*1908.*
*March 26.*

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

UKKU *v.* RANKIRI *et al.*

*D. C., Kandy, 17,688.*

*Estoppel by the deed—Notarial instrument—English Law—Estoppel by conduct—Evidence Act, ss. 100 and 115.*

The English Law of estoppel by deed does not apply to Ceylon.

A notarially attested instrument in Ceylon is not equivalent to a deed under seal under the English Law.

*Don Cornelis v. Manuel Perera* [1] and *Tissera v. Tissera* [2] referred to.

APPEAL from a judgment of the District Judge of Kandy. The facts sufficiently appear in the judgments.

*Van Langenberg*, for the plaintiff, appellant.

*W. Pereira, K.C., S.-G.*, for the defendants, respondents.

*Cur. adv. vult.*

March 26, 1908. HUTCHINSON C.J.—

This is an appeal by the plaintiff from a judgment dismissing the action as regards some of the lands claimed.

The plaintiff says that Sundara, her husband, died in June, 1898, being the owner by purchase of the lands described in the plaint; that she, as his widow, is entitled to the possession of the lands for her life; that the defendants have since 1901 been in the wrongful and forcible possession of the lands, and she asks for a declaration of her title, and for possession, and for mesne profits and damages.

The defendants in their answer say that they cannot identify most of the lands described in the plaint, but that they believe that the plaintiff claims some of the lands described in a deed of August 24, 1901, and in the schedule to the answer; and they disclaim title to and deny their possession of one of the lands mentioned in the plaint. With regard to the lands described in the schedule to the answer, they say that Sundara was the owner of them by paternal inheritance and not by purchase, and died possessed of them, and that the plaintiff took out letters of administration to his estate, and that as administratrix she by the deed of August 24, 1901, conveyed the said lands, as the paraveni property of the intestate, to his sister and next of kin and heir-at-law, the first defendant, Rankiri, who has since been in lawful possession of them by virtue of the said

[1] *Ram. (1851) p. 161.*

[2] *(1896) 2 N. L. R. 238.*

deed. They say that the plaintiff is estopped by the deed from denying that the lands were the paraveni property of Sundara, and that she is estopped from claiming any interest in the lands after she had so transferred them. And the second defendant disclaims title to the lands, and says that he is the son of the first defendant.

Two preliminary issues of law were settled, the first of which was— "Is the plaintiff estopped by her deed of August 24, 1901, from denying that any of the lands affected by that deed were portions of the paraveni property of Sundara?" The District Judge held that she was estopped, and dismissed the action so far as the lands in Schedule A of that deed were concerned, with liberty to the plaintiff to continue the action as to any lands not covered by that deed.

By the deed of 1901 the plaintiff recites that Sundara was by paternal and maternal inheritance entitled to the lands described in Schedule A; that he died on June 5, 1898, and administration to his estate was granted to her on November 10, 1898; that he left his sister Rankiri as his sole heiress, on whom devolved all his paraveni property; and that the administratrix had been called upon to convey to his said heiress the said paraveni lands and to close the estate, and she accordingly conveys the said lands to Rankiri.

The plaintiff does not say that this deed was executed under any mistake of fact or of law; she does not ask to have any mistake rectified; but she treats the conveyance as a nullity, arguing that her life interest in the land vested in her on her husband's death, and that no conveyance of it to her by the administratrix was necessary, and that the conveyance by the administratrix to another person was ineffectual as against her. She has, however, since this action commenced, obtained from herself as administratrix a conveyance to herself personally of a life interest in the lands claimed in this action.

The District Judge held that the law to be applied is the English Law under the reservation in section 100 of the Evidence Ordinance, and that the plaintiff was estopped by the deed. I do not think that the question of estoppel is one which is not provided for by the Ordinance; I think it is provided for by section 115, and that the English Law of estoppel by deed does not apply. And even if it did apply, even if all these transactions had taken place in England, and this issue was being tried in England, there would be no estoppel by deed, because the conveyance of 1901 is not a deed. People here often apply the word "deed" or "bond" loosely to instruments which have some resemblance to an English deed or bond; but when it comes to applying a rule of English Law, which in England itself only applies to that which is strictly and technically a "deed," it could not be held to apply in Ceylon to an instrument to which it would not apply in England.

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On the appeal it was also contended for the defendants that even if the plaintiff was not estopped by the deed, she was estopped by her conduct, by virtue of section 115 of the Evidence Ordinance. The plaintiff says that it was not she who made the transfer of 1901, but the administratrix, and that she is in the same position as if the administrator who made it had been some third person. Counsel for the defendants replied that the plaintiff personally stood by and allowed the representation to be made, upon the faith of which Rankiri acted; that Rankiri (as the deed shows) demanded the conveyance and accepted it, and that her position was thereby changed, because she might otherwise have sued for possession of the land, whereas now possibly, after five years, some of the evidence which she might have obtained may be no longer available. This defence was apparently indicated in paragraph 7 of the answer; it may possibly be good if it is proved, but there is no evidence at present upon which we can adjudicate upon it.

In my opinion the ruling of the District Judge was wrong; the decree should be set aside, and the case should go back to the District Court for settlement of issues and trial.

WENDT J.—

The plaintiff, a Kandyan woman, as the widow of one Sundara Duraya, deceased, seeks to recover from defendants certain lands, which, she says, were the acquired property of Sundara, and in which therefore, by the Kandyan Law, his widow has a life interest. The first defendant is the sister of Sundara, and his sole heiress in respect of his paraveni or inherited lands. The plaintiff in November, 1898, obtained letters of administration to her husband's estate. On August 21, 1901, by a notarial deed No. 4,426, she as such administratrix conveyed to first defendant a large number of lands, including some at least of those claimed in the action. This deed recited that Sundara was by paternal and also by maternal inheritance seized and possessed of or otherwise well entitled to the lands; that he died intestate, and administration was granted to the plaintiff, his widow; that he left surviving him his sister, the first defendant, his heiress-at-law, on whom devolved all his paraveni property; and that the administratrix had been called up to convey to the said heiress the said paraveni lands. The deed then proceeded in consideration of the premises to convey, transfer, assign, and assure to first defendant, her heirs, &c., the said lands to have and to hold for ever.

In their answer the second defendant, who is the son of the first, disclaimed all right, and the first defendant, admitting possession of the lands comprised in the deed, pleaded title to them by inheritance from Sundara and under the deed. She also pleaded as matters of law (1) that plaintiff was by her deed estopped from

denying that the lands were the paraveni property of Sundara, and (2) that plaintiff could not assert her right to a life interest without a conveyance thereof to her from the legal representative of Sundara.

On the trial day the only issues framed were two issues of law, viz.:—

(1) Is the plaintiff estopped by her deed No. 4,426 of August 21, 1901, from denying that any of the lands affected by that deed were portion of the paraveni property of Sundara, deceased?

(2) Whether the plaintiff can maintain this action, in that she had not at the date of the answer obtained a deed from the administratrix of Sundara's estate for the lands in claim.

The learned District Judge decided the first issue in favour of the defendants, and therefore considered it unnecessary to deal with the second.

It would appear from the District Judge's notes of the argument that the estoppel relied upon by the defendants was what is known in England as an estoppel by deed, it being contended that a notarially attested instrument in Ceylon was, for this purpose, on the same footing as a deed under seal in England. The only authority cited for this contention was the dictum of Bonser C.J. in the case of *Tissera v. Tissera*,[1] where the question was whether an instrument calling itself a debt bond executed in triplicate before a notary and two witnesses, whereby the person executing it acknowledged to have borrowed from the person in whose favour it was executed a certain sum of money and promised to pay him the same with interest on demand, and whereby also he bound all his property generally as security for the debt, was a " bond conditioned for the payment of money " within the meaning of section 6, or was a promissory note or written promise within the meaning of section 7 of " The Prescription Ordinance, 1871. " That case is not an authority for saying that for the purpose of an estoppel a notarial instrument is equivalent to a deed under seal. See the case of *Don Cornelis v. Manuel Perera*,[2] which was apparently a case upon a notarial instrument. The District Judge upheld the contention of the defendant. He said: " Here we have formal attestation before a notary, which takes the place of attestation under seal in England, and there is nothing that I am aware of in the Roman-Dutch Law which would justify me in holding that an estoppel by deed is not applicable to deeds in this Colony, even if the Roman-Dutch Law applies. But the law to be applied is not, in my opinion, the Roman-Dutch Law, but English Law under the reservation contained in section 100 of the Evidence Ordinance.

[1] *(1896) 2 N. L. R. 238.*

[2] *Ram. (1851) 161.*

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I am of opinion that the plaintiff is by English Law estopped by her deed from denying that the lands mentioned in the schedule to that deed were the paraveni property of her husband Sundara."

Mr. Solicitor, who appeared for the respondents, did not argue in support of this view of the estoppel, beyond quoting the case of *Tissera v. Tissera*, but he argued that by reason of the provisions of section 115 of the Evidence Ordinance the plaintiff was estopped by her conduct relative to the execution by herself in her capacity of administratrix of the deed in question. That is to say, he argued that plaintiff by standing by and seeing herself as administratrix execute and deliver the deed to the first defendant, with the recital that the lands were the paraveni property of Sundara, and had therefore devolved *ab intestato* on the first defendant, had by such conduct intentionally caused the first defendant to believe that the lands were such paraveni property, and to act upon such belief, and that plaintiff was therefore precluded by section 115 from denying the truth of the representation so made by her. This is an estoppel which was neither pleaded nor tried. What was pleaded and tried was the estoppel by the mere statement in the deed under the hand of the plaintiff. On the footing upon which the case was put in appeal, it is necessary for the defendants to show, besides the conduct of the plaintiff amounting to the representation alleged, two other facts at least, viz., that the first defendant believed that representation to be true, and that she acted upon it. I think that in a case like the present these elements of the estoppel at least should be embodied in issue and tried as matters of fact. I would, therefore, set aside the order appealed against and send the case back for a new trial. The plaintiff will have her costs of appeal, but the costs in the District Court will be costs in the cause.

*Appeal allowed; case remitted.*