

May 30, 1910

Present: Mr. Justice Grenier.

## KANAPATHIPILLAI v. KANNACHI et al.

C. R., Batticaloa, 15,096.

Prior registration—Fraud—Ordinance No. 14 of 1891, s. 17—Deed of gift—Revocation without judicial proceedings.

A person who has actual notice of the existence of an instrument cannot get priority over it through the medium of the Registration Ordinance, inasmuch as such an attempt to get priority amounts to fraud within the meaning of the proviso to section 17 of Ordinance No. 14 of 1891.

THE facts material to this report are set out in the judgment.

Vernon Grenier, for appellants.—A deed of gift is by nature irrevocable, and, unless a power of revocation be reserved, can only be set aside by proper judicial proceedings (*Voet* 39, 5, 24-26; *Sanson* v. *Foenander*; <sup>1</sup> *Government Agent, Western Province v. Palaniappa Chetty* <sup>2</sup>). The deed of revocation is therefore inoperative and conveyed no interest capable of registration. *Marikar v. Fernando* <sup>3</sup> and *Kadiravel v. Pina* <sup>4</sup> lay down the principle that prior registration cannot avail in such cases. The second defendant cannot, in view of his having been a witness to the original deed of donation, be regarded as an innocent purchaser. He is presumed to know the law i.e., that only the Court could have set aside the deed of gift. *Salgado v. Salgado* <sup>5</sup> lays it down that such notice of a prior deed prevents prior registration availing a party. See also English cases on the Doctrine of Notice referred to in *Jayewardene's Law of Mortgage* 84.

No appearance for respondent.

*Cur. adv. vult.*

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The first defendant donated to the plaintiffs, who are the appellants, the garden described in the second paragraph of the plaint. The deed is dated November 5, 1904. It was not registered. On October 29, 1906, the first defendant purported to revoke the deed of gift by deed dated October 29, 1906, and by deed dated January 18, 1908, conveyed the garden to the second defendant. This action has been brought by the plaintiffs to have the conveyance of January 18, 1908, in favour of the second defendant cancelled, and for a declaration of title in their favour.

<sup>1</sup> (1872) *Ram.* 32

<sup>3</sup> (1909) 4 *Bal.* 128.

<sup>2</sup> (1908) 4 *A. C. R.* 4.

<sup>4</sup> (1839) 9 *S. C. C.* 36.

<sup>5</sup> (1907) 1 *A. C. R.* 137.

The defendants impeached the validity of the deed of gift relied on by the plaintiffs on the ground that it was not accepted, and they also alleged that the deed of transfer in favour of the second defendant, by reason of prior registration, should prevail over the deed of gift in favour of the plaintiffs. Several issues were framed by the Commissioner, which were agreed to by the parties, but we are concerned only with the 6th issue on this appeal. The Commissioner held that the deed of donation was duly accepted, and that it could not be revoked without the intervention of the Court. The 6th issue was whether the deed in favour of the second defendant had priority over the deed in favour of the plaintiffs. The Commissioner was of opinion that it had, and dismissed the plaintiffs' action. Two points were sought to be made in support of the appeal by the plaintiffs. The first was that there could not be any conflict of registration between the deed of gift and the subsequent deed of conveyance, because it could not be said that the defendants had any adverse interest within the meaning of section 17 of Ordinance No. 14 of 1891. So long as the deed of gift remained in force without any cancellation of it by a Court of competent jurisdiction, the fact of its not having been registered did not make it void nor render it less operative as a deed of gift. The first defendant, therefore, had no right to execute a deed of revocation, and the deed itself must be regarded as a piece of waste paper. The question, therefore, is as regards the effect on the deed of gift of the deed of conveyance which was registered whilst the deed of gift remained unregistered. It seems to me that the first defendant had no right, so long as the deed of gift was in force, to have either executed a deed of revocation, or following upon that, a deed of conveyance. Could any adverse interest in these circumstances have been conveyed to the second defendant so as to enable him to set up his deed in opposition to the deed of gift? No authorities have been cited to me, nor am I aware of any where there has been a conflict of registration in circumstances similar to those present in this case, but the inclination of my own opinion is that the registration of what I consider a useless document by the second defendant gave him no priority over the deed of gift so long as that deed remained unrevoked by a decree of Court. I would therefore hold on the first point that the Commissioner was wrong in deciding the question of registration in the way he did. The second point taken on the appeal was that, inasmuch as the second defendant was an attesting witness to the deed of gift in favour of the plaintiffs, and the transfer deed in favour of the second defendant recited that the deed of revocation formed a link in the chain of title, the element of fraud entered into the transaction, and section 17 of Ordinance No. 14 of 1891 operated to defeat it as a deed of conveyance. The proviso to that section is as follows: " Provided, however, that fraud or collusion in obtaining such last-mentioned deed, judgment, order, or other instrument, or in securing such

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prior registration, shall defeat the priority of the person claiming thereunder." I was referred to the case of *Crowley v. Bergtheil*, in which the Privy Council appears to have accepted the principle laid down by Lord Hardwicke in the case of *Le Neve v. Le Neve*. Lord Hardwicke held that a person who having actual notice of the existence of an instrument attempts to get priority over it through the medium of the registration act is guilty of *dolus malus* or fraud. Lord Hobhouse said in the case of *Crowley v. Bergtheil* " Their Lordships cannot find there is much difference between the Roman-Dutch Law, which requires proof of *dolus*, to set aside a later completed purchase in favour of an earlier contract, and the English Law relating to similar questions in a locality where the system of registration prevails." If there are differences they do not affect this case. In *Le Neve v. Le Neve*, Lord Hardwicke tests the case by the Roman definition of *dolus malus*, and the Natal Court has treated the judgment in *Le Neve v. Le Neve* as applicable in Natal. The law of Natal is very clearly and fully stated by Connor J. in the case of *Ross v. Van Buren*<sup>1</sup>. In my humble opinion the definition of *dolus malus* given by Lord Hardwicke, and endorsed by Lord Hobhouse, is a perfectly sound one as affecting the question of registration now before me. It does certainly seem a fraudulent thing for a person who knows of the existence of an instrument to attempt to get priority over it through the medium of the Registration Ordinance.

The object of the Registration Ordinance was not to enable persons under cover of it to perpetrate a fraud, but to prevent it, and in this view I think that the prior registration of the deed of conveyance did not in any way affect the operation of the deed of gift. There are, however, several decisions of this Court which do not harmonize with the ruling of the Privy Council in the case of *Crowley v. Bergtheil*, but as the judgment of the Privy Council must be considered as of the highest authority, I am bound to follow it.

The judgment of the Court below must be set aside, and this appeal allowed, with costs in both Courts.

*Appeal allowed.*

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<sup>1</sup> (1896) 17 Natal L. R. 251.