1933 *Present :* **Dalton A.C.J. and Maartensz A.J.**

CEYLON EXPORTS, LTD. *v.* ABEYSUNDERE

174—D. C. Kurunegala, 11,914.

Registration—Donation of property by father to son—Deed not registered—Sale of property to defendant—Knowledge of prior deed and of attempt to defraud son—Fraud and collusion in securing registration—Benefit of priority—Subsequent acquisition of Crown title by defendant—Concealment of title in minor—Title held in trust for minor—Registration of Documents Ordinance, No. 23 of 1927, s. 7.

By deed, dated September 20, 1908, B donated an estate consisting of several allotments of land to his minor son. The gift was accepted by the mother on behalf of the minor but was not registered till December 17, 1915. The deed was retained by B, who remained in possession of the property and mortgaged it on several occasions, concealing the fact of the donation.

By deed, dated September 28, 1915, B transferred the property to the defendant who registered it on October 1, 1915. Defendant was aware that B's action in not registering the deed was prompted by a fraudulent intention to deprive the minor of the property, and further induced B not to register the deed till he completed his transfer, which was done without search of encumbrances and despite the opinion of Counsel, who advised that the title was bad.

The estate consisted of Crown lands in the Kandyan Provinces for which B had village title and for which he covenanted with the defendant that he would obtain Crown grants in defendant's name or if the grants were made in B's name, he would execute the necessary conveyances in favour of the defendant.

The defendant with the help of B obtained the Crown grants in his favour, concealing the fact that the title was in the minor.

The minor came of age in January, 1924, and on November 30, 1926, instituted the present action for declaration of title to the property. By deed, dated February 24, 1927, the minor assigned his rights to the substituted plaintiff.

Held, that the defendant had acted fraudulently and collusively in securing registration of his deed and that he was not entitled to the benefit of priority conferred by section 7 (1) of the Registration of Documents Ordinance, No. 23 of 1927.

Held, further, that the defendant had acted in fraud of the minor in obtaining the Crown grant, and that the title so obtained must be held by him for the benefit of the minor and now for the substituted plaintiff.

APPEAL from a judgment of the District Judge of Kurunegala. The facts are stated by Maartensz J. as follows:—

"This was an action instituted by John de Silva Rajapakse against the defendant for declaration of title to a land called Raigamwatta *alias* Malagama estate consisting of the six parcels of land described in the schedule to the plaint and for damages and costs.

John Rajapakse claimed to be entitled to the land under a deed of gift No. 1,294 dated September 20, 1908 (P1) executed in his favour by his father Benjamin Rajapakse, and accepted by his mother as he was then a minor of the age of five years and nine months; and alleged that the

defendant, on or about September 28, 1915, wrongfully and unlawfully entered into possession of the land claiming title to the said land on a deed of transfer which had been fraudulently and collusively obtained by him from Benjamin Rajapakse, the prior registration of which had been fraudulently and collusively secured.

The plaintiff assessed his damages at Rs. 100,000 up to date of action and at Rs. 9,000 per annum from that date.

The defendant in his answer (*a*) denied that the land called Raigamwatta *alias* Malagama estate was identical with the allotments of land described in the schedule to the plaint, and said that some of the allotments fell entirely and others partially outside the limits of the estate.

(*b*) Admitted the execution of the deed of gift No. 1,294, but denied that the deed was delivered or acted upon in any way or registered before the date of the deed No. 5,487. He also denied Benjamin Rajapakse's title to the allotments of the land which he said were forest or chena land in the Kandyan Provinces and the property of the Crown, and purchased by him, the defendant, from the Crown and from Crown grantees upon the Crown grants and Final Orders under the Waste Lands Ordinance and deeds set out in the answer.

(*c*) Averred that Benjamin Rajapakse, who had improved a small portion of the said allotments about 40 acres in extent, sold whatever interest he had in Raigamwatta to him for Rs. 42,500 by deed No. 5,487 (P4) dated September 28, 1915, and that the deed having been registered on October 1, 1915, rendered the plaintiff's deed No. 1,294 which was registered on December 17, 1915, void and of no effect.

(*d*) Denied that the deed No. 5,487 or the prior registration of it was obtained fraudulently and collusively.

(*e*) Said that the defendant had improved the land and paid off a mortgage over the said land created by bond No. 170 dated January 28, 1915, registered on February 5, 1915.

The defendant prayed for a dismissal of the plaintiff's action, and in the alternative for compensation Rs. 140,000 for improvements and for possessing till compensated for his improvements.

The original plaintiff John Rajapakse by deed No. 555 dated February 24, 1927, (P 8) sold his rights of action and his interest in the land in dispute to A. W. Rupesinghe as trustee on behalf of a company to be duly incorporated under the name, style, and firm of the Ceylon Exports, Limited, for a sum of Rs. 5,000. Rupesinghe by deed No. 605 dated June 21, 1927, (P 20) conveyed to the company which the deed recited had been duly incorporated.

The company was substituted plaintiff on October 24, 1928."

The learned District Judge found against the plaintiff on all the issues and dismissed the action with costs.

N. E. Weerasooria (with him *L. A. Rajapakse* and *J. R. Jayewardene*), for substituted-plaintiff, appellant.—Is the defendant's deed of sale subsequent in date but prior in registration to the donation to the minor plaintiff void by reason of fraud or collusion? Notice of the prior deed is admitted. But this is not a case of mere notice. There are other considerations.

(1) The grantor on both deeds was in a fiduciary relationship to the minor.

(2) The grantor was in financial difficulties at time of second deed.

(3) The grantee of the second deed had legal advice that a second deed would defraud the minor, and acted contrary to that.

(4) The value paid for the second deed was a bargain.

(5) Every effort was made to strengthen his position under the second deed, viz., entering on land, dispensation from search, peculiar clauses in the deed itself.

(6) The grantor gave an undertaking not to register the first deed.

(7) The defendant did not give evidence and explain the charges of fraud and collusion against him.

In these circumstances the Courts have held there is fraud and collusion. The defendant took advantage of the financial difficulties of one who was in a fiduciary relationship to the minor, to deprive the minor of his property.

For fraud and collusion see *Jayewardene on Registration, p. 123,* which discusses the Ceylon and English cases and see *Ferdinando v. Ferdinando*[1]. Since the case reported in *Ramanathan (1877) p. 398,* when the Ceylon Courts departed from the English doctrine that mere notice is sufficient to defeat prior registration, it is clear that the extension of the principle beyond mere notice has been very strictly confined. The slightest element of moral blame in addition to notice would constitute fraud. In *Baltison v. Hobson*[2] actual fraud was construed. In Ceylon it is not necessary to prove actual fraud.

The possession of the defendant is possession for the minor. A long series of English cases holds that a stranger who enters into a minor's property possesses for the minor. See *Morgan v. Morgan*[3], *Doe v. Skeen*[4], and *Keech v. Sandford*[5]. A person in a fiduciary position may not say, I tried to secure this land for the infant but could not do so. There is no difference between a person in a fiduciary position and a trustee under a constructive or express trust.

The defendant obtained Crown grants in his favour through Rajapakse, the grantor of both deeds. Crown grants are based on Rajapakse's title. A person who gets a legal title with notice of a prior equitable interest gets the legal title for this entitled to the equitable interest—see *Munford v. Stowhasser*[6]; *Jared v. Clements*[7].

[MAARTENSZ A.J.—If the later registered deed is valid, you cannot attack the Crown grants obtained on that deed.]

I am assuming for the moment that that deed has been demolished. A Crown grant is merely a veil. It does not affect the rights of the parties *inter se.* See *Sinno Appo v. Dingirihamy*[8], *Coudert v. Don Lewis*[9]. The Crown merely declares that it has no rights to the land. The English case

[1] *23 N. L. R. 143.*
[2] *(1896) 2 Ch. 403.*
[3] *(1737) 1 Atkyn 488.*
[4] *7 Term Rep.; 386, p. 389.*
[5] *(1726) White and Tudor's Leading Cases, p. 46.*
[6] *(1874) 30 L. T. 859.*
[7] *(1903) 1 Ch. 428.*
[8] *15 N. L. R. 259.*
[9] *4 B. N. C. 40.*

of *Yem v. Edwards*[1] decided that a widow who got land from the Crown on the strength of her husband's possession held the land for the benefit of the estate of her husband ; see also *Biss v. Biss*[2].

The new Land Settlement Ordinance, No. 20 of 1931, in schedule 3 lays down rules governing Settlement Officers. Equitable considerations are always considered when making offers and settlements. This clearly puts down in statute form the long established rules guiding settlements of Crown land.

H. V. Perera (with him *E. G. P. Jayetilleke, A. R. H. Canekeratne,* and *D. W. Fernando*), for defendant, respondent.—The basis of plaintiff's case is that defendant's deed is void. The defendant is an honest purchaser for real and valuable consideration. Defendant buys on the deed sought to be avoided with the knowledge of certain facts, (1) that the donees on the previous deed are minors, (2) that the previous deed is unregistered, (3) Rajapakse in spite of the previous deed is dealing with the property as his own, (4) Counsel's opinion, but he acts as any prudent purchaser would act. Defendant and Rajapakse are two opposite parties. It cannot be argued that they put their heads together to deprive the minor donee on the previous deed. Fraud arises when the subsequent purchaser is an unreal purchaser. The mere purchase must be a means to an end. If the end is to deprive the donee on the first deed then there is fraud. Defendant's end is to see that his title is good.

[DALTON A.C.J.—They were acting together but for different reasons. Rajapakse wanted money, the defendant wanted the land.]

Suspicious are not sufficient. Fraud and the particular acts which constitute fraud must be clearly proved. The vendor's fraud does not affect the vendee if he acted prudently. Mere notice of a prior deed is not fraud as required by the Registration Ordinance. When dealing with this Ordinance it is not legitimate to graft on to it English rules of Equity. In this country there is no such thing as Equity.

Fraud apart from collusion must mean (1) a definite representation made to some person who acts on that representation to his prejudice, (2) when a person stands in a fiduciary relationship to another, a duty is cast on the first to safeguard the interest of the other—any breach of this duty would amount to fraud.

Collusion exists when two or more persons put their heads together and achieve a common object which does not appear on the face of the transaction. It implies something under-hand. It is the indirect, improper end which moves vendor and vendee.

The sameness of the means adopted does not amount to collusion if the parties wish to achieve different ends.

[MAARTENSZ A.J.—What if the means adopted to attain your end would result in defeating the prior deed ?]

There are a number of consequences of a man's act which he does not intend. One cannot infer that defendant's end was to defeat the prior grant. It may be unfortunate that the prior deed is set aside, but that is the law as it stands. Even if defendant asked the grantor not to register the first deed it would not amount to collusion as he did so merely to

[1] *3 K. & G. 564.* [2] *(1903) 2 Ch. 40.*

protect himself as a purchaser. There is a strong presumption against fraud and collusion. Intellectual precautions prohibit an inference of fraud which must be affirmatively proved and not negatively disproved by us. See *S. Dey v. Gopaulchunder Dey*[1] and *Raheem v. Begum*[2].

On the question of the Crown grants, it is not denied that these lands are chena and in the Kandyan Province. The Crown has absolute title, and there are no statutory or equitable interests which can be claimed by squatters (*Babappu v. Don Andris*[3]). The Crown as owner has conveyed title to the defendant.

[DALTON A.C.J.—On what rights did you get title ?]

The Crown can ignore all rights. If the Crown as owner granted land on a misrepresentation, then an action would lie to the grantor against the grantee. The defendant secured Crown grants on his own rights, under the second deed. It cannot be argued that the plaintiff can claim relief under the Trust Ordinance. Our Trust Ordinance is complete. We have not incorporated the whole of the English law . . . . . A trust implies a legal title in the trustee and a beneficial interest in the beneficiary. . . . . Even in a constructive trust the legal title is in the alleged trustee. . . . . In this case the Crown had both the legal and equitable interest in the lands. . . . . The proposition that a person who enters upon minor's property possesses for the minor does not apply to Ceylon. The principle is to prevent prescription running against the minor. In Ceylon we have special provisions as regards minors, who are protected by the Prescription Ordinance. . . . . The deed of gift is bad. Roman-Dutch law permits a person to sell property not his own, but he may not gift such property. . . . . (*Voet 39, 5, 10*). At the time of the gift, the Crown had title and not the donor.

Weerasooria, in reply—Referred to *2 Vesey (Sen) 125* on fraud. Roman-Dutch law permitted donations of property which may become the property of the donee. Crown land has a marketable value and the donee may become owner. Voet further says a person may donate future property (*Burge—Vol. II (1st ed.), p. 142*). The English principles of trust have been codified in our Ordinance. Any *cases omissus* can be supplied by section 118 which makes the English law applicable.

D. E. Wijewardene (with him *S. Alles*), for added defendant, respondent.

Cur. adv. vult.

October 23, 1933. DALTON A.C.J.—

The original plaintiff, John Rajapakse, instituted this action for declaration of title to property described in the plaint, called Raigamwatta or Raigam estate, made up, according to the plaint, of six parcels of land, about two hundred and fifty-one acres in extent. John Rajapakse was born on January 25, 1903, and came of age in January, 1924. This action was instituted on November 30, 1926. By deed (exhibit P 8) of February 24, 1927, this plaintiff assigned his rights in the action to one A. W. Rupesinghe, as trustee of the Ceylon Exports, Ltd. By deed (exhibit P 20) of June 21, 1927, Rupesinghe as such trustee assigned and

[1] *11 Moore's Indian Appeals 28.* [2] *11 Moore's Indian Appeals 551.*
[3] *13 N. L. R. 273.*

conveyed all his rights in the action to the company. The company was substituted as plaintiff by order made on October 28, 1928. It is stated and not denied that the company is, to all intents and purposes, Mohandiram D. P. A. Wijewardena, who made proposals for the purchase of this property in 1915, and who is referred to later in the course of this judgment. The added-defendant, W. Benjamin Rajapakse, is the father of the original plaintiff, and the defendant is a purchaser of the property, the subject of the action, from Benjamin Rajapakse.

Benjamin Rajapakse is or was a landed proprietor and planter. At different times he seems to have got into financial difficulties. About 1898 he was in difficulty from this cause and states his brother then settled his debts, he conveying the properties he then possessed to his brother, who conveyed them to Benjamin's children by his first marriage. In 1901 he was insolvent for the first time with liabilities of Rs. 250,000, but with the help of his father he settled with his creditors. In 1921 he went through the insolvency court a second time and obtained a certificate under the Ordinance. In 1908 also he got into financial difficulties and his father agreed to settle his debts, if he transferred the properties he then possessed to the children by his second marriage. Benjamin Rajapakse agreed to do so, and as a result Raigam estate made up of the first six parcels in the deed, and other lands, were conveyed by deed of gift (exhibit P 1) of September 20, 1908, to his son John Rajapakse, then a child of five years of age, and another estate called Rawita was conveyed by deed of gift (exhibit P 33) the same day to his two minor daughters, Emma and Norah. In each case the gift was accepted in conformity with law on behalf of the minors by their mother, the deeds P 1 and P 33 being retained by Benjamin. The deed P 1 was not registered under the provisions of Ordinance No. 14 of 1891, until December 17, 1915. The deed P 33 was apparently never registered.

On September 28, 1915, by deed marked P 4, Benjamin Rajapakse purported to transfer Raigam estate to the defendant. This deed was registered on October 1, 1915. The principal question arising for decision is whether the deed of gift P 1 of 1908 is to be deemed void as against the deed P 4 in favour of the defendant by reason of the prior registration of the latter deed, or whether the deed P 4 was obtained, or its registration secured by fraud or collusion. The learned trial Judge has found in favour of the defendant that there was no fraud or collusion and that P 1 is void as against P 4, and the substituted plaintiff has appealed.

There is no doubt that the gift to the minor John Rajapakse was duly and properly accepted and that the deed was duly delivered. It was retained by Benjamin Rajapakse as father and guardian of his son. The case put forward by the defendant in this connection, however, is that the agreement in 1908 by the father Mudaliyar Rajapakse to pay Benjamin Rajapakse's debts, in return for which Benjamin Rajapakse was to convey his properties to his minor children, was never carried out by his father, who did not pay the debts he had undertaken to pay. Therefore Benjamin Rajapakse was right in regarding himself as still the owner of the property. The learned trial Judge has found that Benjamin Rajapakse's father did not so pay as he had promised. He hold that on the

evidence and the probabilities of the case it is difficult to hold that the promise was carried out. I regret I am quite unable to agree with the learned Judge on this point.

The debt which was to be paid in 1908 in connection with the conveyance of Raigam was a sum of Rs. 15,000 and interest secured by mortgage on the property. That this debt was paid and discharged in October, 1908, there is no doubt whatsoever. It is admitted the father undertook to pay it in return for something being done. That something was done and the debt was discharged within a month. Who paid it? There is evidence that the father paid it. There is some evidence also from Benjamin Rajapakse that he paid it himself out of his own funds, but this story he changes, at times admitting his father paid it. If he paid it himself, whence did he obtain the money to do so? He does not say. He was in financial difficulties at the time, unable to pay his debts, and in danger of being sued and losing his properties. The learned trial Judge has, it seems to me, lost sight of these circumstances in holding that Benjamin Rajapakse paid out of his own moneys.

The evidence of Benjamin Rajapakse on all matters must clearly be carefully scrutinized before being accepted on any point. On this question of the payment of his debts in 1908 he has at one time stated one thing, and at another time another. The trial Judge is of opinion that greater weight should be given to earlier statements, because when those statements were made the validity of the transfer to the defendant was not in question. But Benjamin Rajapakse was not even consistent in those earlier statements, for in 1916 he stated his father had discharged the mortgage over Raigama in 1908. Further, his inability to pay his debts in 1908 is entirely inconsistent with the truth of earlier statements that he had himself discharged the debt, and he makes no attempt to show how he did this.

The notary who attested the deed P 1 in 1908 is fortunately alive and was a witness in this case. The deed P 33 was also prepared and attested by him the same day. He had done work for Benjamin Rajapakse and his father before, and lived opposite the latter's house. Having attested P 1, he made an endorsement in the usual way on Benjamin Rajapakse's title deed (exhibit D 4) of the deed of donation. He also made an endorsement on Rajapakse's title for Rawita estate of the conveyance (P 33) to his two daughters. The witness then goes on to say that a bond, he hinks for Rs. 15,000, was cancelled the same day, adding later that he thinks the Rs. 15,000 was paid after the deed of gift had been executed. He knew of the arrangement between father and son for the conveyances and for the payment of the debts of the latter by the former. Some of the payments were actually paid in his presence. The learned Judge says that the witness appeared to be a respectable and disinterested witness, and ordinarily he would be quite prepared to accept his evidence. He is unable to do so in this instance, however, because it is proved that the bond for Rs. 15,000 was not discharged until October 21, a month after P 1 was executed. The learned Judge is of opinion that the payment of the debt was more pressing than the execution of the deed, and, therefore, if the debt was paid, it would be paid at the time of the deed. That the debt was paid within a month of the deed is admitted and clearly proved,

but the learned trial Judge does not give his mind to the question as to who paid it in October. Only two persons are put forward as paying it, the father and the son. I can only point out again that the son was in financial trouble, unable to pay his debts in September and has disclosed no source when, a month after P 1, he was suddenly in funds again. On the other hand, speaking in 1932 of something that took place in 1908, the notary, when deposing to payment by the father in his presence, knowing in the ordinary way of business (this, be it noted, was not an ordinary business transactions but an arrangement between father and son) a debt of this kind would generally be discharged at the time of the conveyance, might well and truthfully say he thought the payment was made at the time of the execution of the deed. The evidence of the notary, in my opinion, strongly supports the plaintiff's case that Benjamin Rajapakse's debt over Raigama was discharged by his father, whereas the statement of Benjamin Rajapakse that he discharged the debt himself has nothing to support it beyond his own contradictory statements.

There is one further circumstance in which the learned trial Judge finds support of Benjamin Rajapakse's statement that his father did not pay this debt. There was some suggestion in 1915 that an application might be made to Court for an order to re-vest Raigam estate in Benjamin Rajapakse. I refer to this later, and it was not pursued. In 1920, however, an application was made to the District Court, Negombo, supported by affidavit (exhibit D 24) for an order to re-vest in Benjamin Rajapakse the share of one of his minor daughters in Rawita estate (conveyed to her by deed P 33 before mentioned). This application came up for disposal before an acting District Judge, the then Crown Proctor who was acting for the District Judge for the day, a Mr. J. E. de Zoysa, and it was allowed by him. This Mr. de Zoysa is Benjamin Rajapakse's brother-in-law, having married one of his sisters, whilst one of his daughters later married John Rajapakse, the original plaintiff. It was this very proctor who according to the witness de Silva had drafted the deed of gift P 1 in 1908. The learned trial Judge appears to be of opinion that the application came before this near relative by design, since he expresses the opinion that under the circumstances it was an application no other Judge could have been expected to allow, the debt, to settle which the application was made, having been created by Benjamin Rajapakse subsequent to the deed of gift. Even Benjamin Rajapakse has to admit in his evidence in this case the impropriety of getting this order from his brother-in-law. In spite, however, of this episode, which seems to me to be alike most discreditable both to acting Judge and litigant, the learned trial Judge accepted the argument of defendant's counsel in the lower Court in this trial, that Mr. de Zoysa allowed this application "although legally he could not have done so as he was satisfied from personal knowledge that Rajapakse was not doing anything morally dishonest". That, the learned Judge says, is a circumstance which supports Benjamin Rajapakse's statement that his father did not settle the debt in 1908 as promised. I regret I am unable to agree with him. It must not be thought that the defendant had anything to do with this episode in 1920, but if it supports his case, it is admitted that Mr. de Zoysa is still alive and therefore he could have been called for that purpose. In the absence

of this witness the learned Judge was not entitled to draw the inference he did; if his view of the episode is the correct one, and I am quite unable to say he is wrong, it clearly reflects no credit on any of the participants, and the absence of Mr. de Zoysa from the witness box is not surprising. On this question then of the payment of debts in 1908, I am satisfied that Benjamin Rajapakse's statements that his father discharged this debt are correct, and that all the terms of the settlement in 1908 were duly carried out.

After 1908 the three minors continued to live with their parents up to 1918, near Negombo, Benjamin Rajapakse retaining the deeds of gift and possessing, he states, the lands donated to his children on their behalf. In 1918 the parents appear to have separated and John Rajapakse lived with his mother from 1918 to 1924. There is no doubt that in 1915, when compensation had to be paid by Sinhalese owners of lands after the riots. Benjamin Rajapakse gave the name of his son as owner of one of the other pieces of land included in P 1. He recognized also that the deed P 33 conveyed title to Rawita to his daughters, for in 1919 he took a conveyance from his daughter Nora of her share of Rawita. On August 30, 1919 (exhibit D 23) he agreed to sell the whole of Rawita to Goonewardena brothers, in February, 1920, moving the District Court at Negombo to grant an order for the reconveyance to him of the minor Emma's share. I have already referred to this proceeding. After the execution of P 1 and P 33, however, Benjamin Rajapakse took no steps to have the deed registered. The learned trial Judge believes that he kept back the deeds from registration in order to take advantage of the effect of non-registration. I am not prepared to say that I entirely disagree with him there, for the deeds in his favour were registered and he admits he knew of the effect of registration. Even, however, if one were to accept the reason he puts forward for his failure to register, the fact remains that it was his duty on behalf of the donees, his minor children, to see that the deeds were registered, and he failed in that duty. He took advantage of this failure later. As was perhaps to be expected, he got into financial difficulties again, borrowing money again. When he was in want of more money and Chettiars wanted some security, he says "I discovered that owing to the non-registration of the deeds of gift I could deal with the property as my own". He commenced mortgaging Rawita as early as 1909 (exhibit D 36). In 1911 by deed D 35 he mortgaged small portions of Raigam estate, with other properties including portions of Rawita, mortgaging further portions of both estates by D 37 in 1912. These two mortgages he paid off in 1913 with the proceeds of a further mortgage (D 7), executing a secondary mortgage (D 6) for a further amount later in the same year, over portions of Raigama. There is no doubt that in these deeds he purported to deal with Raigama and also Rawita estate as his own. At some time during this period also, I think from the evidence there can be no doubt that the notary's endorsement of the deed of gift (P 1) on Benjamin Rajapakse's title for Raigama (D 4) was purposely concealed by a strip of paper being pasted over it. His title for Rawita was a Crown grant, the endorsement thereon of the deed of gift to his daughters had also been covered up by a strip of paper. The person whose interest it was to conceal these transactions in raising money on the land was Benjamin Rajapakse, and I should certainly, under all the

circumstances, hesitate to accept his denial that he was responsible for it, and his statement that the Chettiars had done it. If the latter were responsible, Benjamin Rajapakse must obviously have been a most willing party to the attempt to conceal the fact that the land belonged to his son. Up to 1915 Benjamin Rajapakse made no attempt to dispose of either Raigama or Rawita by sale, but in that year getting deeper into debt, he tried to obtain a purchaser for Raigama. As a result Mudaliyar Wijewardene, amongst others, got into communication with him and began negotiations for its purchase. Benjamin Rajapakse's title deeds were left with Mr. A. Alvis, Wijewardene's proctor, and then it was discovered that a strip of paper was pasted over an endorsement on the deed (D 4) of November 7, 1906. The witness Perera states how this was discovered and the strip removed, the deed of donation (P 1) of 1908 being then disclosed to Wijewardene and his proctor for the first time. Benjamin Rajapakse was asked to account for it, and then produced the deed (P 1). He said there was nothing in it and that he had paid off a debt on the property. There is no doubt that Benjamin Rajapakse told Alvis this, and as a result the alleged payment of the mortgage by him was put forward as a possible ground upon which to base application to the District Court to obtain an order for the retransfer of the property to Benjamin Rajapakse. The evidence shows, however, that Mr. Alvis pointed out to Benjamin Rajapakse his duty to his son to have the deed of gift registered. He also pointed out to Wijewardene that the deed might be registered at any moment. In the end counsel's opinion was taken on a statement of facts submitted by Mr. Alvis as to whether a reconveyance could be allowed by the Court (exhibit P 9A). The information in this statement must have been largely obtained from Benjamin Rajapakse, and it is remarkable that there is no reference there at all to any agreement with his father. Mudaliyar Rajapakse to convey Raigama to his minor son John, on his father paying his debts, or to any failure on the part of his father to carry out such an agreement. If such an agreement had been mentioned, and if it had been suggested by Benjamin Rajapakse at that point of time that Mudaliyar Rajapakse had not carried out his part of the agreement, I cannot think the proctor would not have set it out in the statement drawn up for counsel's opinion. It might have afforded some ground upon which to have an application for a reconveyance, and it is in fact the principal reason put forward in the case now before us to support defendant's contention that the deed was never acted on, that his part of the agreement was not performed by Mudaliyar Rajapakse, and that therefore the conveyance by Benjamin Rajapakse to his son was of no effect. When counsel's opinion was obtained it was to the effect that Benjamin Rajapakse had no title, and the Court would not sanction any retransfer to him. The opinion goes on to explain the effect of the Registration Ordinance on a subsequent purchase for value from the donor. Mr. Alvis pointed out to Wijewardene the difficulties of the position and the possibility of litigation; whereupon Wijewardene declined to take a transfer from Benjamin Rajapakse, unless he got the property revested in him. Some further correspondence on this subject passed between them, when the present defendant came forward as a possible purchaser.

The defendant has not himself given evidence in this case, and it must necessarily be a matter for comment, since there is a charge of fraud and collusion made against him in respect of which some of the evidence given might reasonably have called for some answer from him. There are several points at which the case presented on his behalf is directly at variance with the plaintiff's case and with the added defendant's evidence, but to assist the Court in arriving at a conclusion as to which is true, the defendant has himself given no help. The added defendant's evidence on numerous matters, as I have already pointed out, needs very careful scrutiny before being accepted, There are, however, some instances where his evidence is at variance with the case put forward on behalf of defendant and in those instances, with which I deal later, I see no reason why his evidence should be rejected in the absence of any denial by defendant himself. If it was untrue in the cases to which I refer, it was open to defendant to say so, but he has, preferred to remain silent. In those circumstances, there being no good reason otherwise to reject the particular evidence in question, the presumption to be drawn is that defendant is unable to deny the truth of the evidence. It is apparent from the proceedings in the lower Court that counsel for the defendant did all he could to keep the added defendant out of the witness box. Possibly defendant thought he might now be unduly favourable to the claim put forward on behalf of his son, and one has to bear this in mind in estimating the worth of Benjamin Rajapakse's evidence. Probably neither plaintiff nor defendant wished to call him as witness. Since, however, he was a party to the proceedings, who wished to give evidence himself, both plaintiff and defendant have had the opportunity of cross-examining him and have taken full advantage of that opportunity. After that evidence particularly I have great difficulty in understanding why defendant did not himself go into the witness box to clear himself of the charges made in the issues against him.

Counsel's opinion for Wijewardene had been obtained at the end of August, and shortly before September 11 Benjamin Rajapakse and defendant called on Mr. Alvis, defendant stating he proposed to purchase Raigam estate. The deeds for the property had been handed by Benjamin Rajapakse to Alvis on August 11, and did not leave his possession until November 23, so defendant had had no opportunity of seeing them before deciding to buy. It is suggested that an honest buyer would certainly want to see the title deeds before deciding to purchase. It is obvious that a prudent purchaser would have wished to see them. Alvis then informed him of the deed of gift to the minor and that the endorsement on Benjamin Rapapakse's title had been concealed by a strip of paper. Mr. Samarawickreme's opinion was also shown to him, whilst he was also aware that the deed of gift might be registered at any moment. Defendant replied that he knew all about it, and had taken counsel's opinion on the matter. It seems clear he wanted no advise from Alvis, and merely required his services as a notary to put through the agreement between him and Benjamin Rajapakse. The correspondence (exhibit P 11) of September 11, 1915, shows that he was also anxious to complete the transaction as soon as possible. The next day, however, Mr. Alvis was informed by defendant that the transaction for the purchase of the estate had fallen

through. Alvis says he kept the deeds because he understood the matter would be settled almost immediately, and the next day, September 13, he received instructions to prepare a mortgage bond for Rs. 40,000 by Benjamin Rajapakse in favour of defendant over Raigama and Rawita. The parties to the mortgage authorized the notary to dispense with the search for encumbrances and the bond was completed the next day, the prior mortgagee, the Chettiar, being paid off in the notary's presence. Benjamin Rajapakse says he had given defendant a written undertaking not to register the deed of gift, although he had been informed and was fully aware it was his duty to register it. I see no reason to doubt this statement in the absence of any denial of its truth by defendant. It may in fact account for the defendant's instructions to the notary to dispense with any search. During this time Rajapakse was still continuing his negotiations with Wijewardene, apparently on the ground that he had some prospect of getting the District Court, Negombo, to grant an order re-vesting the property in him. Wijewardene heard, however, of the execution of the mortgage from Alvis and further that defendant was going to purchase the property, whereupon he sent in a claim (exhibit D 3) against Rajapakse for damages. Wijewardene and Rajapakse met after the latter had received this claim, and the latter still persisted that he had only given defendant a mortgage. He also appears to have obtained a sum of Rs. 3,000 from Wijewardene for the purpose of taking the proceedings he had suggested in the Negombo Court. Meanwhile he had also promised to repay defendant the Rs. 40,000 within a fortnight or a month or to convey the property to him. He admits the raising of that sum within the time was for him impossible, and on September 24 (exhibits P 16 and P 17) Alvis received final instructions from defendant respecting the purchase of Raigama by him and for the preparation of the deed of transfer. Again the necessity of putting through the transaction speedily is stressed. He stated in that letter that he was taking possession of the estate on the following Wednesday at the latest, and that he had arranged with Rajapakse to sign the deed on the Monday preceding the Wednesday. These instructions were carried out and on September 28, Rajapakse executed the conveyance (deed P 4) in favour of defendant, after they had again instructed the notary to dispense with the search for encumbrances. This conclusively shows that defendant, who must have known that he was not dealing with a very scrupulous person, had trust in Rajapakse and was confident that the latter, although he had got his liabilities to the Chettiar discharged on September 14, would not register and had not registered the deed of gift P 1 behind his back.

As the learned trial Judge points out, the adequacy of the consideration paid by defendant has some considerable bearing on the question under discussion, but the fact that the consideration may be held not to be inadequate does not of itself rebut all suggestions of fraud or collusion in obtaining the conveyance or in securing its prior registration. There was little difference between the prices offered by defendant and Wijewardene. The value of the property at the time of these proceedings is admitted by defendant to be Rs. 150,000, but there is no doubt also that it had been considerably improved at that date and Crown titles had also then been obtained for the property. Rawita of 151 acres was sold in 1919 for

Rs. 100,000, but it is stated to be situated some ten miles distance from Raigam estate, and there is no evidence whence one can compare them together. There is no doubt that a person in financial difficulties may be compelled, however, to make a sacrifice in selling even his own property, whilst an unscrupulous person would undoubtedly take less than the real value for what was not his. Probably the learned trial Judge is correct when he says that defendant got a bargain, although the price was not so low that it could not represent the value which a *bona fide* purchaser would have been prepared to pay.

In the deed P 4 Rajapakse also covenanted to apply for and obtain for defendant from the Government of Ceylon grants or certificates of quiet possession of the various allotments of Raigama conveyed by the deed. At the same time he executed the undertaking and bond P 5 hypothecating Rawita and Dagonne lands, whereby he undertook to carry out the conditions of the conveyance P 4, and, in the event of it being ascertained that the total extent of Raigama was less than 375 acres, to pay to defendant for such deficiency at the rate of Rs. 200 for every acre or part thereof of cultivated land, and Rs. 100 for every acre of uncultivated or unplanted land. He further undertook, in the event of defendant or his executors, administrators, or assigns being at any time disturbed or deprived of the ownership or possession of Raigam estate, or being ejected therefrom and being compelled to pay any sums of money by way of compensation or mesne profits, to make good to defendant any loss or damage thereby incurred up to the sum of Rs. 50,000. A reason put forward by Rajapakse for this bond was that defendant was afraid that any title he got to the property might be defeated by the minor, and that he declined to purchase the property unless he was protected by this agreement. Rajapakse gave this reason in his evidence in proceedings (exhibit P 35) as long ago as July, 1916, and he repeated it again in his evidence in this case. He seems to have had no ulterior motive in 1916 in making such a statement. I see no reason to doubt that the reason he gives was one of the grounds for obtaining the bond P 5, especially having regard to the wording of clause 4 of the deed, and in the absence of any denial of the truth of Rajapakse's statement by defendant. Defendant had received ample warning of the risk he ran in taking a conveyance from Rajapakse and of the danger of litigation resulting with of course possible loss of the property in such litigation.

The bond P 5 was discharged on August 16, 1920, at which date defendant had obtained Crown grants for the major portion of the property conveyed to him by P 4. He doubtless, therefore, felt secure from any claims being thereafter made against him. On that date defendant sold certain lands at Dagonne to Rajapakse by deed A D 1 for Rs. 25,000. The same day Rajapakse executed a mortgage (A D 2) in favour of the defendant for the sum of Rs. 50,000, mortgaging the lands he had purchased from defendant on A D 1 and other lands. Of that sum of Rs. 50,000, Rs. 25,000 was set off against the purchase price on A D 1; Rs. 10,000 was applied to pay off what was due from Rajapakse to defendant on the bond P 5, in respect of the shortage in acreage obtained by defendant on the Crown grants, the shortage being roughly about 100

acres. The remainder was made up of sums, as set out in the attestation clause, which are not material to this case. The bond P 5 was thereupon discharged.

To return to the incidents of September, 1915, the deed P 4 was duly registered three days after its execution on October 1. The deed P 1 was registered on December 17 following, by whom the evidence does not show. The learned trial Judge seems to think this was done at the instance of Wijewardene, but that suggestion was not put to him when he was in the witness box.

The question that has to be decided on these facts is whether the deed P 1 of 1908 is void as against the deed P 4 of 1915 by reason of the prior registration of the latter, or whether the deed P 4 was obtained or its prior registration secured by fraud or collusion. The Ordinance in force in 1915 was the Land Registration Ordinance (Ordinance No. 14 of 1891) which was repealed by Ordinance No. 23 of 1927, but section 7 of the latter Ordinance reproduces section 17 of the former Ordinance on this matter, and also provides that an instrument duly registered under any Ordinance repealed by Ordinance No. 23 of 1927 shall be deemed to be duly registered under the latter Ordinance.

The authorities on this question are fully discussed by the late Mr. Justice A. St. V. Jayewardene in his book on *The Registration of Deeds, pp. 123-138.* In Ceylon it has been held consistently since 1877 that mere notice of a prior unregistered deed does not amount to fraud so as to deprive a person registering of the priority conferred by law. In D. C. Kandy, No. 67,295 (*Ramanathan's Reports (1877), p. 198*) the Full Bench in considering the question as between a second mortgage taken with notice of an earlier mortgage, but registered before it and the earlier mortgage, could find no grounds on which it could say that either had been trying to mislead the other. The mortgages had been executed on the same day, and were attested by the same notary, the second mortgagee being informed of the execution of the first mortgage by the notary. All that was proved respecting the second mortgage was that knowing of the first mortgage, he took legal steps to secure himself; he had not, in the words of Clarence, Acting Chief Justice, done anything underhand, nor had he been shown to have made any pretence. Each party stood on his legal rights. In these circumstances it was held there had been no fraud on the part of the second mortgagee in securing prior registration of his mortgage. In *Siripina v. Tikiria*[1], Phear C.J. and Clarence J. came to a similar conclusion, holding that the mere purchase of land with the knowledge that the vendor had previously sold to a third person, who had not yet registered his conveyance, does not amount to fraud as against that third party. Phear C.J. states, however, that had the purchaser in the second transaction been party to anything in the way of hindering or delaying the first purchaser in the registration of his title for the purpose of securing to himself priority of registration, then there would clearly be fraud within the meaning of the proviso. (Ordinance No. 8 of 1863, section 39.) He adds that it is possible to put many cases of the like character.

[1] *1 S. C. C. 84.*

This conclusion, that mere notice of a previous deed is not enough to deprive a person who has registered his deed of the prior registration, was affirmed by the Full Bench in *Aserappa v. Weeratunga*[1], and it is not necessary to refer to later cases following that and earlier decisions to the same effect. It will be useful, however, to examine cases in which it has been held that something more than mere notice was proved.

In *Kirihamy v. Kiri Banda*[2], the facts were as follows:—A, on a deed dated November 29, 1887, purchased a property from a sister of B, but he did not register his deed. On January 21, 1898, B obtained a deed from his sister for the same property apparently for value, and registered the deed the next day. The property was subsequently seized by others under a writ on a judgment obtained by them against B. A claimed the property but his claim was disallowed. He therefore brought this action under section 247 of the Civil Procedure Code, in which the two deeds were in competition. It was proved that B had urged A in 1887 to purchase the property from his sister, and was present at the execution of the deed. He was, however, in no fiduciary position with regard to A. After the deed was executed it was kept in the custody of B's wife who was A's daughter, B and his wife enjoying the produce of the property under the deed. The trial Judge held that under the circumstances, the conduct of B in taking a conveyance of the property from his sister in 1898 amounted to fraud both in obtaining the deed and in securing prior registration, and with this conclusion the Court of Appeal agreed. In *Lawaris v. Kirihamy*[3], certain property had been conveyed to Y and his brothers and sisters. Y then prevailed upon his mother to convey the property to him, thereby taking a dishonest advantage of his younger brothers and sisters in order to deprive them of what they had obtained on the earlier deed. He got this later deed registered befor the earlier deed, but it was held he was guilty of both fraud and collusion in the obtaining and registering of his later deed. It was of course the mother whose duty it was as guardian to have the earlier deed registered on behalf of her children and to look after her children's interests, but it appears that the latter also relied upon their elder brother for this purpose. He took advantage of his position, and of his mother's failure to safeguard the interests of her other children.

In the case of *Marikar v. Fernando*[4], the vendor sold a property to the seventh added defendant by deed of transfer of March 25, 1900. He then sold it to plaintiff by deed dated November 26, 1913. The earlier deed was registered in the wrong folio, and so was not duly registered. It was then urged that plaintiff's deed was not entitled to any benefit from prior registration since he and the vendor were guilty of fraud in respect of the second transaction. The trial Judge found that plaintiff was aware of the earlier transfer, and that he and the vendor conspired together to see what could be done to make a little more out of the rights which the vendor had already alienated. The plaintiff went in with open eyes to see whether he could not get a bit of the land for himself. In the opinion of Wood Renton C.J. this conduct amounted to collusion in obtaining

[1] *14 N. L. R. 417.*
[2] *14 N. L. R. 284.*
[3] *3 Bal N. C. 38.*
[4] *17 N. L. R. 481.*

the deed. Ennis J. was of opinion that these facts disclosed that plaintiff and his vendor conspired together and were guilty of fraud in the transaction within the meaning of section 17 of Ordinance No. 14 of 1891.

In the case of *Ferdinando v. Ferdinando*[1], where on the facts collusion was held to have been proved, Bertram C.J. deals with the matter at considerable length, but stresses the limit to which previous decisions have gone, namely, that the mere existence in the mind of a man, who has obtained a conveyance for valuable consideration, of knowledge of the existence of a prior and unregistered conveyance is not sufficient to deprive him of the right to gain priority by registration. On the subject of fraud, without seeking in any way to define the term as used in the Ordinance, he points out that it may involve a conspiracy of mind with mind, but it does not necessarily involve it. It may further involve no conscious moral dishonesty, as was found in the case with which he was dealing. On the subject of collusion he states, "'Collusion' means, as the derivation implies, the joining together of two parties in a common trick. It carries with it the implication of something indirect and underhand. One can well understand that the law should say, 'It is permissible, even if you know of the existence of an unregistered conveyance, to obtain another from the same source and to register your own deed thus obtained and so obtain priority. All parties in such a case stand upon their legal rights. The prior grantee knows the law as well as the subsequent grantee. The person who registers first is entitled to a reward for his diligence'. But this is where all parties are supposed to be acting independently in their own interests. It is otherwise where, though to an exterior view they are simply independent parties to a transaction as vendor and purchaser, they are, in fact, acting together for a common and indirect end. There, even though the result they aimed at is no doubt permitted by the law, their contract amounts to collusion". These latter words were spoken with direct reference to the facts of the case being dealt with by Bertram C.J. The fact that the parties were actuated by different motives would not make it any less collusion.

An attempt to define the term "fraud" as used in section 14 of the Yorkshire Registries Act 1884 was made by Stirling J. in *Battison v. Hobson*[2]. That was a case of solicitors who was held to be guilty of actual fraud in taking advantage of a defect in a security lodged with a bank to defeat the interests of his clients. In dealing with the case Stirling J. states that he understands "actual fraud", as used in the section, to mean fraud in the ordinary popular acceptance of the term, that is fraud carrying with it grave moral blame, and not what has sometimes been called legal fraud, or constructive fraud, or fraud in the eye of a Court of law or a Court of equity. This is what I understand is meant by the term as used in our Ordinances under consideration, and Mr. Perera for the respondent agrees with this conclusion. It seems to me also to conform to what has been held in earlier decisions, even if the parties themselves in any given case may not be conscious of any dishonesty. This latter state of mind may of course be due to various reasons, although in fact grave moral blame exists.

[1] *23 N. L. R. 143.*

[2] *(1896) 2 Ch. 4037.*

The case for the defendant as represented to us during the argument on the appeal was that he had done nothing more throughout his transactions with Rajapakse than an ordinary prudent man would have done. It was suggested for him that in 1915 he was aware that Benjamin Rajapakse's father had promised to pay the latter's debts, but that inasmuch as he was informed by Benjamin Rajapakse that he had not done so, Benjamin Rajapakse continued as owner of the property from 1908, not having registered the deed of gift because the agreement between them had not been carried into effect. I have already called attention to the absence in the statement of facts prepared on information supplied by Benjamin Rajapakse for the opinion of counsel in August, 1915, of any reference to any agreement between father and son in 1908, or of any failure to carry out that agreement on the part of the father. I can find no reliable evidence that defendant was ever told of this alleged breach of the agreement by the father, and there is of course no evidence by defendant himself that he was so told. There was no doubt a statement to the effect that Benjamin Rajapakse had paid off the mortgage, but it did not go beyond that. Even if defendant had been told of the agreement between father and son which was come to between them owing to the financial difficulties of the latter, one would have expected him to have been anxious to ascertain how Benjamin Rajapakse had himself settled the debt after all from his own funds.

It is not denied now by either side that Benjamin Rajapakse has committed a fraud on his son in 1915 by conveying the property to defendant, after having donated it to the former in 1908. What is urged for defendant in addition to what I have stated is that he had in 1915 no knowledge of this fraud, that he owed no duty to that son, and was in no fiduciary position or position of trust as regards him. When, however, he obtained the conveyance in 1915 he knew of the earlier conveyance, and it seems to me that on the facts he was aware of a great deal more than the mere existence of a prior and unregistered conveyance. He knew the earlier conveyance was to the minor son of his grantee, he knew an attempt had been made to conceal it and must have suspected that Rajapakse was the author of that attempt, he knew that conveyance was unregistered, he knew it was the duty of Rajapakse as father and guardian of his son to have the earlier deed registered, he knew counsel had advised that Rajapakse had no title to the property, and was not entitled to have it reconveyed to him, he knew Rajapakse was in the hands of money lenders who were pressing him, he knew Rajapakse was trying to sell this property to others to raise money, he was told that if he took a conveyance litigation might result in view of the earlier deed, and it was a dangerous thing to do, and he knew if Rajapakse registered the deed to his son as he was told he should do, he (defendant) could not even plead the benefit of the Registration Ordinance. Knowing all this, although it probably did not require any persuasion, he got Rajapakse during the course of the transaction to undertake not to register the deed to the minor; he pushed through the conveyance to himself with great celerity, he showed no desire to want the advice of Mr. Alvis who nevertheless cautioned him as to the risk he was taking; he dispensed with searches, lent Rajapakse Rs. 40,000 on mortgage, which in the circumstances put the latter in his

power, and could only result in the conveyance which to judge from his actions he seemed bent on obtaining. In my view of the facts he obtained the deed by fraud within the meaning of the Ordinance, for under the circumstances disclosed he cannot in my opinion be in any better position than his grantee. He, knowing of the fraud of the latter, took advantage of it for his own purposes. To apply some of the tests used in the cases cited, both he and Rajapakse had clearly a common end, although the motives that actuated them were different. Defendant must have known his conduct was underhand as against the minor if he gave any thought to the matter. His eyes were fully open as to all the circumstances and as to the risk he was taking, in spite of which he completed the transaction to see if he could not get the land for himself by getting this deed and having it registered at once. In addition to fraud there was also, in my opinion, on the facts collusion proved between him and Rajapakse in his obtaining the deed, and also in securing its prior registration. In those circumstances the deed P 4 obtains no benefit by its prior registration.

The next question to be decided is, since the deed P 4 does not convey any title to defendant, whether the land vests in him by virtue of the Crown grants subsequently obtained by him.

The land in question, it is urged, is Crown land within the meaning of section 6 of the Ordinance No. 12 of 1840. The defendant, subsequent to his obtaining the conveyance from Rajapakse and after the inquiry by the Settlement Officer, obtained with Rajapakse's help grants from the Crown covering the same land up to 222 acres and 23 perches on payment of Rs. 4,962. He purchased in addition 11 acres 3 roods and 36 perches of the extent conveyed to him under the Waste Lands Ordinance, for which he paid Rs. 226. He purchased from the Crown and obtained a grant for a further 12 acres 2 roods and 18 perches of Crown forest, for which he paid Rs. 505, and he also appears to have purchased from outsiders, who had themselves at the settlement obtain Crown grants, an extent of 8 acres 16 perches for the sum of Rs. 131. He got in all by his subsequent grants and deeds a total of 274 acres 3 roods and 13 perches.

With regard to the settlement it is clear that sometime before the defendant appeared on the scene, that is in 1913, Benjamin Rajapakse employed a surveyor, the witness Murray, to make a survey of Raigamwatta estate for the purpose of obtaining from the Government Agent a certificate of the Crown having no claim to the land under section 7, Ordinance No. 12 of 1840, or as it is commonly called a certificate of quiet possession. Murray made the survey and prepared a tenement sheet (exhibits P 31 and P 30). This survey and tenement sheet were subsequently used in the settlement proceedings that preceded the issue of the Crown grants to the defendant. The witness described the procedure followed when a person wants a settlement of land in the Province in question, which procedure he followed in this instance, and it is clear from his evidence and also from the evidence of the witness F. A. Wickremasinghe, the Land Settlement Office clerk, that at the settlement inquiry the deeds obtained by an applicant, usually called village deeds, are recognized for the purpose of making the settlement, having regard to the age

of the plantations on the land, the object of the settlement being, as the latter witness states, to see that the party who is entitled to the land under the documents gets a grant for the land. Any payment made on settlement usually represents, I understand, the bare value of the land without improvements

After the employment of Murray as stated above in 1913, Benjamin Rajapakse took no further steps for the time being. In the course, however, of his negotiations with the defendant he agreed to help him to get Crown grants to which the owner under the village deeds would have had a claim and as has been seen, in exhibits P 4 and P 5, covenanted to do so. The letter (P 16) from defendant to Mr. Alvis contained his instructions on this point (see 2B of Instructions P 17), the costs of obtaining the grants, however, to be borne by the defendant. The letter (P 37) of April 24, 1917, from defendant's proctors to the Settlement Officer in making the claim forwards Murray's tenement sheet of 1913. In reply to a request from the Settlement Officer to forward the title on which the claim was based, the proctors forwarded the title deeds of the property. These, it is conceded, must have been P 4 and Benjamin Rajapakse's title deed D 4 and probably the earlier deeds. The Settlement Officer's reply is D 57 of June 1, 1917. He points out that the deeds forwarded do not rebut the legal presumption that the land is the property of the Crown and that what is really sought is a settlement, and that the claim will be inquired into upon that footing. That the claim was in fact made in Benjamin Rajapkse's name seems clear. (See block survey tenement list D 56.) He and defendant were present, with other claimants at the inquiry. The Settlement Officer was aware that Benjamin Rajapakse had purported to convey his village title to defendant, but was not informed that in fact Benjamin Rajapakse had already conveyed that title to his son. There is evidence to show that twenty acres of the land dealt with under the deed P 4 and earlier deeds were paddy lands, which would come under section 8 of Ordinance No. 12 of 1840. Apart from that portion, the claimant had no statutory right to obtain a grant under section 8 of the Ordinance in respect of lands that come within the provisions of section 6 (vide *Babappu v. Don Andris* [1]). It is clear, however, from the evidence that the purpose of the settlement inquiry is to settle the land, subject to what the witnesses say as to the age of the plantations, upon the persons entitled thereto under the village title. In other words, the Settlement Officer for the purpose of deciding who is entitled to the grant recognizes the equitable interests of the claimants as disclosed by their village titles, in practice applying the provisions of section 8 of the Ordinance as regards possession and payment. This, I think I might well say, is common knowledge and was of course known to Benjamin Rajapakse, and there is not the least reason to doubt it was known to the defendant. It is the recognized policy of the department in settlement matters. The fact of the earlier conveyance was not disclosed to the Settlement Officer, for it is clear that had it been produced, any grant obtained by Rajapakse must have been obtained on behalf of, and for the benefit of, his son, who had village title in his own name and possession through his father.

[1] *13 N. L. R. 273.*

There is some analogy, it seems to me, to cases where Crown grants have been made after settlement proceedings under the provisions of the Ordinance No. 12 of 1840, in the class of cases in England that may arise under the Enclosure Acts. *Yem v. Edwards*[1], cited to us in the course of the argument, was one of the latter class. Grants of property made thereunder are subject to equitable interests that may exist, the legislature never intending, as stated by Page Wood V.C., to disturb existing equities or to give more than a legal title to the party who at the time of the passing of the Act might happen to be the holder. In the case before us the claimant had no statutory right under the Ordinance to any portion of the land, the subject of his claim, beyond twenty acres, but as I have pointed out, for the purpose of granting Crown title, the policy and practice in settlement is to recognize and give effect to claims based upon village title and possession. In a local case, *Sinnonappu v. Dingirihamy*[2], where a Crown grant in favour of several grantees conveyed property to them *simpliciter* without specifying the respective shares of the parties on a plea that the grant was made in equal shares, Wood Renton J. pointed out that there was nothing to prevent the Court considering the nature of the grant and of the intention of the parties who had applied for and obtained it. A consideration of the nature of the grant would, I take it, include, if necessary, a consideration of all the equities arising in the case. Such a view of the law seems to have been also given effect to in *Coudert v. Lewis*[3]. These decisions cannot be reconciled with the argument advanced on behalf of the defendant, that the Crown grants having been issued in his name and to him personally, however they may have been obtained, that fact is now conclusive of the case, and that he has now acquired a conclusive title to the lands claimed by the plaintiff in the schedule to the plaint. He and Benjamin Rajapakse, having been parties to the deed P 4 and its registration in the circumstances I have already described, acted further in fraud of the minor and collusively in obtaining the Crown grants and final order mentioned in issue 11, concealing the fact that the village title was in the minor, and misrepresenting the true state of affairs at the settlement inquiry. Any rights therefore granted to the defendant thereunder must, in my view of the law, be necessarily held by him on behalf of the minor from the date of the grants, and now on behalf of the substituted plaintiff.

There was one further ground put forward, somewhat tentatively, so it seemed to me, and briefly at the end of a long argument on behalf of the defendant, of which it is necessary to say very little. It was urged that the deed of gift by Rajapakse to his minor son was void as he was donating something that did not belong to him. We were referred to *Voet, bk. 39, tit. 3, s. 10* on this point. It is not denied, however, that there were interests in Raigamwatta in others than the Crown which were salable, for defendant himself purported to buy these rights from Rajapakse. If Rajapakse could sell these rights to defendant, he could equally donate them to his son. It is not denied also that land held under village titles is frequently the subject of purchase and sale, and therefore it may be the subject of donation. I do not think there is anything in the argument raised on this ground.

[1] *3 K. & J. 564.*

[2] *15 N. L. R. 259.*

[3] *4 Bal. N. C. 40.*

For the above reasons the appeal must be allowed, and the decree entered dismissing plaintiff's action must be set aside.

The case must now go back to the lower Court for further inquiry on the question of identity of the lots in the different grants, with the six parcels of land set out in the schedule to the plaint, and for the District Judge to draw up the necessary decree (as mentioned in his judgment) setting out the lots to which the plaintiff is entitled. The eighth issue, relating to the question of compensation for improvements alleged to be due to the defendant and the question of damages to plaintiff, the trial Judge stated he also reserved until after the final decision on the other issue. These questions will also now have to be dealt with in the lower Court.

The appellant is entitled to his costs of this appeal, and to his costs in the lower Court. The added respondent must pay his own costs in both Courts. The plaintiff is also entitled to his costs in the lower Court up to the time he assigned his rights.

MAARTENSZ A.J.—His Lordship, after dealing with the facts, proceeds as follows:—

It was admitted that the conveyance by Benjamin Rajapakse to the defendant, deed No. 5,487 dated September 28, 1915 (P 4 was duly registered on October 1, 1915, and would have priority over the deed of gift No. 1,294 (P 1) in favour of John Rajapakse unless the plaintiff proved that the deed (P 4) or its registration had been obtained by fraud or collusion.

Those deeds were executed and registered in 1915, but the Ordinance which is applicable is the Registration of Documents Ordinance, No. 23 of 1927.

Section 7 enacts that—

" (1) An instrument executed or made on or after January 1, 1864, whether before or after the commencement of this Ordinance shall, unless it is duly registered under this chapter, or, if the land has come within the operation of the Land Registration Ordinance, 1877, in the books mentioned in section 26 of that Ordinance, be void as against all parties claiming an adverse interest thereto on valuable consideration by virtue of any subsequent instrument which is duly registered under this chapter, or, if the land has come within the operation of the Land Registration Ordinance, 1877, in the books mentioned in section 26 of that Ordinance.

" (2) But fraud or collusion in obtaining such subsequent instrument or in securing the prior registration thereof shall defeat the priority of the person claiming thereunder.

" (3) An instrument duly registered before the commencement of this Ordinance, under the Land Registration Ordinance, 1891, or any Ordinance repealed by that Ordinance, shall be deemed to have been duly registered under this chapter.

" (4) Registration of an instrument under this chapter shall not cure any defect in the instrument or confer upon it any effect or validity which it would not otherwise have except the priority conferred on it by this section."

The learned District Judge applied the Ordinance of 1891. Section 17 of that Ordinance corresponds to section 7 of the later Ordinance. But as there is no difference in the effect of the two sections nothing turns on it.

The learned District Judge found on the facts that Benjamin Rajapakse's father had not settled the debts as promised and that "when there was a failure of the condition on which the gift was made Benjamin Rajapakse ignored the deed of gift, kept it without being registered and dealt with the property as his own".

Earlier in the judgment he said: "In my opinion he (Benjamin Rajapakse) must have been fully aware of the consequences of non-registration and he held back the deed P 1 and P 33 from registration deliberately in order to take advantage of the effect of non-registration and after the execution of the deeds of gift dealt with the properties by mortgaging them from time to time as if he were still the owner."

He held that if Benjamin Rajapakse attempted to sell the property "in such circumstances it would be difficult to say that he was trying to commit a fraud on the donee".

He also held that there was no collusion between Abeysundere and Benjamin Rajapakse. In arriving at this conclusion he relied on passages from the judgment of Bertram C.J. in the case of *Ferdinando v. Ferdinando et al.*[1]

He observed that there would have been collusion if Benjamin Rajapakse had asked Abeysundere to help him in nullifying the effect of the deed of gift and that the main object of the subsequent transaction should have been to deprive the donee of the property gifted. "There should be", he said, quoting from Bertram C.J.'s judgment, "the joining together of two parties in a common trick" and they should have been "acting together for a common and direct end". He then puts himself the question, "can it be said that Rajapakse and Abeysundere were acting together for a common and indirect end?" and said "I think the answer is clearly in the negative".

This answer is based on the fact that, in his opinion, Abeysundere had no interest in Benjamin Rajapakse and was working entirely in his own interests and worked on the basis that in no circumstances would Benjamin Rajapakse have registered the deed of gift, and perhaps on a promise by Rajapakse that he would not register the deed of gift in the interval.

In support of this view the District Judge referred to the evidence of Rajapakse at page 213 that "his fixed intention was not to register the deed of gift" and "that as a matter of fact under no circumstances would he have registered the deed of gift" (page 220).

The District Judge further held that even if Benjamin Rajapakse had committed a fraud on his minor son, it would be necessary to prove that the defendant was aware before he got the transfer that a fraud was intended to be committed and actually joined in perpetrating it, and that the contention on behalf of the plaintiff that the fraud in this case was planned by Benjamin Rajapakse and "defendant allowed himself to be joined in perpetrating it" could not prevail as "it would apply to every

[1] *(1921) 23 N. L. R. 143.*

case where a subsequent purchaser takes a transfer with the knowledge of the existence of a prior or registered deed which is clearly not the intention of the legislature or the authorities on the point".

As regards consideration the District Judge was of opinion that though the defendant got a bargain, the price was not so low as not to represent the value which any *bona fide* purchaser would have been prepared to pay if the deed of gift was not in existence.

The learned District Judge finally held that deed No. 1,294 (P 1) was not delivered and not acted on (issue 3), that the deed of gift (P 1) was void against deed No. 5,487 (P 4) by reason of the registration of the later deed (P 4), that deed No. 5,487 or its registration was not obtained by fraud or collusion.

It was contended in appeal that the findings of fact and the decision on the law were incorrect, particularly the finding that the mortgage debt on Raigam estate was not paid by the defendant's father and that the condition on which the deed of gift (P 1) was executed was not performed by the father.

The only evidence on this point is that of Benjamin Rajapakse, who judging by his evasive answers must have been a very unsatisfactory witness, and the notary Silva.

Benjamin Rajapakse said in examination-in-chief, after relating the offer made by his father, ... "My father paid the debts".

In the course of his cross-examination by the defendant's counsel he was confronted with this statement made by him in case No. 12,105 of the District Court of Negombo regarding Rawita estate which had been gifted to his daughter by deed (P 33). "When my father was writing a cheque, my brother Wilfred asked my father to give him Rs. 50,000 if I was to be given Rs. 50,000. Therefore my father failed to give me money as promised. . . . . After that I dealt with the property as if it had not been gifted. I did not register the deed". He said in reply "I heard the evidence read out now. I am bound to say that the statements I made in the Negombo case were true".

Question: As a matter of fact is that evidence true?

Answer: (After much hesitation.) Yes, it is true.

The District Judge was of opinion that Benjamin Rajapakse was clearly trying to help the plaintiff and deliberately went back on statements which he had made in previous cases when the validity of the transfer to the defendant was not in question, and said "I think greater weight should be attached to the statements made by Benjamin Rajapakse in previous cases material to this case than what he states now".

He observed that if the debts had been paid by his father Benjamin Rajapakse would not have left the deeds of gift unregistered and the members of his family would not have allowed him to deal with the property as his own. He also pointed out that in the case stated by Mr. Alvis (P 9A) there is an averment "that the donor out of his funds discharged the mortgage which was in existence at the date of the deed of gift", and came to the conclusion that on the evidence and probabilities of the case it was difficult to hold that Benjamin Rajapakse's father

settled the debt as promised. In coming to this conclusion he did not lose sight of the fact that one of the lands gifted by P 1 called Seguwatta *alias* Dawatagahawatta was said by Benjamin Rajapakse to belong to his son at the time of the assessment for Riot Compensation (P 36).

It was contended that the District Judge was wrong in his opinion that the statement in case No. 12,105 of the District Court of Negombo was made when the validity of the deed of gift was not in question.

The subject of the action was, it was argued, the deed of gift (P 33), and the claim against Benjamin Rajapakse was made by the broker who negotiated a sale on the ground that the sale fell through owing to Benjamin Rajapakse's title being defective as he had gifted the property to his minor children, and it was to Benjamin Rajapakse's interest to establish, if possible, that the deed of gift was ineffective to divest him of title.

This contention is, in my opinion, a sound one, for it was clearly to Benjamin Rajapakse's interest to contest the validity of the deed of gift.

It was also urged that the District Judge had lost sight of Benjamin Rajapakse's evidence in case No. 43,890 of the District Court of Colombo, where he said :—" There were mortgages on Raigam before I gifted it to my son John. My father paid off that mortgage. There was no mortgage on the property when I gifted it to my son John ".

It was, I think, rightly urged that this statement is of greater probative value, as in the Colombo action Benjamin Rajapakse's title to the land was not in issue.

As regards P 9A it was urged that Benjamin Rajapakse was there trying to establish his title to Raigam estate, and P 9A shows that he did not disclose to Mr. Alvis the arrangement with his father. As I have said before if this arrangement had been disclosed to Mr. Alvis, as Benjamin Rajapakse said he did, he would no doubt have mentioned it in his statement to counsel. It would certainly have been an additional reason for moving the Court to revest the property in Benjamin Rajapakse if the deed of gift had been executed in pursuance of an agreement with his father which his father had not performed.

As regards the family it was pointed out that the father was dead in 1915 and there was no evidence of the existence in 1915 of any one who could properly object.

The District Judge rejected the evidence of notary Silva that the father paid the mortgage because he said the mortgage debt was paid on the day P 1 was executed, September 20, 1908, whereas it was discharged on October 21, 1908 (Encumbrance Sheet P 41).

It was urged that the notary was speaking to events which had taken place some 24 years ago and did say in cross-examination that he thought the Rs. 15,000 paid on the bond was paid after the deed of gift had been executed.

The only circumstance therefore which points to the mortgage debt not having been paid by Benjamin Rajapakse's father is the fact that he did not take steps to have the deed of gift registered. Against that is the fact that the bond was discharged within a month of the execution of the deed of gift and there is not a tittle of evidence that Benjamin Rajapakse got the money to pay off the debt from another source than his father.

Benjamin Rajapakse's statement in case No. 12,105 of the District Court of Negombo that his father did not pay the debt because Wilfred Rajapakse demanded an equal sum, I find difficult to believe considering that Wilfred had come to his brother's assistance a few years before.

I am of opinion that the weight of evidence is in favour of the allegation that Benjamin Rajapakse's father's money was used to pay off the mortgage debt over Raigam estate in existence in 1908.

The deed of gift P 1 was accepted by John Rajapakse's mother on his behalf and Benjamin Rajapakse's possession of the estate must be presumed to have been for and on behalf of his minor child whose natural guardian he was.

I am of opinion that the third issue (was deed No. 1,294 (P 1) delivered and acted upon ?) should be answered in the affirmative.

Whether the deed P 1 was delivered or not, Benjamin Rajapakse was the natural guardian of his son and any act by him derogating from the rights of the son, would be a breach of the duty cast upon him in his fiduciary character to protect the interests of his son. His first step against the interests of his son was to mortgage both Raigam and Rawita by the bonds to which I have already referred, D 35, D 37, D 7, D 6, and P 14. His evidence as regards the mortgages is that the Chettiars discovered what lands he owned and insisted on their being mortgaged. He added, " that is why I did not tell the Chettiars about the deeds of gift. I discovered that owing to the non-registration of the deeds of gift I could deal with the property as my own ".

This evidence that he did not tell the Chettiars about the deeds of gift entirely negatives Benjamin Rajapakse's evidence that the piece of paper was pasted on the margin of the deed by the Chettiar. His evidence leaves no doubt in my mind that knowing or having discovered he could deal with the estates as the deeds of gift were not registered, he concealed the endorsement on his title deeds by pasting paper over it and executed mortgages and ultimately sold the estate. The endorsement of the gift to his daughter on the Crown grant of Rawita in favour of Benjamin Rajapakse was also covered over by a piece of paper.

The evidence of John and Benjamin Rajapakse establishes that John lived with his father till about the year 1915 and that John did not attain his majority till the year 1924.

Benjamin Rajapakse in selling the estate clearly committed a breach of the duty he owed to his minor son. It is I think equally clear from the facts I have set out regarding the circumstances in which the deed of sale, No. 9,487 (P 4), was executed, that Abeysundere knew that Benjamin Rajapakse was committing a breach of the duty he owed to his son. It was however contended by the respondent that mere knowledge of the existence of the unregistered deed of gift did not deprive the defendant of the priority gained by his deed by registration (*D. C. Kandy, Case No. 67,295* [1], *Kirihamy. v. Kiribanda* [2], and that there was no fiduciary relationship between John Rajapakse and the defendant, as was the case in *Lawaris v. Kirihamy* [3], and *Battison v. Hobson* [4], and it was argued that

[1] *(1877) Ram. Reports, 198.*
[2] *(1911) 14 N. L. R. 284.*
[3] *(1914) Balasingham, Notes of Cases, p. 38.*
[4] *(1896) 2 Chancery, p. 403.*

on the facts of this case all the minor was entitled to was the price paid by the defendant to Benjamin Rajapakse for the estate as provided by section 90 of the Trusts Ordinance of 1917.

It was also contended that the District Judge was right in holding that Benjamin Rajapakse and the defendant did not act in collusion in obtaining the deed of sale or securing its registration.

Section 90 of the Trusts Ordinance, No. 9 of 1917, enacts as follows:—

> "Where a trustee, executor, partner, agent, director of a company, legal adviser, or other person bound in a fiduciary character to protect the interests of another person, by availing himself of his character, gains for himself any pecuniary advantage, or where any person so bound enters into any dealings under circumstances in which his own interests are, or may be, adverse to those of such other person and thereby gains for himself a pecuniary advantage, he must hold for the benefit of such other person the advantage so gained."

It was submitted that the Ordinance contained the whole law of trusts in Ceylon, and that the rule of English law set out thus in *Lewin on Trusts* at page 877: "But if the alienee be a purchaser of the estate at its full value, then subject as aforesaid (that is, any bar arising out of the Statute of Limitations) if he take with notice of the trust, whether the notice be actual or constructive, he is bound to the same extent and in the same manner as the person of whom he purchased" did not apply in Ceylon.

Section 118 of the Trusts Ordinance, No. 9 of 1917, appears to negative this argument.

I shall deal with the question more fully when dealing with the defendant's claim to title from the Crown. In view of the conclusion I have come to, that the deed of gift is not void as against the deed of sale, the question of trust does not arise on the third, fourth, fifth, and eleventh issues.

The plaintiff must establish that the deed of gift is not void as against the deed of sale to the defendant under sub-section (2) of section 7 of the Registration Ordinance, that is, "that the last mentioned deed on the prior registration thereof was obtained by fraud or collusion".

The respondent invoked the case of *Ferdinando v. Ferdinando* (*supra*). in support of his contention that there was no fraud in obtaining the deed of sale or its prior registration.

In that case "The first defendant transferred to his son in 1908, by a deed which was never registered, a tract of land, subject to a life interest in his favour. The son, nevertheless, possessed and improved the land. He contracted a marriage distasteful to the family, and died in 1918, leaving a widow and a child. The widow (plaintiff) sent a letter of demand to the first defendant for the title deed. Three days thereafter, by a deed which was registered, the first defendant transferred the land to his son-in-law (second defendant), who was aware of the earlier deed; the consideration was stated to be Rs. 5,000, which included a debt of Rs. 2,750 which was already due from the first defendant to second defendant. The second defendant soon after transferred the property to the third defendant".

Bertram C.J. came to the conclusion that there was no fraud. He said: "I think the first defendant may well have supposed that he had a moral right to do what he was doing. He may have thought that his son's widow had no moral claim to the property, that he would never have conveyed it to his son if he had not thought that his son would survive him, and he may have felt himself justified in giving priority to the claims of his son-in-law. Any reasoning he may have so employed may have been sophistical but I do not think it would be correct to describe his action as fraudulent".

I think he took a lenient view of the conduct of the first defendant in view of the construction of the words "actual fraud" in the case of *Battison v. Hobson* (*supra*).

The words were construed as meaning fraud in the ordinary popular acceptance of the term, *i.e.*, fraud carrying with it grave moral blame and not what has sometimes been called legal fraud or constructive fraud or fraud in the eyes of a Court of law or a Court of equity.

On this construction of the word fraud I have no doubt that Benjamin Rajapakse was guilty of fraud when he executed the deed of sale in favour of the defendant, as he knew or must have known that he was depriving his son, who was unable to protect himself, of property which had been gifted to him, and the deed was the culmination of a course of action pursued by the defendant to use the property as his own to finance himself by not registering the deed of gift. But the words of the proviso to the section suggest that the fraud must be fraud on the part of the transferee, such as a fiduciary relationship to the other party as in *Lawaris v. Kirihamy* (*supra*), the relationship of solicitor and client (*Battison v. Hobson*) (*supra*), or the part which he played in the previous transaction (*Kirihamy v. Kiribanda*) (*supra*).

The defendant does not come within the category of these cases, but he knew that Benjamin Rajapakse had gifted the estate to his son, that the son was a minor and unable to register or have the deed of gift registered, and that Benjamin Rajapakse had taken advantage of his position and not registered the deed of gift with a view to financing himself when pressed for money. In these circumstances I do not think it can possibly be said that he was not guilty of grave moral blame and therefore not guilty of fraud. And there can be no doubt that he must have arranged with Benjamin Rajapakse not to register the deed of gift before the deed of sale was registered.

I am accordingly of opinion that the deed of sale No. 5,487 dated September 28, 1915, (P 4) was obtained and its prior registration secured by fraud.

I am of opinion that there was collusion as well. The respondent contended again on the authority of the case of *Ferdinando v. Ferdinando* (*supra*) that there was no collusion as the vendor Benjamin Rajapakse and Abeysundere the vendee were, to use the words of the Chief Justice in that case, "acting independently in their own interests".

The argument on behalf of the respondent was put in this way:—

If two persons conspired together to deprive another of his property by the prior registration of a subsequent deed it was collusion. But if each

was acting in his own interests there could be no collusion, although to attain this object it was necessary that they should act together to secure the prior registration of the deed.

I am unable to accept this argument; as the law stands mere knowledge of the existence of a prior registered deed will not deprive the subsequent registered deed of its priority. But if the grantor and the grantee of the deed had to act together to secure the prior registration I am of opinion that the prior registration must be held in law to have been secured by collusion.

Here Abeysundere knew that the deed of gift existed and that to secure the prior registration of his deed of sale he had to act with Benjamin Rajapakse whose duty it was to register the deed of gift. In other words there had to be an arrangement with Benjamin Rajapakse that he should not register the deed of gift before the deed of sale (P 4) was registered. The arrangement was nothing less than a collusive act to secure the prior registration of the deed of sale. The fact—if it is a fact—that Benjamin Rajapakse had, before Abeysundere came on the scene, made up his mind not to register the deed of gift cannot affect this view of the transaction.

I accordingly hold on the fifth issue that deed No. 5,487 and its prior registration was obtained by fraud and collusion, and on the fourth issue that the deed of gift (P 1) is not void as against deed No. 5,487 (P 4).

I shall now deal with the first, sixth, seventh, ninth, tenth, and twelfth issues.

The first and ninth appear to overlap, so do the sixth and tenth. These issues arise from a title set up by the defendant on certain Crown grants and a Final Order published under the Waste Lands Ordinance.

The first question for decision is whether the parcels of land described in the schedule to the plaint were forest and chena lands. The District Judge's finding that the land comes within section 6 of Ordinance No. 12 of 1840, that is, that it is forest, waste, or chena lands was not seriously contested in appeal, nor was it contested that the lands are situated in a district comprised in the Kandyan provinces.

Section 6 of Ordinance No. 12 of 1840 enacts—

> "All forest, waste, unoccupied, or uncultivated lands shall be presumed to be the property of the Crown until the contrary thereof is proved, and all chenas and other lands which can be only cultivated after intervals of several years shall, if the same be situate within the districts formerly comprised in the Kandyan provinces (wherein no thombo registers have been heretofore established), be deemed to belong to the Crown and not to be the property of any private person claiming the same against the Crown, except upon proof only by such person of a sannas or grant for the same, together with satisfactory evidence as to the limits and boundaries thereof, or of such customary taxes, dues, or services having been rendered within twenty years for the same as have been rendered within such period for similar lands being the property of private proprietors in the same districts; and in all other districts in this Colony such chena and other lands which can only be cultivated after intervals of several years shall be deemed to be forest or waste lands within the meaning of this clause."

The lands described in the schedule to the plaint therefore belonged to the Crown when the deed of gift (P 1) was executed. Abeysundere acquired them from the Crown or from Crown grantees and his contention is that he has a title to the lands in dispute which is not affected by considerations of collusion or fraud.

On the other hand, the appellant contends that the Crown issued grants to Abeysundere because he was the holder of a transfer from Benjamin Rajapakse and that, if that transfer does not take priority over the deed of gift, Abeysundere must be deemed to have acted as John Rajapakse's agent and to hold the lands in trust for him.

Up to a point in this Court the arguments proceeded on the footing that Benjamin Rajapakse had acquired a statutory right to a Crown grant for the parcels of forest and chena lands which he had planted and improved.

But there is a ruling to the contrary in the case of *Babappu v. Don Andris*[1]. The plaintiff in that case prayed for declaration of title to a land which he had acquired by purchase from the Crown. The defendants alleged that the land had been planted by one of their predecessors in title 30 years before and that he and they had possession ever since. The District Judge held that the land was jungle or chena and probably Crown property, that the planting took place about 20 years before action, and that at the date of the sale to the plaintiffs in 1907 by the Crown the defendants had acquired a statutory right under section 8 of Ordinance No. 12 of 1840, and dismissed plaintiff's action.

In appeal it was held that: "A person who possesses and cultivates chena (jungle) land for a period under thirty years does not acquire any right under section 8 of Ordinance No. 12 of 1840. The effect of section 2 of Ordinance No. 9 of 1841 being to exclude the application of section 8 of Ordinance No. 12 of 1840 to any land referred to in section 6 of that Ordinance".

Wood Renton J. who delivered the main judgment said in conclusion:—

> "The construction that we are placing in this case on section 2 of Ordinance No. 9 of 1841 will, I fear, revolutionize for the future the practice that has grown up under Ordinance No. 12 of 1840, of acknowledging in cases like the present a statutory interest under section 8 of that Ordinance as a matter of strict legal right . . . ."

According to the evidence of Wickremesinghe, a clerk in the Land Settlement Office called by the defendant, the practice has continued.

The proceedings under Ordinance No. 12 of 1840 are started after the block surveys are received from the Surveyor-General with a tenement sheet showing the names of the people who claimed the lots.

The Settlement Officer visits the lands and goes through the various claims with the Headman, and the names of other claimants, if any, are included in the tenement sheet.

The Settlement Officer next advertises the lots for sale or settlement in the *Government Gazette*. If the plantation is over 30 years old the land is declared to be private, if under 30 years the Settlement Officer comes to terms with the claimant and issues a Crown grant after examining his title deeds.

Mr. Murray, the Surveyor, gave evidence to the same effect.

[1] *(1910) 13 N. L. R. 273.*

In 1913 Benjamin Rajapakse began taking steps to arrive at a settlement with the Crown regarding his title to Raigamwatta. For that purpose he got Mr. Murray to make what is called a C. Q. P. (Certificate of Quiet Possession), plan P 31, and a tenement sheet (P 30). The boundaries were shown to the Surveyor by Benjamin Rajapakse and he shows the land in his survey divided into blocks according to the "condition" (cultivation) of the land. The extent shown in the plan is 360 acres and 13 perches. The aggregate extent of the lots described in the schedule to the plaint aggregate 251 acres 2 roods and 28 perches. The lots are not located in plan P 31. The District Judge, on the question of the identity of the lands sued for, said that that the lots described in the schedule to the plaint and in the deed of gift (P 1) were identical with six of the lots conveyed to the defendant, and "it was clearly these lots that the defendant claimed through Rajapakse before the Settlement Officer".

He therefore thought "that the land claimed by the plaintiff must be held to be within the estate claimed by the defendant under the name of Raigamwatta".

On April 24, 1917, the defendant's solicitors, Messrs. de Vos & Gratiaen, sent the plan and tenement sheet made by Mr. Murray to the Settlement Officer, Colombo, with a request that a C. Q. P. (Certificate of Quiet Possession) should be issued to the defendant (P 37). The Settlement Officer requested the solicitors to set out the defendant's title (P 39). The title deeds were sent to the Officer with letter (P 40).

The Settlement Officer by letter (D 57) dated June 1, 1917, informed Messrs. de Vos & Gratiaen that the defendant will not be entitled to a C. Q. P. for any of the land except a few acres of old garden, as the private deeds forwarded by him do not rebut the legal presumption that waste land in a Kandyan province is the property of the Crown.

The Officer added: "If what your client is really seeking is a settlement of his disputes as to title with the Crown, the matter will come up in the ordinary course of business within the next two years, as Giritalane korale will shortly be taken up for settlement purposes and half of the korale is already surveyed, the claim will then be inquired into".

The claims of the defendant were investigated and Crown grants issued to him.

Benjamin Rajapakse's evidence is that he was present at the inquiry and was questioned by the Crown officers, that Abeysundere was also present, and that the Crown officers were aware that he had transferred his "village title" to the defendant.

Later he said: "I got Mr. Murray to make a plan of the lands of Raigamwatta which I was going to claim from Government. I pointed out the boundaries. Mr. Murray made a plan and gave it to me. While I was negotiating with Government I sold that land to defendant. I said I would get the Crown grants or C. Q. P.'s in my name, but the defendant's lawyers said that they would go forward and get them. Defendant also told me so and went before the Settlement Officer. I said I would help the defendant in getting the Crown titles".

This part of the case has not been fully inquired into in the District Court, but I think it is clear from the evidence that the Crown grants were issued to Abeysundere because he had on P 4 apparently acquired the land and the plantation from Benjamin Rajapakse.

The learned District Judge rejected the contention of the plaintiff that if there was fraud or collusion in the execution or registration of the deed of transfer in favour of the defendant, the Crown grants and the Final Order would enure to the benefit of John Rajapakse. If this contention was based on the principle that title subsequently acquired by a vendor who has voluntarily sold a land to which he had no title enures to the benefit of the vendee, I agree with the decision of the Judge.

The principle does not extend to title acquired by another transferee from another vendor.

It was also argued in the District Court as well as in this Court that Abeysundere held the estate or so much of it as was sued for for the benefit of John Rajapakse.

It will in this connection be necessary to determine whether the English law of trusts is limited by the provisions of Ordinance No. 9 of 1917.

The answer turns on a construction of section 118 of the Trusts Ordinance which enacts that—

> "All matters with reference to any trust, or with reference to any obligation in the nature of a trust arising or resulting by the implication or construction of law, for which no specific provision is made in this or any other Ordinance, shall be determined by the principles of equity for the time being in force in the High Court of Justice in England".

Respondent's counsel contended that this section provided for the application of the English law only in matters incidental to a trust or obligation provided for in the Ordinance for which the Ordinance had not provided.

I am unable to accept this contention. The section, I think, has the effect of making the English law applicable to trusts or obligations in the nature of a trust arising or resulting by the implication or construction of law which has not been provided for by the Ordinance.

I accept the District Judge's finding that the consideration for the deed (P 4) was not so low as not to represent the value which any *bona fide* purchaser would have been prepared to pay if the deed of gift was not in existence.

The principle of English law applicable in such a case is set out thus in Halsbury's *Laws of England*, vol. xxviii. p. 88, s. 193 :—

> "Where a person, whether gratuitously or for valuable consideration, acquires property, or an interest in property, which is subject to a subsisting trust, he becomes a trustee of it for the purpose of the trust, if he has either actual or constructive notice of the trust".

and section 194 says that—

> "to constitute a person who takes a trust property for his own purposes a constructive trustee of it he must have notice that it is being misapplied by being transferred to him".

The District Judge was of opinion that the defendant could not be held to have had notice that the property was being misapplied by the transfer to him.

I am unable to agree with the District Judge that the defendant had no notice that the property was being misapplied by the transfer in this case.

It is clear from the evidence that he knew of the gift to John Rajapakse, that John Rajapakse was a minor, and that Benjamin Rajapakse was depriving the minor of his rights under the deed of gift (P 1) by executing the deed of sale (P 4), and the evidence stands unrebutted, for the defendant has not chosen to go into the witness box and deny the charges of fraud and collusion made against him.

I accordingly hold that the defendant was a trustee of the property for John Rajapakse, and that the Crown grants and Final Order on which he rests his title from the Crown were obtained by him as such trustee and do not give him a title which can prevail over the deed of gift.

The Madras case referred to by the District Judge does not apply in this case and need not be discussed.

I agree for the reasons given by the Chief Justice that the gift to John Rajapakse is not invalid because the Crown had title to the parcels of land gifted.

I accordingly hold that the plaintiff is entitled to judgment for the lands described in the schedule to the plaint. The case must go back to the District Court to determine of what lots the defendant is in possession, the damages plaintiff is entitled to and the compensation and right of retention, if any, to which the defendant is entitled.

The appellant will be entitled to the costs of the trial in the District Court and the costs of the appeal.

The costs of the further inquiry will be in the discretion of the District Judge.

The added defendant will pay his own costs in both Courts.

Appeal allowed.

PRINTED AT THE CEYLON GOVERNMENT PRESS, COLOMBO