Feb. 13, 1911

Present : Hutchinson C.J. and Middleton J.

ALWIS *v.* FERNANDO *et al.*

341—*D. C. Colombo,* 30,220.

Mortgage—Subsequent acquisition of title by mortgagor—Conveyance by mortgagor to another after acquisition of title—Subsequent grantee acquires a title unfettered by mortgage.

A mortgaged a land to B in 1898 when he had no title to the land. In 1902 A acquired title to the land. In 1903 C bought the land from A for valuable consideration in good faith and without notice of the mortgage bond.

Held, (1) that C acquired title to the land unfettered by the mortgage to B ; (2) that C was not A's " representative," and was not estopped by any representation which A made from denying that A had any title at the date of the mortgage bond.

Under the Roman-Dutch Law a mortgage of immovable property by a person who at the date of the mortgage is not the owner does not become valid when he subsequently acquires ownership (as against a *bona fide* purchaser from the mortgagor after he had acquired title).

APPEAL from a judgment of the Acting District Judge, Colombo (Allan Drieberg, Esq.). The facts are set out in the judgment.

Vernon Grenier (with him *H. A. Jayewardene*), for plaintiff, appellant.—The case relied on by the District Judge (*Don Carolis v. Jamis* [1]) does not apply, for this is the case of a mortgage and not of a sale. The Roman-Dutch Law is clear that in certain circumstances a mortgage of another's property is valid (*Voet* 20, 3, 4, 7). Ordinance No. 7 of 1840 only specifies the mode in which mortgages may be created, and we have satisfied its provisions on this point. [Hutchinson C.J. referred counsel to the judgment of Grenier J. in 385—C. R. Galle, January 6, 1911.]

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

Savundranayagam (with him *Jayatileke*), for respondents.—Under the Roman-Dutch Law it is only in the case of general mortgages, including future property, that property which did not belong to the mortgagor at the date of the mortgage would, on the mortgagor subsequently acquiring title, become bound by the mortgage. In Ceylon general mortgages are no longer in force ; the principle of the Roman-Dutch Law would not apply now. Berwick's *Voet*, *pp.* 280, 359. Counsel cited *Don Carolis v. Jamis*,[1] *Guruhamy v. Subaseris*,[2] *Kadiravelupulle v. Pinna*.[3]

Grenier, in reply, cited *Censura Forensis*, *IV.*, 7, 18.

Cur. adv. vult.

February 13, 1911. HUTCHINSON C.J.—

The plaintiff sues on two mortgage bonds granted by Dominga Fernando to David de Alwis in 1898 and 1899 ; he sues as the executor of the mortgagee. The defendants claim the land under a transfer from Dominga Fernando made in 1903. At the date of the mortgages Dominga Fernando had no title to the land ; it was vested in the Crown, which gave a Crown grant to her in 1902. The District Judge has found, and the evidence supports the finding, that the defendants when they obtained their transfer in 1903 had no notice of the mortgages, and were no parties to the fraud, if any, committed by the mortgagor, Dominga Fernando. He gave judgment for the plaintiff against the first defendant, who is the legal representative of Dominga Fernando, for the amount of the mortgage debt, but refused to grant a hypothecary decree ; and the plaintiff appeals and claims a hypothecary decree.

At the date of the mortgages, and until the date of the Crown grant to Dominga, the dominium was vested in the Crown free from the mortgages. The Crown grant transferred that title to Dominga, and she transferred it to the defendants, who acquired it for valuable consideration, and in good faith, and without notice of the mortgage bonds. They are not her " representatives," and are not estopped by any representation which she made from denying that she had any title at the date of the mortgage bonds.

Mr. Grenier, for the appellant, contended that under the Roman-Dutch Law a mortgage for immovable property by a person who at the date of the mortgage is not the owner, becomes valid (not merely as against him, but also as against a *bona fide* purchaser from him without notice of the mortgage) when he subsequently acquires the ownership. In my opinion the passages from Voet (*bk.* 20, *tit.* 3, *s.* 6) and from Nathan (2, 1004) which are quoted in the judgment of Grenier J. in S. C. 385—C. R. Galle, 6,074 (14 *N. L. R.* 65), expressly negative this contention. I think that the appeal should be dismissed with costs.

[1] *(1909) 1 Cur. L. R. 224.* [2] *(1910) 13 N. L. R. 112 ; 2 Cur. L. R. 158.*
[3] *(1889) 9 S. C. C. 36.*

Feb. 13. 1911 MIDDLETON J.—

Alwis v. Fernando

The plaintiff in this case as executor of David de Alwis, deceased, sued the defendant, Maria Fernando, personally and as legal representative of the estate of Dominga Fernando on two mortgage bonds dated respectively September 7, 1898, and August 25, 1899, executed by Dominga Fernando in favour of David de Alwis. The defendant pleaded that by a Crown grant dated April 14, 1902, Dominga Fernando bought certain land on December 24, 1903, sold the same to the defendant and one Helena Fernando, and that if the land so sold were identical with the land mortgaged by Dominga Fernando to David de Alwis, then she had no right so to mortgage the same. The plaintiff replied that the said land was identical, and alleged that the deed executed by Dominga Fernando in favour of Helena Fernando was fraudulent, collusive, and without consideration, with a full knowledge of the existence of the mortgage, and pleaded that Dominga Fernando and her privies in title were estopped from denying the validity of the said mortgage. On June 24, 1910, Helena Fernando, whose proper name appeared to be Selistina Fernando, was added as defendant. Upon the trial it was admitted by both sides that the land mortgaged was the land conveyed by the Crown grant to Dominga Fernando on April 14, 1902, and by her conveyed to the two defendants. After hearing certain evidence the District Judge gave judgment for the amount claimed on the mortgage bonds against the defendant as legal representative of the deceased Dominga Fernando, but on the authority of *Don Carolis v. Jamis*[1] declined to grant an hypothecary decree, holding that the right of the mortgagee was dependent on the title of the mortgagor, and as the mortgagor had no title when the mortgages were executed, the land was not bound and executable. On the question of want of consideration for and fraud in transfer to the defendants, the learned Judge held that although the conduct of Dominga Fernando amounted to a fraud on the mortgagee, the evidence did not establish that the defendants gave no consideration to her for the transfer, or were parties to her fraud. The plaintiff appealed, and relied on a judgment of my brother Grenier's *S. C. M.* of January 6, 1911, in 385—C. R. Galle, 6,074, and on passages to be found in Berwick's *Voet* at pages 348 and 352, and argued that Ordinance No. 7 of 1840 did not alter the Roman-Dutch Law as regards the constitution of a mortgage. The defendants' counsel relied on *Don Carolis v. Jamis, ubi supra*, and cited *Kadiravelupulle v. Pinna*[2] and *Abdul Cader Marikar v. Fernando*,[3] and argued that Grenier J's judgment only applied to a case of competition between two mortgages. Now the point decided in *Don Carolis v. Jamis, ubi supra*, as the Chief Justice pointed out in C. R. Galle, 6,074, was that a transfer of immovable property by a man who has no title does not transfer

[1] *(1909) 1 Cur. L. R. 224.* [2] *(1889) 9 S. C. C. 36.*
[3] *(1909) 4 Bal. 128.*

a title. In the present case Dominga Fernando had no title when she mortgaged in 1898 and 1899, but got a title in 1902 before she sold to the defendants in 1903. The mortgages in 1898 and 1899 were special mortgages, executed in conformity with Ordinance No. 7 of 1840. They have each, moreover, a general clause purporting to bind all the other properties whatsoever of the mortgagor Dominga Fernando. That clause does not, however, bind future property, even if Ordinance No. 8 of 1871, section 1, did not apply. Under the Roman-Dutch Law a mortgage is a charge on the property mortgaged, and the fact that a charge on immovable property has to be perfected by a notarial deed under the Ceylon Statute Law does not, in my opinion, alter the nature of it. Dominium, however, or title in immovable property, has to be conveyed by notarial deed, and does not pass till the deed is duly executed. In the judgment of Grenier J. in C. R. Galle, 6,074, *ubi supra*, the case of *Maynard v. Gilmer's Trustees*[1] is referred to. In that case it was held, that a writ attaching immovable property to which the debtor had a *jus ad rem* while the dominium was in another was invalid to attach the *jus incorporale* or *jus ad rem*, which was all that was vested in the debtor, and that a subsequent transfer to the debtor's insolvency trustee did not cure the defect, or make the charge valid as against a bond creditor of the debtor. The objection appeared to be founded on the fact that when the attachment was made by the sheriff the property did not legally belong to the insolvent.

Voet's opinion as expressed in *bk.* 20, 3, 6, translated by Berwick, *p.* 367, which was relied on by the Attorney-General in that case in support of the successful objection, is that if a person has specially mortgaged immovables as his own and afterwards legally acquired their ownership (as in the case of a sale of land in Ceylon without a notarial transfer)—the words in brackets are my own—the property is only bound so far as future property has been also included in a clause of general hypothec. Here there is no clause of general hypothec binding any *jus ad rem*, but only the present property of the debtor. Ordinance No. 8 of 1871, section 1, abolishes, however, general conventional mortgages. This being so, and the property mortgaged not having legally vested in Dominga when she executed the mortgages, it would pass to a *bona fide* legal transferee for value unfettered by mortgages. As regards Dominga herself, I think the mortgages would be a charge on the ground of estoppel. On the ground of want of consideration and fraud it was not seriously contended that the learned Judge's ruling was wrong, and I think, therefore, that the appeal must be dismissed with costs.

Appeal dismissed.

[1] *3 Menzies' Reports (Cape) 116.*