Present: Mr. Justice Wood Renton and Mr. Justice Grenier.

GURUHAMY *v.* SUBASERIS *et al.*

D.C. Kurunegala, 3,450.

Sale by a person without title—Vendor subsequently obtaining title—Action by vendor against vendee in ejectment—Exceptio rei venditæ

A obtained a conveyance for a land from a person who had no title and sold it to B. After the sale to B, A bought the land from the real owner, and sued B for declaration of title and ejectment.

Held, that B had an equitable claim as against A to have the title conferred upon him upheld.

APPEAL from a judgment of the District Judge of Kurunegala (C. S. Vaughan, Esq.). The facts are fully set out in the judgment of Wood Renton J.

Bawa, for the appellant.—Elmali acquired no title by virtue of the conveyance in favour of her minor daughter Ukkuwa (*Ammal v. Kangany*[1]). Consequently Elmali's conveyance to Rajabu and Rajabu's conveyance (1889) to appellant and second defendant did not pass any title to the land to the grantees. The conveyance by appellant to third defendant (1896) was also invalid for the same reason. The appellant had subsequently acquired a valid title in 1899 from Ukkuwa's vendee. The third defendant may possibly have a right to get the appellant to execute a new conveyance (*Don Carolis v. Jamis*[2]), but as the case stands at present the plaintiff must succeed against both defendants.

De Sampayo, K.C., for the respondents.—*Ammal v. Kangany* is no doubt a binding authority, and Elmali had consequently no title to convey. The plaintiff must get judgment against the second defendant. But the third defendant can plead the *exceptio rei*

[1] *(1910) 13 N. L. R. 65.* [2] *(1909) 1 Cur. L. R. 224.*

venditæ. The plaintiff is estopped from setting up his title as against his vendee (*Voet 23, 3, Berwick's Voet 542*). Without a notarial conveyance from plaintiff after he had acquired a valid title, the third defendant may not be able to sue a third party who is in possession (and who does not claim through the plaintiff) in ejectment. The third defendant may, however, sue her own vendor, or set up a plea of estoppel when she is sued by the vendor. *Don Carolis v. Jamis* does not consider this question, and is therefore no authority on this point. The case reported in *Wendt's Reports 122* appears to indicate that in the case of sales (though not in the case of donations) the plea of estoppel would apply. Counsel also cited *1 Nathan 379; De Silva v. Shaik Ali;*[1] *Encyclopædia of the Laws of England, V., 339, " Estates by Estoppel " and " Title by Estoppel "*.

Bawa, in reply.—The only estoppel our law recognizes is estoppel in pais. The third defendant is setting up an estoppel by deed, which is not known to our law (*Ukku v. Rankiri*[2]). [Wood Renton J.: He is pleading estoppel by equity.] If Ordinance No. 7 of 1840 is in conflict with an ancient rule of equity, the Ordinance must prevail. Ordinance No. 7 of 1840 is unambiguous, and the doctrines of equity stated in Voet cannot supersede the Ordinance. Counsel referred to *Kadirawelpillai v. Pina*,[3] *De Silva v. Shaik Ali*,[1] *Wendt's Reports 122*.

Cur. adv. vult.

March 17, 1910. Wood Renton J.—

The plaintiff-appellant claims a declaration of title to, and the ejectment of the defendants-respondents from, a land described in the plaint. The material and admitted facts are these. The land originally belonged to one Mudianselage Mudalihamy. By deed of sale dated September 1, 1873, he transferred it to Ukkuwa, who was then a minor. By a deed of sale dated June 17, 1885, and during Ukkuwa's minority, his mother Elmali conveyed the land to Rajabu, who by deed of August 26, 1889, sold it to the appellant and the second defendant-respondent, who were then husband and wife. By a deed of December 21, 1896, the appellant transferred (sold) a half share of the land to his daughter, the third defendant-respondent, who was then a minor. The marriage between the appellant and the second defendant-respondent was dissolved by consent on September 7, 1899, and they have since lived apart. On August 23, 1899, Ukkuwa transferred the land to one Punchi Nayede, who by deed dated September 7, 1899, conveyed it to the appellant.

Acting on the law as it stood prior to the recent decision of a Bench of three Judges in *Ammal v. Kangany*,[4] the learned District

[1] *(1895) 1 N. L. R. 228.*
[2] *(1908) 11 N. L. R. 212.*
[3] *(1889) 9 S. C. C. 36.*
[4] *(1910) 13 N. L. R. 65.*

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Judge held that, although the deed of September 1, 1873, was executed in favour of Ukkuwa, the latter was only a nominal vendee, the real purchaser being his mother Elmali, who had every right to transfer the land to Rajabu. It is clear, and the fact is admitted by Mr. de Sampayo, the respondent's counsel, that in view of the decision of the Supreme Court in *Ammal v. Kangany* above referred to, these findings cannot be upheld. The District Judge also held that the appellant was estopped from denying or questioning the title, not of the second, but of the third defendant-respondent, of whom the former was his co-grantee from Elmali, while he had himself, on the strength of the title acquired from Elmali, disposed of a half share of the land to the latter. Here, again, Mr. de Sampayo conceded that, as between the appellant and the second defendant-respondent, he could not contend very strenuously that any estoppel arose. He argued, however, that the case of the appellant's daughter, the third defendant-respondent, stood in a different position, and that she was entitled to set up, if not an estoppel, at least an equitable claim to have the title, conferred upon her by the appellant himself, upheld. In support of this contention Mr. de Sampayo referred to the following authorities: *Voet, bk. 21, c. 3, Berwick's translation, 542 to 544; Nathan, I., 379;* and *De Silva v. Shaik Ali.*[1] Mr. Bawa, on the other hand, contended that the case was governed by the decision of His Lordship the Chief Justice in *Don Carolis v. Jamis;*[2] that a purchaser of immovable property from a vendor, who has no legal title at the time of sale, may, if the vendor subsequently acquire title, have a right to call for a new conveyance, but that the title does not pass to him without a new conveyance.

In my opinion Mr. de Sampayo's contention is entitled to prevail. It has been held in a long series of decisions, which may be sufficiently illustrated by a reference to *Ukku v. Dintuwa*[3] and *Gould v. Innasitamby,*[4] that the provisions of Ordinance No. 7 of 1840 are not to be used as a cover for fraud, or what is tantamount to fraud. I do not think that there is anything in the decision of Sir Joseph Hutchinson in *Don Carolis v. Jamis*[2] which can come in conflict with the principle enunciated in those cases. Mr. Bawa argued that the whole law of estoppel in Ceylon is to be found in section 115 of the Evidence Ordinance. Equities, however, of the class with which I am dealing are not, strictly speaking, estoppels, and they have been recognized not only in England, but in India, in spite of the existence there of a provision identical with section 115 of our own Evidence Ordinance (see *Municipal Corporation of Bombay v. Secretary of State*[5]).

[1] *(1895) 1 N. L. R. 228.*
[2] *(1909) 1 Cur. L. R. 224.*
[3] *(1878) 1 S. C. C. 89.*
[4] *(1904) 9 N. L. R. 177.*
[5] *(1904) I. L. R. 29 Bom. 580.*

On the grounds I have stated I would set aside the decree of the District Court dismissing the plaintiff-appellant's action, and declare the appellant entitled to, and to be put in possession of, the land in suit, save and except the half share transferred to the third defendant-respondent. The appellant is entitled to the costs of this appeal, and, in view of the fact that the honours of the litigation are divided, I would leave each side to pay its own costs of the action.

GRENIER J.—I concur.

Varied.