1932 *Present :* **Dalton J. and Jayewardene A.J.**

MOHAMED *v.* ASIYA UMMA

174—D. C. Colombo, 2,781.

Estoppel—Land acquisition proceedings—Waiver of rights by party before Chairman, Municipal Council—Reference to Court—Subsequent transfer of rights—Validity of waiver.

In land acquisition proceedings, first defendant, second defendant, and one X claimed interests in the lot acquired. X waived her rights in favour of the second defendant, and a reference was made to the District Court for adjudication between the claims of the first and second defendants. Subsequently X transferred her interests in the lot to the third defendant, who intervened in the action.

Held, that the waiver by X of her rights did not create an estoppel against her or the third defendant.

APPEAL from an order of the District Judge of Colombo. The facts appear from the judgment.

L. A. Rajapakse (with him *Manicavasagar*), for third defendant-appellant.

Garvin (with him *Ismail*), for first defendant-respondent.

June 13, 1932. JAYEWARDENE A.J.—

The Chairman of the Colombo Municipal Council acquired, for the purpose of constructing a destructor tip, a portion of the land situated at Bloemendahl road, bearing assessment No. 67, and described as lot 2 in the Surveyor-General's plan No. 19,560 dated July 17, 1928, marked 3D1.

The whole land, bearing assessment No. 67, is shown in plan No. 388, dated December 6, 1928, and made by Surveyor Marikar, 3D3. It contains 3 acres 3 roods and 10.5 perches and has been divided into eight lots, Nos. 1, 1A, 1B, 1C, 2, 2A, 3, and 3A, by the Surveyor. The land originally belonged to one Saibo Mapulle Habiboo Mohamado Markar by deed No. 7,320 dated November 17, 1868. Saibo Mapulle Markar and three others divided the land into three portions, shown in Mr. Charles Sekwallies' survey dated November 7, 1869, as Nos. 1, 2, and 3 and gifted portion No. 1 to Markar's brother Uduma Lebbe Markar by deed No. 2,214 dated November 8, 1869, portion No. 2 to Markar's daughter Muttu Natchia *alias* Pattuma Natchia by deed No. 2,212 of the same date, and portion No. 3 to Hawwah Umma by deed No. 2,210, also of the same date. Mr. Sekwallies' plan is annexed to the deeds No. 2,212 and No. 2,214 at pages 329 and 358 of the record. A small portion of this land was acquired for public purposes and compensation given to the owners in 1876. Uduma Lebbe died in 1881 and his brother, the

donor, Marikar, died in 1893, having possessed the portion No. 1 during his lifetime. Pattuma Natchia and Hawwah Umma, the daughter of the donor, entered into possession of portion No. 1 on the death of the donor and possessed that portion without any question or dispute on the part of Uduma Lebbe's heirs. Pathuma Natchia and Hawwah Umma by deed No. 400 dated May 31, 1907, 3D6, divided the lot No. 1 into equal portions marked A and B according to the survey dated August 6, 1906, made by C. H. Frida, Surveyor, each portion containing 1 rood 34½ perches. Lot A, which adjoined her one-acre block No. 2 was allotted to Pathuma Natchia and lot B was allotted to Hawwah Umma. In plan C3 the lots 3, 2, and A and B (forming lot 1) are clearly shown and lots 2 and A coloured green form a distinct entity. The sisters seem to have made an encroachment on the west and this was also divided equally between them as shown in Frida's plan dated April 16, 1925, 3D8; and the lot 1 rood 8 perches, which adjoined her own portion, was given to Hawwah Umma, her husband being I. L. Marikar Hadjiar.

Pathuma Natchia by two deeds dated 1902 and 1907 gifted her interests to her son Abdul Azees and the latter by deed dated May 28, 1928, transferred his rights to his wife Asiya Umma, the first defendant. Pathuma Natchia herself gifted whatever interests she had to the first defendant by deed No. 231, dated January 5, 1926. Hawwah Umma gifted all her interests by deed dated April 29, 1929, to the third defendant who was described as "the son of our cousin Omer Lebbe Marikar". As a matter of fact Omer Lebbe Marikar was the son of Uduma Lebbe, uncle of Pathuma Natchia and Hawwah Umma, these three being the original donees.

To turn to the acquisition proceedings before the Chairman of the Colombo Municipal Council. After some negotiations those who appeared on April 18, 1929, were—

(1) I. L. M. Hadjiar, husband of Hawwah Umma.

(2) Omer Lebbe Marikar, son of Uduma Lebbe, by their Proctor N. M. Zaheed, and

(3) A. M. Faleel, son of Asiya Umma, and Proctor Abdul Cader for her.

The parties agreed to accept Rs. 12,500 per acre making Rs. 25,387.50 in all.

The compensation was to be paid as follows: —

	Rs.	c.
To I. L. M. Hadjiar	10,030	76
To Asiya Umma	11,948	16
To Abdul Cader	336	4
To the District Court for adjudication between Asiya Umma and Omer Lebbe Marikar ..	3,072	54

The Proctors signed the agreement on behalf of their clients. The Chairman accordingly filed his libel of reference on July 5, 1929, and asked for an order apportioning the sum of Rs. 3,072.54 awarded as

compensation and as to which there was a dispute. Asiya Umma and Omer Lebbe Marikar alone were made defendants, as the only claimants, but the third defendant was allowed to intervene and was added as a party on October 23, 1929. After trial the learned District Judge declared the first defendant entitled to the whole of the money in deposit, and the third defendant has appealed.

It was first contended on behalf of the first defendant that the Court could not go beyond the reference and that title had vested in the Municipal Council at the date of the transfer to the third defendant. In *Government Agent, Sabaragamuwa v. Asirwatham* [1] it was held, where the claim is put forward after the land is vested in the Crown, that the claimant is interested to the extent of his interest in the compensation, which, on the vesting of the rights of himself or his predecessors in title in the land in the Crown, takes the place or is substituted for his interest in the land. This case was followed in *Dyson v. Kadirasan Chetty* [2]. The inquiry is not restricted to those persons who are named in the libel of reference, intervenients being entitled to come in and be joined as parties in the regular way. This contention was rightly rejected by the learned District Judge on the authority of these two cases.

Then the first defendant set up a plea of prescription to the lot 1A. It will be seen that the greater part of this lot falls within the portion marked B in Frida's plan, of August 6, 1906. The portion marked A and coloured green was allotted to Pathuma Natchia and the lot B to Hawwah Umma at the partition of the lot No. 1. The deed No. 400 dated May 31, 1907 (3D6) makes that clear. Frida's plan of 1921 (3D8) shows that this division was always recognized and acted upon. The deed in favour of the first defendant does not convey any title to the portion marked B in Frida's plan of 1906. The learned District Judge has given good reasons for rejecting first defendant's plea of prescription. The portion of land acquired marked 1A in plan 3D3 was as far as it fell within lot B in Frida's plan of 1906 approximately two-thirds, the property of Hawwah Ummah at the date of the acquisition.

It was next contended, and the learned District Judge has upheld the contention, that Hawwah Umma had waived her rights to any share of the money that was deposited in Court. It is said that her Proctor and her husband agreed to accept the sum of Rs. 10,030.76 and renounced all claim to the further sum of Rs. 3,072.54, which, according to the note of the Chairman, was reserved for division between Asiya Umma (first defendant) and Omer Lebbe Marikar (her cousin) after adjudication by the District Court. The learned Judge says that this is not a very good instance of an estoppel, but that Hawwah Umma had deliberately waived her claim. He thinks that Hawwah Umma led first defendant to believe that she had only to fight the second defendant (Omer Lebbe) and first defendant entered upon the contest in that belief and Hawwah Umma should not now be allowed " to cut the ground under her feet " by making transfer in favour of the third defendant, instead of making a claim herself. The result the learned Judge states is curious, but could not be helped, and according to him the only claimant left in the field is the first defendant, and although she is entitled to only a portion of the

[1] *29 N. L. R. 367.* [2] *30 N. L. R. 216.*

money in dispute, the result of her having successfully counter-claimed is that she must be declared entitled to the whole of the money in deposit.

Waiver is the abandonment of a right and is not effectual unless made with consideration. The fact that the other party acted upon it is sufficient consideration. (*13 Hals: 165.*) The principle of waiver or of approbation or reprobation involves the root notion of conduct productive of change of situation in someone else. (*Caspersz on Modern Estoppel and Resjudicata, 3rd., ed., p. 377.*) In *Stackhouse v. Barnston* [1] Grant M.R. observed that it is difficult to say precisely what is meant by the term "waiver" with reference to its legal effect. A mere waiver signifies nothing more than an expression of intention not to insist upon the right, which in equity will not without consideration bar the right any more than at law without satisfaction would be a plea. Similarly a promise not to enforce an accrued legal right is not binding unless there is consideration for it, or the debtor has altered his position. In *Williams v. Stern* [2] Lord Justice Bramwell remarked "I do not think that the defendant's promise was sufficient to prevent him from putting into force the powers of the Bill of sale: it was not an undertaking which bound him: the promise was not supported by any consideration. The plaintiff was not induced to alter his position" and Cotton L.J. thought that the defendant made no representation which operated to the plaintiff's disadvantage; he simply uttered his own private intentions and gave no promise which was enforceable in law.

In the present case at the acquisition proceeding the sum of Rs. 11,948.16 was allotted to Asiya Umma, first defendant, for Pathuma Natchia's admitted share in the land, that is for 2A and 1C and Rs. 10,030.76 was allotted to Hawwah Umma's husband for her share in the land, that is for 3A. As to these there was no dispute. It has not been suggested in the evidence or found by the Judge that the first defendant did any act to her own detriment or disadvantage as a result of anything done by Hawwah Umma or on her behalf. Hawwah Umma made no waiver or disclaimer in favour of Asiya Umma. On this point the evidence of Proctor Zaheed is clear. He says that Hawwah Umma was agreeable that Omer Lebbe should receive the compensation she would get for lots 1A and 1C. He had not realized her position as she had given up her rights in favour of Omer Lebbe. He also says that he would have claimed lot 1A for Hawwah Umma, if there was a dispute between Asiya and Hawwah Umma. It is to be remembered that Omer Lebbe is the son of Uduma Lebbe, the original donee and owner of the whole of lot No. 1. Hawwah Umma and Pathuma Natchia claimed that lot by prescription, and divided it between themselves in 1907 by the deed No. 400. It was natural that Hawwah Umma should feel disposed to renounce her rights in favour of Omer. She would have no such kindly sentiment towards Asiya Umma, and renounced nothing in her favour.

In *Mussumat Oodey Koowur v. Mussumat Ladoo* [3] where it was contended that the defendant had abandoned all her right to the property in claim, the Privy Council was of opinion that if the abandonment was

[1] *(1805) 10 Ves. Jun. 453, 456.* [2] *(1879) 5 Q. B. D. 409, C. A..*

[3] *(1869-70) 13 Moore's I. A. 585, 598.*

to prevent the defendant from recovering the property, it must do so either because it operated as a conveyance, or as a contract to convey the interest which she claims, or because it operated by way of estoppel. Their Lordships held that there had been neither a conveyance nor a contract to convey and that she was not estopped in any way. They said, "In the first place there is no consideration whatever for this conveyance of her particular interest. Neither does Oodey Koowur act on any representation made by her or alter her position in any way. There is no misrepresentation to Oodey Koowur of any sort or kind. Oodey Koowur was acquainted with the actual facts of the case just as much as Mussumat Ladoo was." In the present case Asiya Umma knew the facts as much as Hawwah Umma and her position is exactly similar to Oodey Koowur in the Privy Council case. In *Jordan v. Money*[1] it was held by the House of Lords that when a person possesses a legal right, a Court of Equity will not interfere to restrain him from enforcing it, though, between the time of its creation and that of his attempt to enforce it, he has made representation of his intention to abandon it. To raise an equity in such a case there must be a misrepresentation of existing facts, and not of mere intention. The representation must be meant to be acted upon and it must be acted upon accordingly. This case was followed in *Citizen's Bank of Louisana v. First National Bank of New Orleans*[2].

At the argument, the case of *Janaka Ammal v. Kumalathammal*[3] was cited to show that a party may by conduct or waiver, be estopped from claiming a legal right. In that case Holloway C.J. said "The plaintiff now insits upon a valid family compact varying the ordinary rules of inheritance. She has, however, previously appealed to the general rule, litigated the matter through three courts, designedly keeping back the compact upon which she now seeks to insist. There can be no stronger case of an absolute waiver of that contract, and of conduct rendering it wholly inequitable to permit her now to insist upon it." This case does not apply.

The eighth issue, whether Hawwah Umma or her successor in title is estopped from maintaining any claim to the land has been decided in the affirmative. In *Stuart v. Hormusjee*[4] it was held that the word "intentionally" was used in section 115 of the Evidence Act for the purpose of declaring the law here to be precisely the same as the law in England, and that the party making the representation means it to be acted upon. and that it is acted upon accordingly. In *Rodrigo v. Karunaratne*[5] Bertram C.J. has summarized the law on the subject of estoppel, and adopted the principle that it is essentially necessary that the representation or the conduct complained of, should have been intended to bring about the result whereby loss has arisen to the other party or his position has been altered. As I have pointed out Asiya Umma knew the state of the title and no mistaken belief was created in her by any statement on behalf of Hawwah Umma, nor has she been prejudiced or her position altered in any way. The issues as to waiver and estoppel should have been decided in the negative and in the third defendant's favour.

[1] *(1854-6) 5 H. L. 185.*
[2] *(1873) L. R. 6 H. L. 352.*
[3] *(1873) 7 Mad. H. C. 263.*
[4] *18 N. L. R. 489.*
[5] *21 N. L. R. 360.*

Then the learned District Judge has considered the validity of the deed of gift by Hawwah Ummah to the third defendant, although, as he says, no question was raised on the point. He holds that the gift was invalid because a Muslim gift has to be supplemented by delivery of possession and there was no evidence whatever to show that possession was given. One would hardly expect to find evidence of possession, if no point was made of it at the trial, but for whatever it is worth there is the evidence of the third defendant who says that he has possessed a portion since the date of his deed, which was pointed out to him by the Surveyor Maricar. There is no doubt that the principle of Muhammadan law is that possession is necessary to make a good gift. If a donor does not transfer to the donee, so far as he can, all the possession which he can transfer, the gift is not a good one. There is nothing in the Muhammadan law to prevent the gift of a right of property. The donor must, so far as it is possible for him, transfer to the donee that which he gives, namely, such right as he himself has, but this does not imply that, where the right to property forms the subject of a gift, the gift will be invalid unless the donor transfers what he himself does not possess, namely, the possession of the *corpus* of the property. He must evidence the reality of the gift by divesting himself, so far as he can, of the whole of what he gives. *Anwari Begum v. Nizam-ud-din* [1]. In the case of *Mullick Abdul Guffoor v. Muleka* [2] a gift of *mulikana* rights, that is, the right to receive an annual allowance, was upheld, and in *Mohamed Buksh Khan v. Hosseni Bibi* [3] the Privy Council upheld a gift of property which was not at the time of the gift in the donor's possession. The fact that the donor had been out of possession and therefore had not delivered possession was held not of itself to invalidate the gift. The whole question as to Muhammadan gifts and seisin or delivery of possession was considered in *83 D. C. Jaffna 26,351, S. C. M., 27.5.32,* and the principle stated in *Anwari Begum v. Nizam-ud-din* (*supra*) was followed. I would hold that the gift to the third defendant was valid. It appears to me that the appeal of the third defendant is entitled to succeed. The third defendant is entitled to as much of lot 1A as falls within the portion marked B in Frida's plan dated August 6, 1906.

The parties have properly agreed, in order to avoid further costs, that the third defendant should be declared entitled, in the event of success, to two-thirds of the money deposited in Court and the first defendant to one-third.

I would set aside the decree and declare the third defendant entitled to the two-thirds and the first defendant to one-third of the sum deposited. The first defendant will pay the third defendant one-half of the taxed costs both in this Court and in the District Court. The third defendant is not to be paid without notice to the claimant Vythilingam.

DALTON J.—I agree.

Appeal allowed.

[1] *21 All. 165.* [2] *10 Cal. 1112.* [3] *15 Cal. 684.*