1958 *Present :* **Basnayake, C.J., and Sinnetamby, J.**

A. M. LAIRIS APPU *et al.*, Appellants, *and* E. N. TENNAKOON KUMARIHAMY, Respondent

S. C. 260 and 261—D. C. Kurunegala, 7915/L

Registration of Documents Ordinance (Cap. 101)—Prior registration—Will—Dispositions made thereunder—Effect thereon of non-registration of the will—Competing deeds—Must they be traced to same source ?—Sections 6, 7 (1) (2) (4), 8 (b), 10, 26.

The effect of section 10 (1) of the Registration of Documents Ordinance is that a disposition by will by a testator cannot be defeated by a transfer made by an heir on the basis of an inheritance by intestacy, merely by virtue of the prior registration of the latter instrument.

Quaere, whether the priority created by section 7 (1) of the Registration of Documents Ordinance attaches only to a competing deed from the same source.

APPEAL from a judgment of the District Court, Kurunegala.

H. V. Perera, Q.C., with *N. E. Weerasooria, Q.C.*, and *W. D. Gunasekera*, for 1st Defendant-Appellant in S. C. 260 and for 2nd and 3rd Defendants-Appellants in S. C. 261.

E. G. Wikramanayake, Q.C., with *H. W. Jayewardene, Q.C.*, *P. Ranasinghe* and *K. Shinya*, for Plaintiff-Respondent in both appeals.

Cur. adv. vult.

November 28, 1958. BASNAYAKE, C.J.—

This is an action for declaration of title to a land called Kandubodahena, 2 acres 1 rood and 24 perches in extent, with the building thereon, for ejectment of the 1st defendant-appellant (hereinafter referred to as the appellant) therefrom and for damages. The 2nd and 3rd defendants are persons to whom the appellant had mortgaged the land in dispute.

Tennakoon Dissawe by deed No. 5843 of 29th June 1919 (P1) the original of which has not been produced, gifted this land and several other lands to his son Charles Wilmot Tennakoon. The copy of the deed which is in Sinhalese has not been translated in full. The operative parts of the translation read :—

"I the said Charles Edward Tennakoon Ratemahatmaya for and in consideration of the natural love and affection which I have and bear unto my loving son, Kandegedera Wijesundera Guneratne Tennakoon Herath Mudiyanse Ralahamillage Charles Wilmot Tennakoon Bandara Mahatmaya and for diverse other good causes and considerations, me hereunto moving, do hereby give grant convey make over

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and confirm unto him the said Kandegedera Wijesundera Guneratne Tennakoon Herath Mudiyanse Ralahamillage Charles Wilmot Tennakoon Bandara Mahatmaya as a GIFT OR DONATION subject to my life interest and also subject to the revocation of these presents. Provided however that the said donee shall not sell, mortgage, gift, pledge as security or in any wise alienate the said premises or lease for a term beyond four years at a time or execute any subsequent leases therefor before the expiration of the period of a previous lease but he shall only hold and possess the same during his life time, and after his death the same shall devolve on his two children, who are now alive, and who are my grand-children, namely, Kandegedara Wijesundera Guneratne Tennakoon Herath Mudiyanse Ralahamillage Nandawathie Enid Tennakoon Kumarihamy and—do—Charles Ennoruwe Tennakoon Bandara Mahatmaya and also on any other lawful child or children in equal shares who may be born to my said son, Charles Wilmot Tennakoon Bandara Mahatmaya and they are hereby empowered to hold and possess the said premises at their will and pleasure."

The gift was not accepted either by the donee or by the fidei commissaries and is not registered. Tennakoon Dissawe died in 1932. Before he died, by deed No. 55586 of 1930 (P2), he revoked the deed of gift (P1) in respect of some of the lands in it; but that revocation did not affect the land in dispute. By deed No. 2079 attested by D. N. Weeratunga, Notary Public, on 19th December 1944 (P10) Charles Wilmot Tennakoon leased for a period of ten years commencing on 1st January 1945 the land in dispute to the 1st defendant and on 12th April 1945 the former by deed No. 3014 attested by D. N. Wiratunga (D3) sold the land to the latter for a sum of Rs. 10,000. The execution of both P10 and D3 are contrary to the prohibition contained in P1. The title recited in D3 is not P1 but right of paternal inheritance from his deceased father Tennakoon Dissawe. Both the deed of lease and the deed of transfer are duly registered.

Tennakoon Dissawe left a last will No. 55867 of 1930 (P14) by which he devised and bequeathed the land in dispute and other lands to the two children of Charles Wilmot Tennakoon, viz., Charles Ennoruwe Tennakoon and Enid Nandawathie Tennakoon, the plaintiff. The will was proved in D. C. Kurunegala Case No. 4066 and the estate was administered by Eva Tennakoon wife of Wilmot Tennakoon. Probate of the will was granted in June 1935. By deed No. 2823 of 1945 (P11) the plaintiff and her brother divided the inheritance and in the division the plaintiff received the land in dispute. Wilmot Tennakoon died on 21st May 1951.

The plaintiff bases her claim on both the deed of gift P1 and the last will P14. Learned counsel did not press his objection to the validity of the deed P1 on the ground that the gift was not accepted although it was raised in the petition of appeal. I shall therefore proceed on the assumption that P1 is a valid deed of gift.

The appellant's claim to the land by virtue of the prior due registration of his deed D3 was the sole ground urged in appeal. The deed of gift P1 and the last will P14 are not duly registered while D3 the transfer in

favour of the appellant is. The material portions of section 7 of the Registration of Documents Ordinance on which the appellant relies read—

" 7. (1) An instrument executed or made on or after the first day of January, eighteen hundred and sixty-four, whether before or after the commencement of this Ordinance shall, unless it is duly registered under this Chapter, or, if the land has come within the operation of the Land Registration Ordinance, 1877, in the books mentioned in section 26 of that Ordinance, be void as against all parties claiming an adverse interest thereto on valuable consideration by virtue of any subsequent instrument which is duly registered under this Chapter, or, if the land has come within the operation of the Land Registration Ordinance, 1877, in the books mentioned in section 26 of that Ordinance.

" (2) But fraud or collusion in obtaining such subsequent instrument or in securing the prior registration thereof shall defeat the priority of the person claiming thereunder.

" (4) Registration of an instrument under this Chapter shall not cure any defect in the instrument or confer upon it any effect or validity which it would not otherwise have except the priority conferred on it by this section."

The learned District Judge while holding that the 1st defendant's deed D3 was duly registered has held that fraud in obtaining it has defeated his priority. In arriving at this conclusion the learned District Judge appears to have been influenced by the fact that the appellant had been fined for making false income tax returns and also by the impression he had formed in the course of the trial that the appellant was " an astute and clever man who does not appear to be over scrupulous about the means by which he could amass lands and money ". He also formed the view that the appellant had taken undue advantage of Wilmot Tennakoon's desire to sell the land as he was " sorely in need of money for his drinks ".

For the purpose of bringing a deed within the ambit of section 7 (2) it is not sufficient to establish that the person who obtained the deed was an unscrupulous person who would take undue advantage of any situation for the purpose of gain or that he had been punished for evasion of revenue laws or that he had committed fraud on previous occasions. Fraud or collusion in obtaining the particular deed in question must be established. It is contended on his behalf that neither fraud nor collusion has been established. I have in my judgment in S. C. 688, D. C. Tangalla L. 393, delivered on 13th November, 1958,[2] dealt with the meaning of fraud and collusion in this context. Learned counsel's contention that fraud or collusion within the meaning and content of those expressions in section 7 (2) has not been established is in my view correct and must be upheld.

It was urged on behalf of the respondents that the priority created by section 7 (1) attaches only to a competing deed from the same source. Reliance was placed on the case of *James v. Carolis*[1]. I shall discuss this case after I have examined section 7.

[1] *(1914) 17 N. L. R. 76 at 81.* [2] *(1958) 60 N. L. R. 409.*

That section contemplates the existence of two instruments affecting the same land, one prior and the other subsequent, the subsequent instrument being duly registered under the Ordinance and the prior instrument either not registered at all or registered after the subsequent instrument. The prior instrument is declared to be void as against all parties claiming an adverse interest to the land by virtue of the subsequent instrument.

It is clear from the section that it does not give to a person with a subsequent prior registered instrument a right or title which his instrument does not confer on him. The effect of the sub-section (1) is to render void the unregistered or subsequently registered instrument as *against* all parties claiming an adverse interest to the land. Sub-section (4) seeks to emphasise this aspect of sub-section (1) by providing that registration of an instrument shall not cure any defect or validity or confer upon it any effect or validity which it would not otherwise have except the priority conferred by the section.

In the instant case the appellant claims that in regard to the land in dispute P1 is void as against him as he is claiming an adverse interest in the land by virtue of the subsequent instrument D3 which is duly registered. The expression " void " means of no effect in law, having no legal force, wholly ineffectual in law. The effect of the section is that as far as the plaintiff's claim is based on P1 she cannot be regarded as having any rights to the land based on it as against the appellant. The plaintiff's rights as against the appellant in respect of the land in dispute will have to be determined as if P1 did not exist at all. The plaintiff cannot therefore rely on any rights flowing from it. The next document the plaintiff relies on is the will P14. That instrument is also not registered. Is that also void as against the appellant in respect of his claim to the land in dispute ? The answer to this question lies in section 10. It provides as follows :—

" 10. (1) A will shall not, as against a disposition by any heir of the testator of land affected by the will, be deemed to be void or lose any priority or effect by reason only that at the date of the disposition by the heir the will was not registered under this Chapter.

"(2) This section applies whether the testator died before or after the commencement of this Ordinance, but does not apply—

(*a*) where the disposition by the heir was executed before the commencement of this Ordinance ; or

(*b*) where, at the time of the disposition by the heir, being not less than one year after the death of the testator, letters of administration to the estate of the testator have been granted on the footing that he died intestate."

The effect of the section is that P14 though not registered is not deemed to be void as against the disposition D3 by Wilmot Tennakoon by reason of the fact that at the date of D3 the will was not registered. The effect of P14 which by virtue of section 10 is not void as against the appellant is that it deprived Wilmot Tennakoon of any right to the land in dispute

At the time he executed D3 and claimed that he was entitled to the land by right of paternal inheritance he had no such right and D3 conveyed no right or title to the appellant.

The will P14 in effect revokes the gift P1. They cannot co-exist. Tennakoon Dissawe, being a Kandyan, was entitled to revoke his gift. In fact when Wilmot Tennakoon executed D3 he seems to have acted on the footing that P1 did not exist for he recited his title as based on right of paternal inheritance, Tennakoon Dissawe his father being dead at the time.

Before I part with this judgment I should like to refer to the argument of learned counsel for the respondent that section 7 (1) applies only to deeds from the same source. The argument is based on the case of *James v. Carolis* (*supra*).

It is not clear why it is necessary to introduce into section 7 (1) the concept of two conveyances proceeding from the same source. There is nothing in section 7 (1) that requires that there should be read into it more than what it plainly states. Nor can I see anything in *Warburton v. Loveland*[2] which authorises such a rendering of our section of the Registration Ordinance. The statutory provisions the House of Lords was called upon to interpret in that case are widely different from section 7. I think we should interpret our statute without being influenced by the meaning put upon a statute dealing with the same subject in another system of law. The principles that should be applied in a case such as this are stated in *Warburton's* case thus :—

> " No case can be found either upon the English Registry Acts, or upon the Irish Act now under consideration, in which this precise question has been decided by a Court of Law. It must therefore be determined upon principle, not upon authority ; and the only principle of decision that is applicable to it is the fair construction of the statute itself, to be made out by a careful examination of the terms in which it is framed, and by a reference in all cases where a doubt arises to the object which the Legislature had in view when the statute was passed. Where the language of the Act is clear and explicit, we must give effect to it, whatever may be the consequences ; for in that case the words of the statute speak the intention of the Legislature."

Before I proceed to discuss this aspect of section 7 I shall examine the case of *Warburton v. Loveland* (*supra*). The facts of that case as stated in the headnote to the report are as follows:—

> " A term of 399 years, in certain lands in Ireland, being vested in B. for life, with the residue in his daughter, a settlement is made on the intermarriage of the daughter and W., by which the whole term is conveyed to trustees, on trust to pay the rents and profits to B. the father for life, then to W. the husband for life, then to the daughter for life, if she survived him, and afterwards to convey the term to the first son. This settlement is not registered. On the death of B. the

[2] *2 Dow. & Clark 480, 6 E. R. 808.*

father, W. the husband, demises the whole term for valuable consideration to K., and the indenture is duly registered, and K. afterwards assigns for like consideration his lease of the term to I."

It was held that—

" the registered indenture shall prevail over the unregistered settlement, and that the title of the assignee of the lease is to be preferred to that of the widow of W., and of the trustees under the settlement; and that this is so whether the assignment from K. to I. was registered or not, for the unregistered assignment would pass the interest as between the lessee and assignee, and there is no conflicting claimant under a registered deed.

It was also stated that that construction of the Irish Registry Act, 6 Anne c.2, holds good whether the party executing the prior secret conveyance, and the subsequent registered deed, be the same party or not.

The provision of law the House of Lords was called upon to construe in that case was the fifth section of the Irish Register Act. While discussing the fifth section the House of Lords had also to deal with an argument based on the fourth section which it was urged should be read with the fifth. The portions of the fourth and fifth sections reproduced in the judgment read—

Fourth Section.—" that every such deed or conveyance a memorial whereof shall be duly registered, shall be deemed and taken as good and effectual both in law and equity, according to the priority of time of registering such memorial, according to the right, title and interest of the person or persons so conveying such honours, etc., against all and every other deed, conveyance or disposition of the honours, etc., comprised or contained in any such memorial as aforesaid."

Fifth Section.—" Every deed or conveyance not registered of all or any of the honours, etc., comprised or contained in such a deed or conveyance, a memorial whereof shall be registered in pursuance of this Act, shall be deemed and adjudged as fraudulent and void, not only against such a deed or conveyance registered as aforesaid, but likewise against all and every creditor and creditors, by judgment, recognizance, statute merchant or of the staple, confessed, acknowledged or entered into as for or concerning all or any of the honours etc. contained or expressed in such memorial registered as aforesaid."

The question that arose for decision in *Warburton's* case is thus set out in the judgment—

" The question appears to turn almost entirely on the construction of the fifth section of the statute, which declares in what cases, and under what circumstances, an unregistered deed shall be void. For as to the fourth section, to which considerable importance has been attached in the course of the argument, it appears to us to be confined to the case of priority of registered deeds as between themselves, and to have very little, if any, bearing upon the question immediately under discussion . . . "

> " But it is contended by the plaintiff in error, that the operation of the Irish Registry Act extends no further, but it is confined to cases in which both the earlier and the subsequent conveyances are deeds of the same grantor ; and whether such is the case, or on the contrary the Act extends to give a preference to the subsequent deed when registered against the prior unregistered deed, notwithstanding the same was executed by a former owner of the estate, is, in substance, the question now proposed for our consideration."

It was held that the application of the section was not confined to the case of two conveyances by the same grantor.

After discussing the preamble to the Act and the first five sections the House of Lords summed up its opinion thus—

> " From this general view, therefore, both of the preamble and of the five first clauses of the statute, we think it cannot be doubted but that the statute meant to afford an effectual remedy against the mischief arising to purchasers for a valuable consideration from the subsequent discovery of secret or concealed conveyances, or secret or concealed charges upon the estate. Now it is obvious that no more effectual remedy can be devised than by requiring that every deed by which any interests in lands or tenements is transferred, or any charge created thereon, shall be put upon the register, under the peril that if it is not found thereon, the subsequent purchaser for a valuable consideration, and without notice, shall gain the priority over the former conveyance by the earlier registration of his subsequent deed."

With the greatest respect I wish to say that I can find nothing in *Warburton's* case which requires that the competing deeds must proceed from the same source. The sections of the Irish statute and the whole scheme of that statute are different from the provisions of our Ordinance and its scheme. Under our Ordinance whether the competing deeds be from the same source or not if they relate to the same land the unregistered deed is void as *against* all parties claiming an adverse interest thereto under the subsequent registered instrument. But that does not confer title on the subsequent grantee if his grantor had none. Subsection (4) makes this clear. Prior registration under our law does not confer title on the holder of the prior registered subsequent instrument. The right or title of the instrument holder depends on the right or title of the grantor.

In the instant case as Tennakoon Dissawe had by will bequeathed the land in question to Wilmot Tennakoon's son and daughter, Wilmot had no title to the land after the death of his father in 1932 and his deed D3 of 1945 passed no title to the appellant.

It is not established that Wilmot Tennakoon possessed this land before or even after the death of his father. The rents were collected by his wife who managed her father-in-law's property. There is therefore no evidence that Wilmot Tennakoon acquired a right to a decree under

section 3 of the Prescription Ordinance in his favour. In fact the claim based on possession though formally raised in the appellant's answer does not appear to have been pressed at the trial as the learned trial Judge has held that the question of prescriptive rights of parties does not arise. For the above reasons the appeal of the 1st defendant-appellant is dismissed with costs.

The mortgagees who are the 2nd and 3rd defendants have also appealed. Their case is inextricably bound with that of the 1st defendant-appellant their mortgagor. As the 1st defendant's appeal has failed their appeal must suffer the same fate. Their appeal is also accordingly dismissed with costs.

SINNETAMBY, J.—

The facts of this case relevant to the appeal may shortly be stated as follows : One Tennekoon Dissawe was the original owner of the land which forms the subject matter of this suit. By deed No. 5483 of 29th June, 1919, P1, he donated the land in question and other lands to his son, Wilmot Tennekoon, subject to a fidei commissum in favour of Wilmot Tennekoon's two children, viz., the plaintiff and Charles, and subject to a life interest in himself. This deed was not registered. Tennekoon Dissawe died in 1932 leaving a last will, P14, dated 27th October, 1930, by which he left *inter alia* all his residuary estate, movable and immovable, which would include the premises in suit, to the plaintiff and Charles. The will was admitted to probate but not registered. The plaintiff and Charles amicably divided their common properties between themselves and the land in question was by that division allotted to the plaintiff.

Wilmot Tennekoon by deed No. 3014 of 12th April, 1945, D3, claiming to be entitled by right of paternal inheritance from his deceased father, transferred the land in suit to the first defendant. This was duly registered on 19th April, 1945. Wilmot Tennekoon thus derived only a defeasible title to the land in dispute by the unregistered deed, P1. He was left no property under Tennekoon Dissawe's last will, P14. The main question that arises for decision is whether by the due registration of D3 the first defendant obtained a good and valid title as against the fidei commissaries designated in the deed P1. In my opinion the entire case can be disposed of by the answer to this question. The learned District Judge without discussing the question held that D3 was entitled to prevail over P1 but went on to hold that there was fraud and collusion in securing the registration of the deed. The present appeal has been preferred by the defendant against this finding.

Although under the Registration Ordinance there is no express provision that competing documents must be traced to the same source for the priority created by section 7 of the Ordinance to operate, it is well

recognised that this must necessarily be so. As Sampayo, J. observed in *James v. Carolis* [1]—

> "There is no question that under the law relating to registration the competing deeds must proceed from the same source, nor, on the other hand is there any question that they need not be granted by the same person."

In that case the competing deeds were one executed by the owner during his lifetime and the other by his heir after his death.

Our Registration Ordinance (Cap. 101) provides for the registration of documents and not for the registration of titles. If it had been the latter then from whatever source the title was derived registration by itself would give title to the transferee. When, however, provision is made only for the registration of documents of title the object, in its simplest form, is to safeguard a purchaser from a fraud that may be committed on him by the concealment or suppression of an earlier deed by his vendor. The effect of registration is to give the transferee whatever title the vendor had prior to the execution of the earlier unregistered deeds. This was the principle enunciated in *Warburton v. Loveland* [2] which was adopted and followed in *James v. Carolis* (*supra*). It does not give him a title which is in any way better than the title the vendor had. Thus if his vendor had no title the vendee by mere registration would get none at all and if the vendor had a defeasible title he would get only a defeasible title. Indeed, section 7 (4) expressly states that registration of an instrument does not confer on it any effect or validity it would not otherwise have except priority. This, I venture to think, is how the principle of "the same source" originated in the application of the Registration Ordinance to competing documents.

In the present case we have a deed of Tennekoon Dissawe which, subject to the fiduciary rights of Wilmot Tennekoon, vested title in the plaintiff (P1) and a deed by Wilmot Tennekoon reciting title by inheritance conveying the same property absolutely to the defendants (D3). If the recital in the deed D3 of Wilmot Tennekoon's title is correct there can be no doubt but that the competing deeds proceed from the same source and D3 would by virtue of prior registration prevail over P1. Tennekoon Dissawe would be the source and one channel through which title devolves would be by inheritance to Wilmot Tennekoon and thence by D3 to the first defendant, while the other channel would be by P1 to Wilmot Tennekoon and thence to the plaintiff. The title by inheritance would be an absolute title and that by P1 a defeasible title. By prior registration of D3 the title which devolved by inheritance would prevail over the title created by the unregistered deed P1. This is what happened in *James v. Carolis* (*supra*) and in *De Silva v. Wagapadigedera* [3].

Mr. H. V. Perera who appeared for the appellants relied strongly on the case of *Fonseka v. Fernando* [4]. In that case the plaintiff Fonseka was

[1] (1914) 17 N. L. R. 81.
[2] (1831) 2 Dow. & Clark 480.
[3] (1929) 30 N. L. R. 317.
[4] (1912) 15 N. L. R. 491.

entitled under the will of his father Manuel de Fonseka to an annuity of Rs. 480 a year. S. R. de Fonseka was the residuary legatee under the same will and he by a duly registered deed transferred a land which formed part of the residuary estate to the defendant Fernando. The plaintiff instituted the action for a declaration that the land which the defendant purchased was bound and executable for the payment of his annuity of Rs. 480 on the basis that he had a tacit hypothec over the residuary estate of the deceased Manuel de Fonseka for the payment of the annuity. Probate of the will was not registered and the Supreme Court held that the tacit hypothec was void as against the defendant's deed by reason of the registration of this deed and the non-registration of probate.

Mr. Perera argued that in *Fonseka v. Fernando* (*supra*) although the title the defendant vendor had was subject to the hypothec, nevertheless, the registration of the defendant's deed gave the defendant absolute title because of the non-registration of probate. On a parity of reasoning he contended that although Wilmot Tennekoon had only a defeasible title in P1 by registration of D3 the defendant obtained absolute title as against the fidei commissaries whose rights were based on the unregistered deed P1.

It seems to me that in *Fonseka v. Fernando* (*supra*) the question of whether competing instruments were from the same source was not given due consideration. The main argument in the case centred on two questions, viz., whether the interests claimed were adverse and whether probate of a will is a registrable instrument or not. The decision of the Supreme Court was based on the answer to these questions and sufficient attention does not appear to have been focussed on the question of whether the vendor to the defendant could have conveyed a better title than the vendor himself at any stage had. Indeed it would appear that this aspect of the matter was not considered at all. Some argument no doubt was addressed to the Court to the effect that if the will is void it would destroy the very foundation on which the defendant's title was based. This contention the Court answered by declaring that the title was void only *quo ad* the adverse interest claimed by the defendant. It is not known whether S. R. de Fonseka who conveyed to the defendant was also an heir on the basis of intestacy of Manuel de Fonseka. In that event he would certainly have conveyed absolute title in respect of the share he would then have inherited and the defendant would have obtained good title to that share by virtue of prior registration of his deed.

In the present case it seems to me to be impossible to hold that the defendant got absolute title if his vendor's rights are confined to the interests he derived from P1. Learned Queen's Counsel who appeared for

the defendant at the trial in the original Court apparently realised this for he raised an issue numbered 10 to the following effect :—

Issue 10.—Was the said Wilmot Tennekoon the sole heir of the said C. E. Tennekoon Dissawe ?

meaning thereby intestate heir and when it transpired in the course of evidence that Tennekoon Dissawe left a will which was admitted to probate but not registered he framed issues 17, 18 and 19 which are as follows :—

Issue 17.—Was the probate of the Last Will of Charles Wilmot Tennekoon duly registered ?

Issue 18.—If not, does any title pass thereunder to the plaintiff or any devisee under the will ?

Issue 19.—Is the first defendant's deed No. 3014 entitled to prevail over the plaintiff's title, if any, under the Last Will by reason of due and prior registration ?

If no will had been left and if Wilmot Tennekoon was the sole heir there is no doubt that D3 would prevail over P1 on the authority of the Supreme Court decision in *de Silva v. Wagapadigedera* (*supra*). Does the fact that Tennekoon Dissawe left a will which was admitted to probate make any difference ? In this connection it is relevant to note that Ordinance No. 23 of 1927 effected a change in the law as it stood at the time of the decision in *Fonseka v. Fernando*. Cap. 101 of the Legislative Enactments (Vol. 3) embodies the main provisions of Ordinance No. 23 of 1927 as amended subsequently in regard to certain minor particulars.

Section 8 (*b*), which is the provision that applies to the facts of this case as Tennekoon Dissawe's will was made after the enactment of of Ordinance No. 23 of 1927, read with section 6 makes a will a registrable instrument under the Ordinance. It is to be noted that Probates are no longer registrable and to that extent the decisions in *Fonseka v. Fernando* (*supra*) and *Fonseka v. Cornelis* [1] have been superseded. The amendments incorporated in section 8 makes the will registrable but the effect of the proviso to section 26 of Cap. 101 is that a will cannot be presented for registration unless it has been admitted to probate and is accompanied by the probate or letters of administration to which the will has been annexed. The result is much the same but now it is the last will and not the probate that is required to be registered.

Section 10 of Cap. 101 is a new provision specially enacted to overcome the difficulty created by the decision in *Fonseka v. Cornelis* (*supra*) and envisaged by Sampayo, J. in the course of his judgment in that case—*vide* statement of Objects and Reasons annexed to the Bill when it was

[1] *(1917) 20 N. L. R. 97.*

first introduced in the Legislative Council and which is reproduced in Volume 9 Law Recorder 9 of May, 1928, at page 69. As the law then stood an heir was able to defeat the intention of the deceased testator by transferring the deceased's property for consideration to an outsider and getting the transfer deed registered before registration, or even grant, of the probate. Section 10 (1) provides that—

> " A will shall not, as against a disposition by an heir of the testator of land affected by the will, be deemed to be void or lose any priority or effect by reason only that at the date of the disposition by the heir, the will was not registered under this Chapter."

The effect of this provision, therefore, is that a disposition by a testator cannot be defeated by a transfer made by an heir merely by virtue of the prior registration of the latter instrument. Tennekoon Dissawe had left a last will devising his property to the plaintiff and Charles and this bequest could not be defeated by the intestate heir Wilmot Tennekoon transferring the property in question to the first defendant on the basis of an inheritance by intestacy from Tennekoon Dissawe. Issues 17, 18 and 19 must accordingly have been answered against the first defendant. The resulting position would no doubt have been quite different if Tennekoon Dissawe had left no will. The non-registration of last will P14 does not affect the dispositions made by that last will and the first defendant would get no title merely by registration of his deed D3. Whatever rights he got under D3 must be confined to the fiduciary interests Wilmot Tennekoon had under P1. On the death of Wilmot Tennekoon these rights ceased to exist and his claim to the property in dispute must therefore fail.

In view of the opinion I have formed on the question of registration I do not consider it necessary to go into the question of whether there has been fraud and collusion in securing registration of deed D3. I would accordingly dismiss the appeal with costs.

Since writing the above I have seen the judgment prepared by My Lord the Chief Justice. I do not see much difference between the views he has expressed and mine. Though he has expressed the view that under our Ordinance whether the competing deeds be from the same source or not the unregistered deed is void as against the subsequent deed he has further qualified it by stating that a subsequent grantee from *a stranger* would get no better title if his grantor had none. The effect is that in actual practice the subsequent grantee's deed will prevail over the prior deed by virtue of prior registration only if it is from the same source : if the competing documents are from two different sources the rights of the grantees would depend on the title of the grantors and not on registration.

Appeal dismissed.