1962 *Present :* **T. S. Fernando, J., and Abeyesundere, J.**

E. A. DIYES SINGHO, Appellant, *and* E. A. HERATH, Respondent

S. C. 508—D. C. Gampaha, 5400/L

Registration of deeds—Prior registration—Cross-reference to a different folio—Burden of proof then—Proof of valuable consideration in respect of subsequent deed—Registration of Documents Ordinance (Cap. 117), ss. 7, 14—Notaries Ordinance (Cap. 107), s. 31 (20) (e).

When considering, under section 7 (1) of the Registration of Documents Ordinance, whether an unregistered instrument is void against a subsequent registered instrument, the question whether the later instrument has been duly registered as required by the Ordinance is a mixed question of law and fact.

The folio in which the subsequent instrument of the plaintiff was registered contained a cross-reference to folio C. 234/19, which, in turn, indicated that it was itself " brought forward from folio C. 175/35 ". There was however no attempt to show what folio C. 175/35 represented.

Held, that, under section 14 (1) of the Registration of Documents Ordinance, the burden was on the plaintiff to have led evidence as to whether C. 175/35 was the folio in which the first registered instrument affecting the land was registered or was a continuation of that folio.

Held further, that although no issue was raised by either party in respect of the passing of valuable consideration for the subsequent instrument, the absence of such an issue could not have the effect of absolving the plaintiff from proving that valuable consideration was given. Proof of the existence of a statement in the deed by the notary that consideration was paid is not sufficient to establish the truth of the payment of such consideration.

APPEAL from a judgment of the District Court, Gampaha.

H. W. Jayewardene, Q.C., with *D. S. Wijewardene*, for the defendant-appellant.

S. W. Walpita, with *D. R. P. Goonetilleke*, for the plaintiff-respondent.

Cur. adv. vult.

June 21, 1962. T. S. FERNANDO, J.—

The plaintiff-respondent sued the defendant-appellant for a declaration of title to and ejectment from and damages in respect of a small allotment of land, 1 rood and 22 perches in extent, valued at Rs. 400, and depicted as Lot H in plan No. 1537 dated 18th August 1941 made by D. E. Edirisinghe, licensed surveyor. It is common ground that one Eusinahamy by virtue of final decree entered in District Court of Colombo Case No. 1666/P was entitled to this piece of land. At the time of the institution of the suit with which we are concerned on this appeal, viz. 1st February 1956, the defendant was in possession of this land. He claimed to be owner thereof by virtue of a purchase by him from Eusinahamy effected on 30th April 1952 by transfer deed No. 28859 (Document D. 2)

Eusinahamy died without leaving an estate of administrable value, leaving as her heirs her husband and two children, and these three persons purported to convey this same piece of land on 13th June 1955 to the plaintiff upon deed of transfer No. 379 (Document P. 4). Although D. 2 is some three years prior to P. 4 in point of time of execution, the plaintiff claimed in this suit that the deed to him was duly registered within the meaning of the Registration of Documents Ordinance (Cap. 117), while D. 2 has not been so registered, thus ensuring for him the benefit of due and prior registration. Section 7 of this Ordinance renders void an instrument affecting land which is not duly registered as required by it as against all parties claiming an adverse interest in that same land on valuable consideration by virtue of any subsequent instrument which is duly registered.

Even if, as appears to be the case, deed D. 2 has not been duly registered as required by the Ordinance the plaintiff to succeed in the suit had to establish (*a*) that his later deed P. 4. was duly registered and (*b*) that there was valuable consideration for the transfer to him. At the trial the learned District Judge held that P. 4 prevailed over D. 2 by virtue of due and prior registration. He has not recorded any finding in respect of valuable consideration passing upon the execution of D. 2, apparently for the reason that this question was lost sight of not only by him, but also by the plaintiff who made no attempt at the trial to establish it.

It was argued before us first, that the learned District Judge was wrong in reaching a finding on the material before him that P. 4 has been duly registered as required by the Ordinance, and secondly, that the plaintiff must in any event fail in his suit for want of proof of valuable consideration passing in respect of P. 4.

Though both parties claim through Eusinahamy, the failure on the part of the defendant to establish due registration of the deed on which he relies connot affect him adversely in this suit as against the plaintiff as he is admittedly in possession of the land unless the plaintiff succeeds in establishing that his deed is duly registered.

Section 14 of the Ordinance which requires instruments affecting land to be registered in the proper folio enacts in sub-section (1) that " every instrument presented for registration shall be registered in the book allotted to the division in which the land affected by the instrument is situated *and in, or in continuation of, the folio in which the first registered instrument affecting the same land is registered.* " The folio (Document P. 2) in which plaintiff's deed P. 4 is registered contains a cross-reference to the foilio C. 234/19 in which the partition action is registered, but the point taken is that there is no compliance with the requirement of section 14 (1) reproduced above in the sense that the court was left without proof as to the folio in which the first registered instrument affecting the land is registered. Folio C. 234/19 (Document P. 1) indicates that it has itself been " brought forward from folio C. 175/35 ", but no attempt was made by the plaintiff to show what this latter folio represents.

It was pointed out to us that in the judgment the learned District Judge observes that " It is not disputed that the partition action is registered in the correct folio and I shall therefore presume that the registration of the partition action in P. 1 is duly and correctly done. " The accuracy of this observation was challenged on behalf of the defendant and is not borne out by the note of the argument had before the District Judge, and initialled by the latter himself. The question whether an instrument has been duly registered as required by the Ordinance is a mixed question of law and fact. No evidence was called by either party at the trial. Counsel for the parties agreed to mark certain documents and, after doing so, addressed the Court on their respective cases. The result was that the Court was left without proof as to whether C. 175/35 is the folio in which the first registered instrument affecting the land is registered or is a continuation of the said folio. The plaintiff has, in my opinion, therefore failed to discharge the burden that lay upon him, and the first point taken on behalf of the appellant is entitled to succeed.

Learned counsel for the plaintiff alleged that due registration of the partition action was admitted in the District Court. If this allegation is correct it is certainly unfortunate that the admission is not reflected in the record made at the time of argument. It is pertinent in this connection to repeat the observations made by the Chief Justice in *Zahir v. David Silva*[1], after referring to section 58 of the Evidence Ordinance, that " the whole purpose of admitting facts in a legal proceeding is to avoid having to prove them and that judges should therefore record them with the utmost care because the admissions take the place of proof. "

In regard to the second point taken on behalf of the appellant, learned counsel for the plaintiff, while conceding that the plaintiff was required to establish that valuable consideration passed on the execution of P. 4, argued that the agreement by the parties to mark documents at the trial involved an admission that there was in fact valuable consideration for P. 4. He relies on the circumstance that in deed P. 4 is embodied a statement by the attesting notary that " the consideration of Rs. 400 was paid in cash in my presence " and cited section 31 of the Notaries Ordinance (Cap. 107) in his aid. Section 31 enacts that " it is and shall be the duty of every notary strictly to observe and act in conformity with "certain specified rules, one of which is (see section 31 (2) (*e*)) that he shall in the attestation of every deed or instrument state whether any money was paid or not in his presence as the consideration of the deed or instrument. I am unable to agree that proof of the existence of a statement in the deed or instrument by the notary that consideration was paid

[1] *(1959) 61 N. L. R. at 359.*

is sufficient to establish the truth of the payment of such consideration. Counsel argued that agreement to mark the document was an acknowledgment of the truth of all statements contained therein. I find myself again unable to agree. It is correct that no issue was raised by either party in respect of the passing of valuable consideration for deed P. 4, but the absence of such an issue cannot have the effect of absolving the plaintiff from proving a fact necessary to obtain priority for his later deed over the earlier one of the defendant. It is not without significance in this connection that the petition of appeal of the defendant preferred the day after the delivery of judgment by the District Judge contains the submission that the plaintiff's deed connot prevail in the absence of proof that plaintiff paid consideration for it. The defendant is entitled, in my opinion, to have the second point taken by him also upheld.

In the result the judgment and decree in favour of the plaintiff have to be set aside, and I would direct that the plaintiff's action be dismissed with costs in both courts.

ABEYESUNDERE, J.—I agree.

Appeal allowed.