

1909.
May 3.

Present : The Hon. Sir Joseph T. Hutchinson, Chief Justice,
and Mr. Justice Grenier.

MUDIANSE *v.* WILSON *et al.*

D. C., Kandy, 18,374.

Civil Procedure Code, s. 547 — Mortgage without administration — Validity.

A mortgage is not a transfer, and does not fall within the purview of section 547 of the Civil Procedure Code.

ACTION *rei vindicatio*. Appeal by the plaintiff from a judgment of the District Judge. The facts sufficiently appear in the judgment of the Chief Justice.

E. W. Jayewardene (with him *R. L. Pereira*), for the plaintiff, appellant.

Wadsworth, for the defendants, respondents.

Cur. adv. vult.

May 3, 1909. HUTCHINSON C.J.—

The appellant brought this action to recover two pieces of land called Galahitiyawakumbura and Galahitiyawahena. The lands belonged to Punchi Naide, who died intestate in December, 1902, leaving an estate worth (as alleged in the plaintiff's answer and admitted in the answer) more than Rs. 1,000, and leaving as his sole heir Pallegedera Appu, who took out administration in October, 1905, and then conveyed the lands to himself as heir, and thereafter sold them to the plaintiff. But before he had obtained administration, Pallegedera Appu had mortgaged the lands; and in two actions against him they were sold in execution and transferred by the Fiscal to the Ceylon Land and Produce Company, which is not a party to this action; the original defendant is the Company's manager of the lands, and the added defendant is the Company's attorney. The first question is whether the mortgages granted before administration was taken out were void by reason of section 547 of the Civil Procedure Code; and if they were not void, a further question arises as to the priority of registration. The material facts are as follows:—

January 17, 1903.—Mortgage of the field by Pallegedera Appu (not as stated in the answer to the plaintiff, but to M. Punchi Banda); registered on January 6, 1903.

January 15, 1904.—Mortgage of the hena by Pallegedera Appu to the same person; registered in February, 1904.

March 15, 1905.—Action against Pallegedera Appu on the mortgage of the field.

April 16, 1905.—Sale of the hena to the Company by the Fiscal in execution of a money decree in action against Pallegedera Appu.

October 16, 1905.—Administration to Punchi Naide's estate granted to Pallegedera Appu.

October 25, 1905.—Fiscal's transfer of the hena to the Company on sale in execution of the money decree against Pallegedera Appu ; registered May 9, 1906.

November 29, 1905.—Transfer of the lands by Pallegedera Appu as administrator to himself as heir, reciting that it was necessary to close the estate by conveying the immovable property of the deceased to the heir.

November 29, 1905.—Transfer of the lands by Pallegedera Appu to the plaintiff ; registered December 6, 1905.

February 14, 1907.—Fiscal's transfer of the field to the Company on sale in execution of a decree in an action against Pallegedera Appu on the mortgage of January, 1903 ; registered February 22, 1907.

There is no evidence as to the dates of the decrees under which the sales to the Company took place ; but it appears from the Fiscal's transfers that the writ of execution under which the hena was sold was dated February 28, 1905, and that the writ under which the field was sold was dated December 14, 1905. The Civil Procedure Code imposes a penalty on any one who transfers any property of an intestate before administration is taken out. The appellant contends that a mortgage is a transfer, and that not only is the mortgagor in a case like this liable to the penalty, but that the mortgage itself is void by reason of the rule of construction that anything in respect of which a penalty is imposed by the Legislature is absolutely void. But a penal enactment should be construed strictly ; and a mortgage is not a transfer. In my opinion the mortgages made by Pallegedera Appu were not void. They were liable to be defeated by the administrator dealing with the property in a due course of administration ; but the administrator did not deal with it in that way ; his transfer to himself, which was obviously made for the purpose of defrauding his mortgagee, shows that the administration was closed.

As to the priority of registration, the Company's title to the hena is not derived from the mortgage of it, but from the Fiscal's transfer in execution of a money decree. This transfer was not registered until after that to the plaintiff. The plaintiff therefore has priority. The Company's title to the field dates back to the mortgage of January 17, 1903, which was registered in February, 1903. The appellant contends that the mortgage decree, in execution of which the Fiscal's transfer of February, 1907, to the Company was made, ought to have been registered. But, as I have said, there is no evidence that the decree was made before the plaintiff's transfer ; all

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that appears is that the writ of execution was dated December 14, 1905, a few weeks after the plaintiff's transfer. In my opinion the Company's title to the field is better than the plaintiff's.

One of the issues was whether the sale to the plaintiff was made fraudulently and without consideration. The District Judge recorded no finding on this issue ; he says " for the purposes of this case it is not necessary for us to consider whether the plaintiff deliberately took part in the fraud, but I will assume that he acted *bona fide* and paid valuable consideration." There were also issues as to the damages sustained to the plaintiff, and as to what compensation, if any, the added party was entitled to for the improvements which he alleged in his answer that he had made on the hena ; but it was agreed at the trial that those issues should stand over pending the decision of the other issues. The plaintiff swore that he paid Rs. 1,000 for the transfer to him (which included some other pieces of land also) ; that he did not search the register for encumbrances, and that the plaintiff told him nothing about the mortgages or the Fiscal's sale. He does not say that he did not know about them. But in the absence of any other evidence I must conclude that he was not a party to the fraud, and that he paid consideration.

The decree dismissing the action should be set aside and judgment given for the plaintiff for the hena, *i.e.*, for the second piece of land described in the plaint ; and the case must go back to the District Court for evidence and judgment on the 4th and 5th issues. The original defendant in his answer denied that he was in possession of the hena ; but the uncontradicted evidence is that he cut down the trees on it and is still in possession of it. The added defendant in his answer says that he planted the hena and improved it. The parties have throughout treated the action as if the added defendant was the Company ; and whatever compensation is awarded for the improvements should be awarded to the added defendant. The defendant should pay the plaintiff's general costs of the action ; the costs of the further proceedings in the District Court will be in the discretion of the District Court. Each party should bear his own costs of this appeal.

GRENIER A.J.—Agreed.

Judgment varied.