Present : Fisher C.J. and Garvin J. 1929.

DE SILVA *et al. v.* WAGAPADIGEDERA.

272—D. C. Kandy, 33,761.

Registration—Fideicommissary gift unregistered—Sale by fiduciary heir—Registration of deed of sale—Priority.

Where a deed of gift creating a *fidei commissum* was unregistered and the fiduciary who was also the intestate heir of the donor sold the property to the defendant who registered his deed,—

Held, that the defendant's title was superior to that of the fideicommissary heirs.

James v. Carolis[1] followed.

APPEAL from a judgment of the District Judge of Kandy.

Loku Mudianse by an unregistered deed of 1868 (P1) gifted his rights in the land which was the subject-matter of this action to his wife subject to a *fidei commissum*, extending to the full period, in favour of his grandchildren Bandara Menika and Muttu Menika. Bandara Menika gifted her rights free of the *fidei commissum* to her son William by a registered deed of 1902, and William sold to the defendant-respondent by D 1 of 1914, registered on January 14, 1914. On the death of William, his widow and children brought this action against the defendant for a declaration of title to Bandara Menika's rights. In a previous appeal the Supreme Court held that

[1] *17 N. L. R. 76.*

1929.

De Silva v. Wagapadigedera

on an interpretation of P1 the plaintiffs were entitled to these rights, but at the subsequent hearing the defendant taking advantage of the fact that Bandara Menika was the intestate heir of Loku Mudianse claimed better title on the ground of prior registration. The District Judge upheld the contention.

H. V. Perera (with him *Rajapakse*), for plaintiffs, appellants.—The two claims of title go back to Bandara Menika—that is the common source. The defendant is bound by the recitals in his deeds. He must have had knowledge of P1.

A person who enters on property on a certain footing holds the property on the footing of that document. He and all those claiming through him cannot be allowed to plead a different title (*Board v. Board*[1]).

An attempt was made, but unsuccessfully, to limit this doctrine to wills (*Dalton v. Fitz Gerald*[2]).

Keuneman (with him *N. E. Weerasooria* and *Navaratnam*), for defendant, respondent.—The learned District Judge was right in giving D1 priority over P1. We get back to Loku Mudianse *via* Bandara Menika by treating her as an intestate heir.

[GARVIN J.—Can you give a single case where a son who received a deed of gift from his father has been allowed to say that he is the intestate heir ?

Ellapata v. Fernando[3] is very similar to this case. *James v. Carolis*[4] is directly in point and is binding. *Vide* also *2 Dow & Clarke's R. 480.*

[GARVIN J.—Can you extend the principle of *James v. Carolis* any further ?]

You must disregard all unregistered deeds if you can trace title through any other channel.

As regards the question of estoppel you cannot have an estoppel against the Statute law of the land.

The English cases are all based on an interpretation of the English Statute of limitations.

Paine v. Jones[5] is a case in which estoppel was not allowed.

The English law of estoppel by recitals in deeds is not in force in Ceylon (*Gunatileke v. Fernando*[6]).

Mere knowledge will not do (*Aserappa v. Weeratunge et al.*[7]). Section 17 of the Registration Ordinance does not bring in any form of notice.

[1] *(1873) L. R. 9 Q. B. 48.*
[2] *(1897) 2 Ch. 86.*
[3] *24 N. L. R. 375.*
[4] *17 N. L. R. 76.*
[5] *18 Equity Case 320.*
[6] *22 N. L. R. 385.*
[7] *14 N. L. R. 417.*

H. V. Perera, in reply.—Cases cited by the other side can be distinguished. *Paine v. Jones* (*supra*) has been distinguished in *Dalton v. Fitz Gerald* (*supra*).

We can rely on estoppels to prevent the defendant from going back to Loku Mudianse. The question of estoppel was not raised in *Ellapata v. Fernando* (*supra*) and could not have been raised in the *2 Dow & Clarke's* case.

March 8, 1929. FISHER C.J.—

In this case one Mudianse by deed of gift P1 dated December 4, 1868, created a *fidei commissum* over the property which is the subject-matter of the action. This Court has already held that under the provisions of that deed his daughter Bandara Menika was a fiduciary and in the events which have happened the plaintiffs and an infant who is not a party to the action are, so far as the construction of the deed is concerned, entitled to the property. Bandara Menika entered into possession under the deed, but it was never registered. By P3 dated June 10, 1902, Bandara Menika gave the property to her son William, who by D1 dated January 9, 1914, registered on January 14, 1914, sold it to the defendant for Rs. 2,000. The defendant is and has been for several years, though not long enough to establish a title by prescription, in possession of the property, and the question for decision is whether the plaintiffs have proved, and the onus is on them, that they have a title which prevails over that of the defendant.

The case set up for the plaintiffs involves a consideration of section 17 of the Land Registration Ordinance, No. 14 of 1891. In *James v. Carolis*[1] Lascelles C.J. said that the scope and object of the Ordinance is the protection of the purchaser for valuable consideration and there can be no doubt there where a question as to the effect of that action arises in its simplest form, namely, between two persons who have obtained transfers for valuable consideration from the same person, their respective rights will be decided, apart, of course, from any question of fraud and collusion, according to priority of registration. To construe the second proviso to the section to mean that the later in date of two transfers of the same land cannot be taken to have transferred property already dealt with by the former transfer would be to nullify the first paragraph of the section under which a previous dealing with property by a deed which is not registered is void as against a subsequent dealing by a deed which is registered.

In the present case there was no question of fraud or collusion, and the title of the plaintiffs entirely depends on the deed of gift P1. It must be taken that Bandara was the intestate heir of Mudianse but it is clear that apart from the effect of section 17 she had on

[1] *17 N. L. R. 76.*

1929.

FISHER C. J.

De Silva v. Wagapadigedera

interest in the property other than her life interest as fiduciary, and it is equally clear that under the provisions of that section P1 is void as against the defendants. The case, in my opinion, is covered by the decision in *James v. Carolis* (*supra*). In that case A conveyed a land to B and died. C, who was the intestate heir of A, conveyed to D, who registered his deed before B. Clearly C had in law no title, as A did not die possessed of the property. Nevertheless, the Court (three Judges) held that D's title prevailed. We need not therefore consider the question from the point of view that Bandara dealt with a register interest than to which she was entitled. But it was urged that notwithstanding the provisions of the section the defendant is estopped from disputing the rights of the plaintiffs under P1. In my opinion that is not so. Nothing which does not amount to fraud and collusion is sufficient to stop the operation of the section in favour of a party claiming under a duly registered deed. In the result the plaintiffs have nothing to rely upon to prove their title, but a deed which is void as against the defendant and their claim must fail.

As regards costs, the hearing in the Court below was due to the raising by the defendant of an entirely new defence which, had it been raised in the first instance, might have obviated the necessity for deciding any other question. I think the judgment in his favour in the Court below should be without costs, but he is entitled to the costs of the appeal.

GARVIN J.—I agree.

Appeal dismissed.