learned Judge gave two reasons for his decision, either of which would be sufficient but the appellants dispute both of them. His first reason is that, according to Roman-Dutch Law, the title which the mortgagor acquired in December, 1903, accrued to the benefit of the plaintiff under his mortgage, which was given when the mortgagor had no title. He says that this doctrine has long

[1] *Citator 2, 4, 132 ; (1907) 6 Ca . L. J. 134.* [2] *(1910) Citator 6, 5, 105.*

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been followed in Ceylon until some recent decisions in the Supreme Court (1 *Cur. L. R.* 224 and 13 *N. L. R.* 112), and he thinks that the old equitable practice must be followed until we have a Full Court decision definitely deciding between conflicting decisions.

The appellants' counsel contends that the Roman-Dutch Law was not as stated by the learned Judge, but that according to that law, as stated in *Voet* 20, 3, 6 (*Berwick* 358), a mortgage by one who had no title but afterwards acquired it was postponed to a mortgage of the same land made by him after he had acquired title. No doubt such a mortgage would be binding on the mortgagor himself when he afterwards acquired title, and that was the point decided in the case in 13 *N. L. R.*; and the point decided in the case of 1 *Cur. L. R.* was that a transfer by a man who has no title does not transfer title. I think, however, that the second reason given by the Commissioner of Requests is a good one. This was that the plaintiff got a valid mortgage decree and bought the land in execution before the date of the first defendant's mortgage. The appellant's objection to this is that although the first defendant's own mortgage was later, he is entitled to rely on the mortgage of March 1, 1904, to Gunasekera. They contend that one who pays off a mortgage and takes at the same time a fresh mortgage is entitled to the benefit of the mortgage so paid off, which he must be presumed to have intended to keep alive in order to protect himself against any mortgage created between the date of the one so paid off and his own mortgage. In the Indian case of *Bhanaya Lal v. Chidda Singh* (1910), reported in *The Citator* 6, 5, 105, it was held that where a prior mortgagee obtains a decree on his mortgage, and in lieu of the amount of that decree takes a subsequent mortgage of the same property from the mortgagor, the prior mortgage enures to his benefit, and he can hold it up as a shield against a puisne mortgagee whose mortgage is of a date subsequent to the prior mortgage. That is not quite the present case. In another Indian case, *Bisseswar Prosad v. Lala Sarman Singh*,[1] it was said that "the true principle is that, when money due on a mortgage is paid, it shall operate as a discharge of the mortgage, or in the nature of an assignment of it, as may best serve for the purposes of justice and the just intent of the parties." The Court said that this doctrine of subrogation is founded on the circumstances of each individual case and on the principles of natural justice, and would be applied whenever a denial of the right would be contrary to equity and good conscience; and in that particular case they held that it did not apply because the persons who claimed the benefit of it must have known of the existence of the mortgage over which they claimed priority. In the present case there is no evidence or averment that the first defendant paid off Gunasekera's mortgage, or that he knew of it, and therefore it

[1] *Citator 2, 4, 132.*

may be said that he could not have had any intention to keep it alive for his benefit. It is very probable that he did know of it, for it was registered and a decree had been obtained on it. But the plaintiff's mortgage was also registered, and if we are to assume that the first defendant knew of Gunasekera's mortgage, we should also assume that he knew of the plaintiff's ; and if we are to be guided by " equity and good conscience ," it is as much contrary to equity and good conscience that the plaintiff's mortgage should be postponed as that the first defendant's should be postponed. And it is reasonable to suppose that if the first defendant knew of both the prior mortgages and had any suspicion that the plaintiff's was invalid, he would have made sure of his position by taking an assignment of Gunasekera's. In my opinion he is not entitled to rely on Gunasekera's mortgage, and the appeal should be dismissed with costs.

GRENIER J.—

The facts are fully stated in the judgment of my Lord, which I have had the advantage of reading. As regards the question, whether under the Roman-Dutch Law a person can mortgage property of which he is not the owner, the authorities which I shall presently cite are clear that he can do so. The further question, whether such a mortgage is postponed in favour of one which is effected after the mortgagor has acquired ownership of the property, requires close examination, as we have not been referred to any local decisions directly bearing on the point.

In the first place, I must say that in Roman Law and the Roman-Dutch Law the word *pignus* is a generic term, including *hypotheca*, and is used as applicable to both movable and immovable property. The term " mortgage," as a generic term, comprehends both *pignus* and *hypotheca*.....and, as pointed out by Mr. Berwick in a note on page 451 of his translation, the term *pignus* is indiscriminately and conveniently rendered by some text writers in many places by the barbarous word " mortgage," as meaning the pledge right or security constituted with or without delivery of possession. As is well known, the term *pignus* is technically applied to cases where the property, which is the subject of the *vinculum pignoris*, is delivered to the pledgee, and the term *hypotheca* to cases when the property bound remains with the owner. If we keep the meaning and relation of these terms in mind, it is easy, upon a consideration of some passages in Voet, in which he makes constant references to the *Digest* and other sources of original legal information, to see that in the Roman-Dutch system of jurisprudence a person was permitted to pledge or mortgage property of which he was not the owner at the time. I am referring particularly, to *Voet, lib. XX., tit. IV., s.* 31. The translation by Mr. Berwick is as follows : " Thus far we have stated who are preferential when the same

thing has been hypothecated by the owner of it to several persons. But if a *pignus* has been first bound to one person by one who was not the owner, and then again to another person by the same mortgagor, but subsequently to his having become owner, the first mortgagee is still preferential, because the right of pledge was confirmed from the moment of the mortgagor's acquisition of the ownership. *Dig. h. t. fr.* 3, *section* 1 ; *Arg. Dig.* 21. 3 *fr.* 2 *de*, except *rei vend. et trad.* Plainly, if the debtor was owner at neither time, neither when he constituted the pledge right to the first nor to the second creditor, but subsequently acquired the ownership, it has to be considered whether the mortgagor had the right of possession, and a right of the *Actio Publiciana in rem*, or whether he had obtained it without *justus titulus* and *bona fides*, and without the faculty of usucaption and right to the *Actio Publiciana*." Much follows after the passage I have quoted, which makes it clear that the term *pignus* is not restricted to movable property, but embraces immovable property also. Indeed, throughout the whole of the sections which deal with the subject of *pignus*, there is no distinction made between movable and immovable property. I have therefore, I think, established my first proposition, that under the Roman-Dutch Law a person may mortgage property of which he is not the owner at the date of the mortgage, whether that property consists of movables or immovables.

It seems equally certain that when such a mortgage is effected, the first mortgage is preferential to any subsequent mortgage after the mortgagor had acquired ownership. Voet's statement of the exact legal position is supported by certain passages from the *Digest* and seems to me faultless. He says the first mortgagee is still preferential, " because the right of pledge was confirmed to the first mortgagee from the moment of the mortgagor's acquisition of the property." He means that although the right of pledge sprang into existence contemporaneously with the execution of the mortgage, it had not all the essential elements of a right which the law would then recognize and enforce, but that no sooner the mortgagor acquired ownership, the mortgagee by operation of law became vested with all the rights and preferences attaching to that character ; in other words, that at the very moment the mortgagor became owner, the mortgage became a primary one, and no subsequent incumbrances could affect it in any way.

The law, as I have stated it above, was I conceive the law which prevailed in Holland up to a certain period until certain usages and customs became recognized, which largely modified it. These usages are referred to in *Voet, lib. XX., tit. III., s.* 6. That section is as follows :—

" By our usages, however, what has been said as to the ' convalescence ' of the mortgage of another person's property after the acquisition of its ownership by the debtor does not hold good

universally, but only obtains with respect to movables. For if one has solemnly and before the tribunal of the place specially mortgaged another's immovables as his own and afterwards acquires their ownership, although at the time of the mortgage they may have been due to him (as when they have been already sold to him but not delivered), they are only bound to the creditor by the tie of mortgage so far as future property has been also included in a clause of general hypothec, and thus begin to be bound generally (not specially) to the creditor. The consequence of which is that if the debtor after having acquired the ownership specially mortgages the same immovable thing to another before the local tribunal, the latter creditor who has this special hypothec would be preferent in Holland and other places where an anterior general mortgage is postponed to a posterior special one. "

It will be seen from this passage that a person is at liberty to mortgage property which does not belong to him. The tie of mortgage is created between the mortgagor and the mortgagee, but only to the extent that the mortgage should not be considered a special mortgage but a general one. Now, general mortgages are no longer in force in Ceylon, and all our mortgages are special. The conditions, therefore, contemplated in this section are no longer present in Ceylon, and it is difficult therefore to say that an anterior general mortgage should be postponed to a posterior special one. We have no usages and customs here corresponding to, or even approaching, those mentioned in section 6 ; and, so far as I am aware, a mortgage by a person of property of which he is not the owner at the time has been regarded as a special mortgage—special in the sense that specific property has been bound and hypothecated by the instrument of mortgage. In the present case what was mortgaged was specific property, the ownership of which, although not in the mortgagor at the time, became subsequently vested in him. If the acquisition of the ownership, according to the strict letter of the Roman-Dutch Law, confirmed the right of pledge or mortgage in the mortgagee as at the date of the mortgage, then I can see no reason why the mortgage should not be considered a special one, and therefore not covered by the section I have referred to, if it applies at all.

From a passage in *Nathan* (*vol.* 2, *s.* 1004) I find the law stated as follows : " There is no doubt, however, that a thing or property may be validly hypothecated by one who is not the owner, if the owner consents or afterwards ratifies the hypothecation. Such consent may be tacit or may be implied from conduct. A thing belonging to another may be hypothecated on condition that the hypothecation shall take effect when the thing becomes the property of the person making the hypothecation. A pledge of another person's property may be subsequently validated by the pledger afterwards becoming owner of the property. It makes no difference

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whether at the time of hypothecation the creditor knew or did not know that the property belonged to another..... Voet points out that some Roman-Dutch authorities are of opinion (*Dutch Consultations, part III., vol. I., p.* 21, and *Maynard v. Gilmer's Trustees*, 3 *M.* 116) that the foregoing rules as to the validation of hypothecation of another's property by subsequent acquisition of ownership only apply to movables. He appears to be of this opinion, too, for he says that if a person has with due solemnities specially mortgaged immovable property which belongs to another, even if it be due to him (the mortgagor), for instance, if it has been sold but not yet transferred to him, such property will not be bound to the creditor (mortgagee), except if future property is included in the clause of general hypothecation (that is, the general clause), and the property has thus become generally bound to the creditor." Unfortunately we have no statement from the learned author as to what the law on the subject is at the present time in South Africa, and whether general mortgages, as opposed to special mortgages, are in existence there. To sum up, therefore, this part of the case, it seems to me that the plaintiff's mortgage has priority over the mortgage in favour of the first defendant.

On the other question as to whether in equity and good conscience the plaintiff or the defendant should succeed in this action, I have nothing to add to the observations of His Lordship the Chief Justice. I would dismiss the appeal with costs.

Appeal dismissed.