1942 *Present :* **Hearne and de Kretser JJ.**

KUMARIHAMY *v.* MAITRIPALA.

257—D. C. Ratnapura, 8,589.

Conveyance—Conflict between the recitals and the operative part—Operative part prevails.

Where there is a conflict between the operative part of a deed of conveyance and the recital, the terms of the operative part prevail.

APPEAL from a judgment of the District Judge of Ratnapura.

N. Nadarajah, K.C. (with him *M. D. H. Jayewardene*), for defendant, appellant.

N. E. Weerasooria, K.C. (with him *Kurukulasooriya*), for plaintiff, respondent.

Cur. adv. vult.

June 22, 1942. DE KRETSER J.—

The plaintiff brought this action claiming one-sixth of a field called Ihalabatadombayaye-Kumbura and one-sixth of a high land called Batadombayayewatta *alias* Ihala Batadombayayewatta by inheritance from her brother David, who had died issueless, leaving him surviving his widow Susan, and three sisters.

The trial Judge held that plaintiff was not entitled to the high land on the ground that, while both lands formed part of a Nindagama, the *paraveni nilakarayas'* rights in the field alone had passed to David and the high land had escheated to the Nindagama, coming thereby to the landlords.

The defendant appeals. The plaintiff has acquiesced in the declaration regarding the high land.

In 1914 the plaintiff's only daughter, Victorine, had married E. S. Dassanaike, Barrister-at-Law. A few days before the marriage the plaintiff had gifted a large number of lands to the prospective bride and bridegroom on D 1. The relevent portions of this deed are as follows :—

> "Whereas under and by virtue of the last will and testament of Don Moses Tillekeratne, Mudaliyar, ... I, the said grantor, am the owner and seized and possessed of all the lands, houses and

premises described in the Schedule hereto annexed . . . . Now Know Ye that . . . . do hereby give, grant, convey, make over and confirm unto the said grantees . . . . as a gift or donation *inter vivos* all the shares of the said lands . . . . and all my estate, right, title, interest, property, claim and demand whatsoever from, in, out of and upon the said premises."

The Schedule conveys one-third of 35 lands, the first being Walauwewatta, the tenth being an undivided half share of Kitulpe Nindagama . . . . excluding all the chena lands situated in the village, and the 35th the whole of the chena lands in the village then the subject-matter of a partition case.

Batadombayayewatta had reverted to the landlords and Moses was entitled to half. The trial Judge probably would have held that D 1 had conveyed this land to the donees as part of lot No. 35 or of lot No. 10. In fact he held only that David had no right to it and therefore plaintiff had no right. As regards the field he held that inasmuch as plaintiff had gifted only what she got from her father therefore the rights which she derived from her brother remained intact. In other words, he made the introductory recital govern the whole deed.

Apart from the recitals the conveyance was in wide and unrestricted terms and it is admitted would have conveyed to the donees all the donor's rights in the field. It is admitted that Walauwewatta belonged to David and not to the father, and it is the first land mentioned. The donees had litigated for Walauwewatta successfully on the strength of the conveyance and plaintiff was aware of it. Quite clearly she had nothing to do with the field in question and it was the donees and their successors in title who possessed it. Recently gems were found and a speculator tried to claim rights to the field. Thereupon one Willie Gooneratne informed plaintiff of her rights and this action followed. Willie Gooneratne is said to be the F. W. Gooneratne who gave evidence for plaintiff and who was married to her sister. His wife and defendant obtained the licence to gem and he said his wife was entitled to one-sixth and defendant to five-sixths. There had been trouble between him and the defendant and he had had to sue defendant.

Apart from the law, the defendant had quite clearly acquired a little by prescriptive possession; the evidence is all one way. The trial Judge dealt with this aspect of the matter very shortly and said that plaintiff had allowed Susan to possess her rights and it was only after Susan conveyed to defendant that any prescriptive possession began. He has forgotten that although plaintiff did attempt to give this explanation she had to admit "I dont know whether Susan possessed at all. Until Willie Gooneratne told me I did not know who possessed this land. I don't know whether Dassenaike or my daughter possessed this land or not." . . . . "I don't claim any share of Kitulpe Nindagama I was prepared to give Mr. Dassenaike whatever he asked for."

But while the action might be decided on this ground alone it is also clear that the grantor of D 1 was not confining herself in any way by the recital I have previously mentioned, and that she meant what she said when she conveyed all her right, title, and interest in all the lands forming the Nindagama, from whatever source derived.

Mr. Weerasooria ingeniously suggested that when she conveyed her rights in the Nindagama she could only be held to convey the landlord's rights as that is what the language meant. It is perhaps some such idea that the trial Judge had when he says the high land reverted to the Nindagama.

Now the Nindagama is a *gama* or village in which a certain tenure obtains by which tenants or *nilakarayas* obtain a perpetual *usus* on performance of services (now commuted) and in which their rights are transmissible and so closely resemble full dominium that they are called *paraveni nilakarayas*. But every land in the village, whether belonging to the tenants or the landlord, forms part of the Nindagama. It cannot escheat to it but rights in it belonging to the tenants may escheat to the landlord. When, therefore, a grantor conveys rights in a Nindagama he conveys such rights as he has whether as landlord or as tenant or as both. Besides, D 1 is quite clear, for all the lands in the village except the chenas form item No. 10 and the chenas form item No. 35. Nothing having been excluded, this field was clearly included in item 10. Now in this field, as in Walauwewatta, Moses had no rights and David had rights. If the plaintiff had any but the vaguest idea of the source of her rights, then she blundered badly right at the very outset regarding Walauwewatta.

It is conceded that if there be a conflict between the recitals and the operative part of the conveyance, the terms of the operative part should decide the question. There is such a conflict regarding Walauwewatta and if there be a similar conflict regarding this field the operative part of the conveyance should succeed. It was to avert this difficulty that Mr. Weerasooria attempted to argue that there was no conflict inasmuch as a conveyance of the Nindagama meant only conveyance of the landlord's rights; in this case the rights plaintiff inherited from her father. I cannot agree. In point of fact the plaintiff inherited from her father one-eighth, as she herself says, and from her brother David one-third of one sixteenth or a total of seven forty-eighths of the landlord rights, and it was from David that she inherited one-sixteenth of the *nilakarayas'* rights.

There are many reported cases dealing with analogous situations. In *Senathiraja v. Brito*[1] Schneider J. dealt with the argument that the true intent of the parties was to be gathered from the recitals and that the recitals should be regarded as controlling and limiting the operative part of the instrument. He said "It is a well settled principle of construction of an instrument that the recitals are subordinate to the operative part, and consequently when the operative part is clear it is treated as expressing the intention of the parties and it prevails over any suggestion of a contrary intention afforded by the recitals. It is when there is a variance between the recitals and the operative part, or when the operative part is ambiguous, that recourse can be had to the recitals for explaining the operative part." Schneider J., who was quoting from *paragraph 803 of Volume X of Halsbury's Laws of England (1909)*, seems to have departed slightly from what is there stated when he brought in a variance between the operative part and the

[1] *4 C. L. Rec. 149.*

recitals. He probably meant an ambiguity, creating what looks like a variance, or he was referring to a case where the operative clause was in such general terms as to be vague and in conflict with specific details in the recitals. *Halsbury* quotes a number of English cases, and among them is the case of *Alexander v. Crosbie* where, in a marriage settlement, there was a recital of the settler's intention to convey all his estate except the lands of B and its sub-denominations, and there was in the operative part a specific conveyance of K, one of the sub-denominations of B, and it was held that K passed. This case is quoted as authority for the proposition—" Parcels in a deed described with certainty are not cut down by recitals showing that something less was intended to pass." In D 1 the parcels are described with certainty and the recital cannot affect the title which passed.

In *Podi Singho v. Podi Menika* [1], where V was entitled to rights both by inheritance and by purchase and where he sold claiming to be entitled only by inheritance, his conveyance was held to pass title to both shares since the operative clause did not limit the share to one obtained by inheritance.

In *Wickremesinghe v. Ensohamy* [2], where A owned rights both by inheritance and by purchase and donated the rights he obtained on purchase and mortgaged all his rights claiming to be entitled by inheritance and the mortgage prevailed, de Sampayo J. said : " The general principle appears to be that if a person sells a specific thing, even though the source of his title is mistakenly stated, his title, however derived, passes to the purchaser."

Besides, in D 1 there was a further recital to the effect that the donor was desirous of donating the lands, houses and premises mentioned in the Schedule. She therefore meant to give the shares she donated but thought her title to them was by inheritance from her father. The operative part says in effect—" all my right, title, and interest in one-third of half of all Nindagama." It is clear and the assistance of the recitals is not needed.

The appeal is allowed, the decree entered is set aside, and plaintiff's action is dismissed with costs both in this Court and the Court below.

HEARNE J.—I agree.

Appeal allowed.