[FULL BENCH]

Present: Wood Renton C.J. and Shaw and De Sampayo JJ.

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FONSEKA *v.* CORNELIS

313—D. C. Kalutara, 6,923.

Land Registration Ordinance, No. 14 of 1891, ss. 16 and 17—Probate—Is it an "instrument" within the meaning of s. 17?—Widow appointed sole devisee and executrix under her husband's will—Probate not registered—Sale of land in execution for a private debt of widow—Registration of Fiscal's conveyance—Subsequent sale in execution by a creditor of the testator—Fiscal's conveyance not registered—Fiscal's sale pending a Paulian action against executrix and another by creditor of the testator—Is sale subject to the result of the Paulian action?—Sale by or against an executor—Is there a presumption that he is acting in his representative capacity?

Solomon died in February, 1902, leaving a last will, by which he appointed his wife Francina his sole devisee and executrix. Francina took out probate in 1902, but the probate was never registered. In October, 1902, Francina sold the land in question, which formed part of Solomon's estate, to her brother Marthenis. In 1903 Pedro, who had obtained judgment against the executrix for a debt of the testator, seized the land in execution, when Marthenis claimed the same. This claim having been upheld, Pedro brought a Paulian action against Francina and Marthenis to have it declared that the transfer to Marthenis was fraudulent, and that the land was available for sale under his writ. Pedro obtained judgment in June, 1904, and bought the land himself at the Fiscal's sale held under his writ, and obtained a Fiscal's transfer in October, 1905. While the Paulian action was pending, Letchiman sued Francina and Marthenis for a personal debt of theirs and obtained judgment, and sold the land on his writ in April, 1904, and purchased it himself, and registered the Fiscal's transfer in August, 1904, and subsequently sold the land to the defendant.

Held [*per* FULL BENCH], that a probate of a last will is an "instrument" within the meaning of section 17 of the Registration Ordinance, 1891, and the non-registration under section 16 of the probate of a will affecting immovable property renders it void as against a person claiming an adverse interest under a duly registered deed of subsequent date.

Held, further [*per* WOOD RENTON C.J. and DE SAMPAYO J.], that though Letchiman (defendant's predecessor in title) was entitled to a half share (Francina's share as intestate heir) by reason of prior registration of his Fiscal's conveyance as against Pedro (plaintiff's

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predecessor in title), yet, as Letchiman bought the land pending the Paulian action, the sale was subject to the result of it, and, consequently, the sale under Pedro's writ, though subsequent in date, prevailed over the sale under Letchiman's writ.

"The effect of the decision on the point referred to the Full Bench, so far as this case is concerned, is that where property of the estate is disposed of by a devisee, who is also an heir of the deceased, or is sold against him in execution upon an instrument which is registered prior to the probate of the will, the transferee obtains, in respect of any share or interest to which the devisee would have been entitled by law but for the will, a superior title to that of the executor or a party claiming under him."

"I think that this matter requires the attention of the Legislature, and in the meantime I would impress on all District Courts and practitioners the importance of seeing that the probate and letters are duly registered."

THE facts are set out in the judgment of Wood Renton C.J., as follows:—

The point of law reserved in this case for consideration by a bench of three Judges is whether the non-registration under section 16 of the Land Registration Ordinance, 1891, [1] of the probate of a will affecting immovable property, will render it void as against a person claiming an adverse interest under a duly registered deed of subsequent date. The material facts are these. Francisco Fonseka and his wife Apollonia, who were married in community of property, were the owners of the land in suit. On June 20, 1894, by deed No. 12,489, they gifted the property, subject to the reservation of a life interest in their own favour, to Solomon Fonseka, who died on February 7, 1902, leaving a last will, by which he appointed his wife Francina his sole devisee and executrix. Francina proved the will, but the probate was never registered. In execution of a judgment in D. C. Kalutara, No. 2,620, against Francina Fonseka as executrix of her husband's estate, the property was seized and the seizure was registered on February 23, 1903. Her brother, Marthenis Fernando, claimed it on a deed from Francina, and on March 17, 1903, his claim was upheld. In case D. C. Kalutara, No 2,722, that deed was, on July 12, 1903, set aside as having been executed in fraud of creditors, and on June 22, 1904, the decision of the District Court was affirmed in appeal. The land was again seized by the Fiscal and sold to Clarence Pedro Fonseka, who obtained a Fiscal's transfer (No. 58,261) on October 25, 1905, and died in September, 1913, leaving the plaintiff as the sole devisee under, and executrix of, his will. In the meanwhile, however, Letchiman Chetty had, in D. C. Colombo, No. 18,816, sued Francina and her brother Marthenis on a promissory note. The action was instituted on August 18, 1903. Decree was entered

[1] *No. 14 of 1891.*

up in the plaintiff's favour on September 9, 1903. The land here in dispute was seized and sold in execution, purchased by Letchiman Chetty himself on Fiscal's transfer No. 5,610 dated July 18, 1904, and sold in turn by him, by deed No. 45 dated February 3, 1916, to the defendant. The case went to trial on the following issues:—

(1) Was the judgment in D. C. Colombo, 18,816, against Francina Fonseka personally ?

(2) Did Letchiman Chetty get good title as against a purchaser in execution against the estate of Solomon Fonseka, even if the claim in the said case No. 18,816 was for money borrowed to meet testamentary expenses ?

(3) If so, was the said claim for money borrowed to meet testamentary expenses ?

(4) Did Francina sell the property to one Marthenis Fonseka ?

(5) If so, did any title pass to the defendant ?

(6) Was the sale to Marthenis Fonseka set aside as having been executed in fraud of the creditors of Solomon Fonseka's estate ?

(7) Has defendant been in wrongful possession of a portion of the said premises as averred in the plaint ?

(8) What damages is the plaintiff entitled to ?

(9) What damages is the defendant entitled to ? (As damages between the same parties are provided on the same basis. it was agreed that whoever succeeds should get damages on that basis.)

(10) The probate of the last will of Solomon Fonseka not being registered and the Fiscal's transfer in favour of the defendant's predecessor being duly registered, is the defendant's title superior to that of the plaintiff ?

(11) Even if the debt incurred by Francina Fonseka on the note sued in D. C. Colombo, 18,816, was not in respect of testamentary expenses, is the defendant's title superior, if the sale against her in the said case was in her capacity as executrix and sole legatee ?

The learned District Judge answered the 1st, 4th, 6th, and 7th issues in the affirmative, and the 2nd, 3rd, 5th, 9th, 10th, and 11th in the negative, and gave judgment for the plaintiff as prayed for, with costs.

The probate of Solomon Fonseka's will was anterior in date to the Fiscal's transfer in favour of Letchiman Chetty, but was never registered. The Fiscal's transfer was registered on August 4, 1904. If, in that state of the facts, it acquired priority over the probate, the defendant would be entitled to half of the property in suit.

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This point was raised in the 10th issue. The learned District Judge has answered it in the plaintiff's favour, but without giving in detail his reasons for doing so.

The defendant appealed.

A. St. V. Jayawardene (with him *H. J. C. Pereira*), for the appellant.—As regards the half the widow was entitled to by right of inheritance, the registration of the Fiscal's conveyance in favour of Letchiman Chetty gave the defendant a title superior to that of the plaintiff. The Registration Ordinance, 1891, section 16, requires that probates and letters of administration should be registered. In section 17, dealing with priority, probates and letters of administration are not expressly referred to : they are included in the term " other instrument " or in the term " judgment or order." See section 18 and sub-sections (3) and (4) and the schedule III. to the Ordinance, which provides for the stamp duty on registration; see also section 22. These sections read together clearly show that the words " other instrument " in section 17 must include probate and letters of administration. *Fonseka v. Fernando* [1] has been rightly decided. The same principle obtains in the English Registry Acts. *Chadwick v. Turner.*[2] The probate not being registered is void as against the defendant's deed, which was duly registered, and the defendant is entitled to the half share which devolved on the widow *ab intestato*, according to the principle laid down in *James et al. v. Carolis et al.*[3]

Bawa, K.C. (with him *Samarawickreme* and *Cooray*), for the respondent.—In the West Riding Acts there was provision for the registration of wills, and an express enactment that a will if not registered within a certain time shall be void as against a conveyance from an heir at law. The English decision, therefore, does not apply. Probates have not been so far registered in Ceylon. The words " other instrument " do not include a probate of a will. Section 26 of the Ordinance is against the appellant's contention. The decision in *Fonseka v. Fernando* [1] is wrong, and ought to be reconsidered. If the appellant's contention is upheld, it would open the door to fraud and injustice.

A. St. V. Jayawardene, in reply.—The terms of section 26, which speaks of a " registered owner, " show that it has reference to lands the title to which had been registered, for which provision was made in the first Registration Ordinance (No. 8 of 1863). It has no reference to the registration of deeds. It is out of place in the present Ordinance, and should be ignored. It is necessary to insist on the registration of probate if the register is to show a complete history of titles to land.

Cur. adv. vult.

[1] *(1912) 15 N. L. R. 491.* [2] *(1866) 1 Ch. App. 310.*
[3] *(1914) 17 N. L. R. 76.*

November 3, 1917. Wood Renton C.J.—

His Lordship set out the facts, and continued:—

The relevant provisions of the Land Registration Ordinance, 1891,[1] on the question are not happily drafted. But the point was decided in a sense contrary to the view of the learned District Judge by Lascelles C.J. and myself in *Fonseka v. Fernando*,[2] and that decision has been indirectly recognized by later authorities.[3] After full re-consideration of the whole matter, I venture to think that *Fonseka v. Fernando*[2] was rightly decided. Little help is, in my opinion, to be obtained either from the fact that the Land Registration Ordinance, 1907,[4] which has not yet been proclaimed, expressly includes the " probate of a will " in its definition of " deed, "[5] and confers[6] upon probates priority by registration, or from English decisions[7] under the Middlesex Registry Act, 1708,[8] and similar legislation.

The question has to be decided under the provisions of the local Ordinance.[1] Now, it is true that section 15, in providing for the preparation of books for the purposes of the Ordinance, refers only to deeds. But section 16 enacts that " the probate of any will " affecting lands " shall be registered ". The requirement is as peremptory in the case of probates as in that of deeds of sale. Section 17 then provides that " every deed, judgment, order, or other instrument as aforesaid, unless so registered, shall be deemed void as against all parties claiming an adverse interest thereto on valuable consideration, by virtue of any subsequent deed, judgment, order, or other instrument which shall have been duly registered as aforesaid ". It is argued on behalf of the plaintiff that the Legislature had advisedly omitted any mention of probates in this clause, and that the words " other instrument as aforesaid " show that what was being dealt with was the class of instruments indicated in the opening clause of section 16, viz., " every deed or other instrument of sale, " &c. I cannot agree. If that had been the intention of the Legislature, I should have expected the words " other instrument " to follow the term " deed " in section 17, as they do in section 16. The expression " instrument " does not ordinarily include judgments or orders.[9] I think that what was intended by its use and juxtaposition in section 17 was to catch up and include in a compendious phrase everything in section 16 that the following section was not expressly mentioning. The words " as aforesaid " in section 17 are not limited to " other instrument." They govern equally " deed, " " judgment, " and " order. " That this is the correct interpretation of section 17 is, I think, shown by the fact

[1] *No. 14 of 1891.*
[2] *(1912) 15 N. L. R. 491.*
[3] *Marikar v. Marikar, (1916) 2 C. W. R. 79.*
[4] *No. 3 of 1907.*
[5] *Section 3.*
[6] *Section 86.*
[7] *See. e.g., Chadwick v. Turner, (1886) L. R. 1 Ch. 310.*
[8] *7 Ann. C. 20.*
[9] *Stroud's Judicial Dictionary, s. v. " Instrument ".*

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that probates are included in the third schedule to the Ordinance as liable to stamp duty, and that the only authority for the imposition of such duty is to be found in section 18 (3) and (4), which are in these terms:—

> " (3) No deed, judgment, order, or other instrument shall be registered unless the same has been stamped with a stamp denoting that the duty payable thereon has been duly paid as hereinafter provided.
>
> " (4) The duty payable for the registration of the several instruments mentioned and described in the third schedule hereunto annexed shall be the amount set down in figures against the same respectively, together with the additional duty, if any, payable under section 20. "

It was argued for the plaintiff that sections 22 and 26 told against the construction which I am here putting on section 17. Section 22 provides that " when a party applies to have a probate or letters of administration registered, he shall produce to the Registrar an authenticated copy of the inventory or list of appraisement filed in the case in which application for probate or administration was made, and shall further give such description of the land as the Registrar shall require for the purposes of registration." But this provision is clearly supplemental to the general requirements of section 18 (1), (2), as to the form and substance of applications for registration. It could never have been the intention of the Legislature that an executor, on applying for registration of probate, should merely produce an authenticated copy of the inventory, and that then the Registrar, after reference to the lists of executors forwarded to him from the District Courts in compliance with section 28 of the Ordinance, should allow probate to issue. Section 26 is as follows:—

> " On the death of any registered owner or other interested party, all lands belonging to him, or in which he may have an interest, shall remain in his name until probate or administration of his estate shall have been granted, whereupon, and upon a written application in that behalf, the name of the executor or administrator shall be registered in the books until a partition, transfer, or alienation of the lands shall have been effected, whereupon, and upon like application, such partition, transfer, or alienation shall be registered as hereinbefore provided. "

This enactment is borrowed from the repealed Ordinance No. 8 of 1863, which provided for registration of titles, and seems out of place in an enactment confined to the registration of deeds. I do not think that we should be justified, on the strength of anything in section 26, in holding that the registration of a probate under section 16 of the Ordinance of 1891 was intended to supply a link in the history of the title to the land which it affects.

I would answer the question submitted to us in the affirmative.

SHAW J.—

The only question raised for determination by a bench of three Judges is whether, in consequence of the provisions of the Land Registration Ordinance, 1891, the title obtained under a subsequent sale of land that has been duly registered under the provisions of the Ordinance takes precedence to a title derived under a prior probate that has not been registered.

The point has already been decided in the affirmative by a bench of two Judges in the case of *Fonseka v. Fernando*,[1] followed in *Marikar et al. v. Marikar et al.*,[2] and, in my opinion, the decision in those cases was correct.

The Ordinance, by section 16, provides that all deeds and other instruments of sale, purchase, &c., affecting land, and deeds affecting such deeds, and other instruments, probates, and grants of administration affecting land, and judgments and orders of Court affecting land, shall be registered in the branch office of the district in which such land is situate. Section 17 then provides that every deed, judgment, order, or other instrument as aforesaid, unless so registered, shall be deemed void as against all parties claiming an adverse interest thereto on valuable consideration by virtue of any subsequent deed, judgment, order, or other instrument which shall have been duly registered as aforesaid.

The question that arises is whether a probate is an " other instrument as aforesaid " within the meaning of this section. The object of the legislation is to ensure that, for the protection of *bona fide* purchasers, all incumbrances, &c., affecting land shall be registered in the proper place so that they may be discovered on search being made, and the provision that probates shall be registered would be useless if it were intended that failure to register them should have no effect, and should give no priority to subsequent duly registered instruments. The words " other instruments as aforesaid " in section 17, in my opinion, refer to all instruments mentioned in the previous section, and not to those only as are mentioned in the first paragraph of that section.

A probate is an " instrument," the form of which is provided in the schedule of the Civil Procedure Code, unlike judgments and orders, which are, therefore, specially mentioned in section 17, and that this is so seems to me to be clear from the fact that schedule III. of the Land Registration Ordinance provides for a stamp duty of Rs. 5 in respect of a probate under section 18 of the Ordinance, which by sub-section (3) provides that " no deed, judgment, order, or other instrument " shall be registered unless stamped as provided. In this section probates are not specifically mentioned, and the duty of Rs. 5 would not be authorized by the section unless they come under the words " other instrument. "

[1] *(1912) 15 N. L. R. 491.*

[2] *(1916) 2 C. W. R. 79.*

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The argument that has been adduced of the possible hardships upon a person entitled under a will if this construction be adopted does not appear to me to have much weight, seeing that the other construction would be at least as likely to effect hardships on *bona fide* purchasers, who are the persons for whose protection the provisions of the Ordinance are concerned.

I would answer the question for our determination in the affirmative.

DE SAMPAYO J.—

I had considerable doubt whether a probate or grant of administration is an " instrument " within the meaning of section 17 of the Registration Ordinance, No. 14 of 1891, and, more particularly, whether it was intended that a deed by an heir dealing with the property of the estate should get priority over the title of the executor or administrator, or a party claiming under him, by reason of registration of the deed prior to the probate or letters. It appeared to me that such a construction would lead to disastrous results. If the deed were prior in date to the probate or letters, prior registration would, of course, have no effect. But if it were subsequent in date, an heir would thereby be enabled to defeat the intentions of the deceased and the claims of creditors of the estate. This very case is an illustration of the kind of results which I have indicated. Probate was obtained in 1903, and the land in question was sold in 1905 in execution against the executrix for a debt of the testator, and was purchased by the plaintiff's predecessor in title. But in 1904 the land was sold by the Fiscal for a private debt of the executrix, who was also widow and sole devisee, and was purchased by the defendant's predecessor in title, who registered the Fiscal's transfer in the same year. The probate was never registered, and on the above construction of the Ordinance the title of the executrix as such must yield to her own title as widow and devisee. The person whose duty it was to register the probate was primarily the executrix. Her failure to do so was probably unintentional, but she might well have purposely abstained from registering the probate and thus have placed the property of the estate at the disposal of her own creditors. The result would be the same if the transaction were her own act and not an execution sale. It might be said, of course, that it was within the power of the creditors of the estate or other interested parties to have got the probate registered, but that does not remove the practical difficulty. There may be even cases in which no amount of caution would save the situation. For instance, a land may be devised, subject to a *fidei commissum*, in favour of unborn children of the devisee, and yet the devisee, by failing to register the probate, would be able to defeat the *fidei commissum* by selling away the land on a registered deed. It may be that purchasers from an heir must also be protected.

But since they know that their vendor's title is derived from a deceased person, the circumstance necessarily puts them on inquiry, and if they buy a risky title, they can have no substantial grievance. Of course, if the Legislature has in plain terms provided that a probate or grant of letters should be deemed void as against all parties claiming an adverse interest on a subsequent and duly registered deed by an heir, there is an end to controversy, and the law so laid down must be accepted and enforced, however harmful the results might be. It is because the provision of section 17 of the Ordinance in this respect is not very plain that a doubt arose as to the propriety of construing it in that sense. But after considering all the relevant sections of the Ordinance, I think that the expression " other instruments " in that section includes probates and grants of letters of administration, and that the requirements of section 16 as to the registration of such instruments in the same way as deeds and judgments necessitates the application to them of the invalidating process provided by section 17. *Fonseka v. Fernando*,[1] which decided this point, must therefore be followed. I was at first inclined to think that section 26 of the Ordinance altered the aspect of things. It is in these terms: " On the death of any registered owner or other interested party, all lands belonging to him, or in which he may have an interest, shall remain in his name until probate or administration of his estate shall have been granted, whereupon, and upon a written application in that behalf, the name of the executor or administrator shall be registered in the books until a partition, transfer, or alienation of the lands shall have been effected, whereupon, and upon like application, such partition, transfer, or alienation shall be registered as hereinbefore provided. This section contemplates a continuous registration of the title in the hands successively of (1) the deceased owner, (2) his executor or administrator, and (3) the heir, devisee, or other party to whom the property ultimately passes, and the provisions, especially the words " shall remain in his name, " seemed at first sight to indicate that no person except one claiming from or under the executor or administrator could derive any benefit from registration. But the Ordinance is concerned with registration of deeds or other instruments, and not with registration of titles, and section 26 appears rather out of place and irrelevant. I think Mr. Jayawardene's explanation of the apparent anomaly is right. Section 26 is a reproduction of section 44 of the Ordinance No. 8 of 1863, which provided both for registration of titles to land and for registration of deeds affecting lands, and section 44 had obvious reference to the part of the Ordinance which dealt with the registration of titles. That part was replaced by the Land Registration Ordinance, No. 5 of 1877, which relates solely to the registration of titles. The Ordinance No. 14 of 1891, now under consideration, has repealed the

[1] *(1912) 15 N. L. R. 491.*

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whole of the Ordinance No. 8 of 1863, and by section 16 thereof has provided that deeds and other instruments affecting land shall be registered in the books mentioned in section 15, " unless or until the division has come within the operation of the Land Registration Ordinance, 1877, and if the division has come or hereafter comes within the operation of the said Ordinance, in the books mentioned in section 26 of the said Ordinance. " There thus appears to be an intention to dovetail the registration of deeds with the registration of titles, and section 26 in question is apparently connected with that intention. The Ordinance of 1877, however, was never brought into operation except in the Wellawatta division, and section 26, therefore, does not affect the application of section 15 and 17 to the present case.

I therefore agree, though not without reluctance, that a duly registered deed affecting land belonging to a deceased person's estate gets priority over any claim based on an unregistered or subsequently registered probate or grant of administration. I, however, think that this matter requires the attention of the Legislature, and in the meantime I would impress on all District Courts and practitioners the importance of seeing that probates and letters are duly registered.

The case was listed for further argument before Wood Renton C.J. and De Sampayo J. on December 5, 1917.

December 10, 1917. WOOD RENTON C.J.—

Now that the question as to whether the non-registration of a probate is affected by section 17 of the Land Registration Ordinance, 1891,[1] has been decided, it only remains for us to dispose of the issues still outstanding in the case.

Certain points do not present any difficulty. Francina Fonseka clearly was sued in D. C. Colombo, No. 18,816, in her personal capacity. This is proved by the pleadings in that action, and by the fact that, in the inventory filed by her in the testamentary case (D. C. Kalutara, No. 283), no mention is made of any debt due by the estate to Letchiman Chetty. There is nothing to show that the judgment debt in D. C. Colombo, No. 18,816, was incurred by Francina for testamentary expenses. On the contrary, the final account in D. C. Kalutara, No. 283, shows that only a sum of Rs. 150 was borrowed from any one for that purpose; and the association of her brother Marthenis with Francina as a joint debtor on the promissory note indicates that the liability was a personal one. Moreover, I do not agree with the argument of the defendant's counsel, raised for the first time on the hearing of this appeal, that Letchiman Chetty was, as successor in interest to Francina, in a

[1] *No. 14 of 1891.*

position to convey good title to the defendant, whether the money secured by the promissory note was borrowed by her for testamentary expenses or not. The decision of the Full Court in *Harmanis v. Harmanis*[1] clearly shows that an heir or devisee is capable of giving only a qualified title to property, which is liable to be claimed by an executor for purposes of administration.

The next point is, whether it is open to the defendant, in spite of the Full Court decision, to argue that, although the probate is invalid as regards the half share that would have devolved on Francina, and although the Fiscal's transfer in Letchiman Chetty's favour does not describe her as executrix, the circumstance that Francina was in fact executrix at the time, the sale against her must be taken to have been against her in that capacity, and as the Fiscal's transfer, in pursuance of that sale, is prior in date to that of the plaintiff, the defendant is entitled to claim the remaining half share of the land also. Assuming that this argument is not obnoxious to the rule of " approbate and reprobate," I do not think that the authorities establish the proposition involved in it. They merely show that a vendor or a lessor of land who is, and is known by a prospective purchaser or lessor to be, an executor, may be presumed by such purchaser or lessor to have been acting, as regards the sale or the lease, in his representative capacity, and that the mere circumstance that the deed of sale or of lease does not purport to have been executed by him as executor is not sufficient to raise a presumption that he was acting otherwise.[2] This principle is, however, quite inapplicable to the present case, in which no evidence has been adduced on the part of the defendant to prove that Letchiman Chetty knew that Francina, at the time of her joint promissory note transaction with him, or at the date of the judicial sale against her, was in fact an executrix.

Through no fault of counsel on either side, the various points involved in this case have been developed in piecemeal fashion, and the one raised last, namely, that as Letchiman Chetty's purchase was effected while the appeal in the action brought by Pedro Fonseka against Francina and Marthenis Fernando was still pending, his purchase was subject to the result of that appeal, is the most important of all. For the reasons given by my Brother de Sampayo, whose judgment I have had the advantage of reading, I think that this point is a sound one, and that, although it was not raised in the District Court, there is nothing to prevent us from giving effect to it here.

On these grounds I would dismiss the appeal, with costs.

[1] *(1907) 10 N. L. R. 332.*

[2] *See In re Venn and Furze's Contract (1894) 2 Ch. D. 101 ; Whale v. Booth, (1792) 4 T. R. 625, note (a) ; Farr v. Newman, (1792) 4 T. R. 625 ; McLeod v. Drummond, (1810–11) 17 Ves. 152 ; Corser v. Cartwright, (1875) L. R. 7. Eng. and Ir. App. 721, and cp. Gangabai v. Senabai, (1915) I. L. R 40 Bom 69 ; Graham v. Drummond, (1896) 84 L. T. 417.*

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DE SAMPAYO J.—

The effect of the decision on the point referred to the Full Bench, so far as this case is concerned, is that where property of the estate is disposed of by a devisee, who is also an heir of the deceased, or is sold against him in execution, upon an instrument which is registered prior to the probate of the will, the transferee obtains, in respect of any share or interest to which the devisee would have been entitled by law but for the will, a superior title to that of the executor or a party claiming under him. The testator's widow Francina would be an heir of her husband to the extent of a half share in case of intestacy, and therefore the defendant, whose predecessor in title purchased the land in suit in execution against her personally, may, if there was no other circumstance invalidating the sale, be entitled to that half share by reason of prior registration as against the plaintiff, whose claim is founded on a sale in execution against Francina in her capacity as executrix. But it is now urged that the defendant is also entitled to the other half share, the argument being that, although the probate is invalid as regards the half share which would have come to Francina as heir, the probate is good for other purposes, and that, notwithstanding the circumstance that the Fiscal's transfer, upon which the defendant relies, does not expressly describe the execution-debtor Francina as executrix, she having been in fact executrix at the time, the sale must be taken to have been against her as executrix, and consequently, as that Fiscal's transfer is prior in date to that of the Fiscal's transfer under which the plaintiff claims, the defendant has better title to the remaining half share of the land. I doubt whether the defendant, whose title is based on a sale of the entire property under one and the same set of circumstances, can maintain that the probate is invalid in respect of a share of the property and is good in respect of another share. But let that pass. In my opinion the authorities cited in support of the argument above noted do not apply. The case *In re Venn and Furze's Contract*[1] is relied on as showing that, even where the executor's deed does not purport on the face of it to be executed by him in that capacity, the deed is as good as if it had purported to be so executed. That may be so, but the point decided in that case is that where a person who is in fact an executor deals with the property of the testator's estate, the purchaser may presume that he is acting in the discharge of his duties as executor, unless there is something in the transaction which shows the contrary, and that the contrary will not be shown merely because the deed does not purport to be executed by him in that capacity. Nor do the other cases cited advance the argument on behalf of the defendant. In *Corser v. Cartwright*[2] it is held that an executor, who is also a devisee of an estate charged with payment of debts, may be

[1] *(1894) 2 Ch. D. 101.*

[2] *(1875) L. R. 7 Eng. & Ir. App. 721.*

presumed by a *bona fide* purchaser or mortgagee of that estate to be dealing with it for the purpose of administration, and that, even though the money may be misapplied, the purchaser's or mortgagee's title is not postponed to the claims of the testator's creditors. Similarly, *Graham v. Drummond* [1] lays down that where an executor, who is also residuary legatee, has parted with an asset of the estate for valuable consideration to a person who has no notice of the existence of unsatisfied debts of the testator, or of any improper dealing with the asset, that person's title is valid against any unsatisfied creditor of the testator. These cases proceed on the basis that the third party has dealt with a person in the position of an executor. As a matter of fact, these and other decisions of the same kind are an application under varying circumstances of the general rule as to the powers of an executor over assets, which was laid down by Lord Mansfield in *Whale v. Booth* [2] as follows: "The general rule of both law and equity is clear, that an executor may dispose of the assets of the testator, that over them he has absolute power, and that they cannot be followed by the testator's creditor It would be monstrous if it were otherwise, for then no one would deal with an executor." An exception is, of course, allowed where the purchaser or mortgagee acts with knowledge and is otherwise party to a fraud, but where the sale was three years after the testator's death, and no demand had during that time been made by the plaintiff (creditor), and where if the debts were paid the asset would belong to the executors, it was held in that case that fraud was negatived, as it was not stated that the defendant, who had purchased in execution against the executors personally, knew that the debts of the estate were unpaid. It was argued that in the present case it had not been shown that the defendant's predecessor in title knew of the existence of any unpaid debts, and that he was therefore safe. The point in the case cited, however, is that in the circumstances of that case the purchaser might well presume that all claims against the estate had been satisfied, but the facts of this case do not justify any such presumption. Moreover, *Whale v. Booth* [2] is a decision on the Common law, and *William on Executors, vol. 1., pp. 704-705*, commenting on that case, and referring to a number of authorities, says: "In equity it seems to be established that, generally speaking, the executor or administrator can make no valid sale or pledge of the assets as a security for or in respect of his own debt, on the principle that the transaction itself gives the purchaser or mortgagee notice of that misapplication, and necessarily involves his participation in the breach of duty." This principle is applicable to the present case. *Whale v. Booth* [2] has also been referred to as an authority for the proposition that a sale in execution cannot be distinguished from an alienation by the executor himself, and that, therefore, in the case of a sale under

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[1] *(1896) 74 L. J. 417.*

[2] *17 Ves. J. 165.*

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writ against the executor for his private debt, the property passes by the execution and cannot be followed by a creditor of the testator. But in the later case, *Farr v. Newman*,[1] in which *Whale v. Booth* [2] was cited, it was laid down broadly that the property of a testator in the hands of his executor could not be seized in execution of a judgment against the executor in his own right, and there are other authorities to the same effect. In my opinion the argument on behalf of the defendant in respect of the half share of the land which is unaffected by the question of registration of the probate cannot be sustained.

So far I have dealt with the defendant's claim to a half share of the land on the strength of the decision of the Full Bench as to the effect of prior registration, and with his claim to the other half share on the further argument now maintained. But Mr. Bawa raises a serious point, which, if decided in favour of plaintiff, will go to the root of the defendant's entire claim. The facts relevant to this point may be briefly stated. The testator, Solomon Fonseka, died on February 7, 1902, and his widow, Francina, as executrix, took out probate later in the same year. Francina, by deed dated October 21, 1902, purported to sell the land to her brother Marthenis Fernando. One Pedro Fonseka, who had obtained judgment against the executrix for a debt of the testator, seized the land in execution on February 18, 1903, when Marthenis Fernando claimed the land. This claim being upheld, Pedro Fonseka brought a Paulian action against Francina and Marthenis Fernando to have it declared that the transfer by the former to the latter was a fraudulent transaction, and that the land was still property available to creditors of the estate. The District Judge gave judgment in favour of the plaintiff on July 13, 1903, and the same was affirmed in appeal on June 16, 1904. The land was ultimately sold at the instance of the plaintiff and bought by himself, and the Fiscal's transfer was issued to him on October 25, 1905. While the case was pending in appeal, however, a Chetty who had got judgment against Francina and Marthenis Fernando on a promissory note made by both of them, seized and sold the land on April 9, 1904, on a writ to levy the amount out of the property of the judgment-debtors, Francina and Marthenis Fernando. It is from the purchaser at this execution sale that the defendant claims title. It has been assumed in the case that the land has been sold as the property of Francina. I think rather that, in view of the transfer to Marthenis Fernando, the land should be more properly be taken to have been sold as the property of Marthenis Fernando. But, even on the above assumption, the question raised is whether the purchaser is not bound by the decision of the Paulian action. I think he is. The sale was pending that action, and must be held to be subject to the result of it, which was that the land was still the property of the estate, and was liable to be

[1] *4 L. J. 621.* [2] *17 Ves. J. 165.*

sold in execution of the judgment against Francina as executrix. Consequently the sale under the writ of the creditor of the testator, though subsequent in date, in my judgment prevails over the sale to which the defendant traces title. For this reason I think the defendant's appeal absolutely fails.

I would dismiss the appeal, with costs.

Appeal dismissed.