1945 *Present:* **Howard C.J. and Keuneman J.**

MITCHELL, Appellant, *and* FERNANDO *et al.*, Respondents.

344—D. C. Colombo, 731.

Mortgage—Shares in Company—Delivery of scrip—Delivery of possession—Cession of right—Sale in execution against mortgagor—Knowledge of mortgage—Title of Fiscal's transferee—Action on mortgage bond—Roman-Dutch law.

The first and second defendants mortgaged shares in a Company with the plaintiff by bond and deposited the share certificates with the plaintiff along with the bond. While the shares were under mortgage the third defendant purchased the shares in execution of a money decree against the first and second defendants and obtained Fiscal's conveyance. Thereafter the shares were registered in the Company's register under the name of the third defendant.

Held (In an action on the bond by the plaintiff), that delivery of the share certificates was not sufficient evidence of the effective delivery of the shares mortgaged. The possession of the share certificates did not give to the plaintiff such control and direction of the shares mortgaged as to be equivalent to possession in law of the shares mortgaged.

As regards delivery of possession the mortgagee of an incorporeal right stands on the same footing as that of a corporeal right. Although an incorporeal right is incapable of physical delivery possession may be given by cession of right.

Held, further, that, as the third defendant had knowledge of the mortgage, the plaintiff was entitled to resort to the shares in her hands in execution of a decree on the bond.

Held, also, that the Roman-Dutch Law was applicable to the case.

APPEAL from a judgment of the District Judge of Colombo. The facts appear from the head-note.

N. Nadarajah, K.C. (with him *E. F. N. Gratiaen* and *S. J. Kadirgamer*), for the plaintiff, appellant.—The question for consideration is, where shares in a Company have been mortgaged both by hypothecary bond and delivery of the share certificates to the mortgagee, whether an execution sale of the right, title and interest of the mortgagor in the shares extinguishes the mortgagee's rights even where the execution purchaser had knowledge and notice of the existence of the mortgage. The plaintiff in the present case is the mortgagee, the first and second defendants are the executors of the deceased mortgagor, and the third defendant had caused to be seized and sold and herself purchased the shares in question under a money decree in D. C., Colombo, No. 52,407.

Shares are regarded as movables. Sections 61-69 of the Companies Ordinance, No. 51 of 1938, are relevant. It is the English law which would govern a mortgage of shares. Section 3 of the Civil Law Ordinance (Cap. 66) definitely states that any matter relating to joint stock companies is to be decided according to the English law, unless it has been superseded by special enactment. There is no enactment superseding the

English law as regards mortgages of shares. Moreover, shares in Companies were things unknown to the Roman-Dutch law. According to English law, the method of dealing with shares is by share certificates. The certificates are the only evidence of title, and a mere deposit of them is sufficient to create an equitable mortgage—Palmer on Company Law (16th ed.) 127; *Societe General de Paris v. Walker* [1]; *Bradford Banking Co. v. Briggs* [2].

Assuming that Roman-Dutch law is applicable in the present case, a mortgage of movable property may be effectually made by delivery of the movable to the creditor coupled with an agreement that it is to be held as security—Wille on Mortgage (1920 ed.) 95 ; Vote 20. 3. 1 ; Voet 20 1. 12; Grotius *Intro* 2.48.26-28; *Tatham v. Andree* [3]. The difference in law between a mortgagee with possession and a mortgagee without possession of the property mortgaged is dealt with in *Adaicappa Chetty v. Perera et al.*[4]; *Voet 20. 1. 13;* Wille on Mortgage p. 257; *Coaton v. Alexander* [5]. See also *Miller v. Young* [6]; *Ramen Chetty v. Campbell* [7]; *Muttiah Chetty v. Don Martinas* [8]; *Casy Lebbe Marikar v. Aydroos Lebbe Marikar* [9]; *Meera Saibo v. Muttu Chetty* [10]; *Vellaiappa Chetty v. Pitcha Maulo*[11]. The view expressed in *Mohideen v. Abubucker* [12] on this question is *obiter.* The present case is to be dstinguished in two respects:—(1) there was delivery of the property mortgaged, (2) the purchaser had notice of the mortgage. A purchaser with notice does not stand in a better position than the pledgor himself—Lee's *Introduction to Roman-Dutch Law* (3rd ed.) p. 205; Wille on Mortgage p. 258.

The appellant is also entitled to succeed on the ground that the Fiscal's transfer to the third defendant conveyed merely "the right, title and interest" which the executors had in the shares; the interest of the executors was subject to the mortgage.

H. V. Perera, K.C. (with him *S. J. V. Chelvanayagam, E. B. Wikremanayake* and *V. Wijetunge*) for the third defendant, respondent.—The law in Ceylon with regard to the mortgage of movables is the Roman-Dutch law—*Hong Kong and Shanghai Bank v. Krishnapillai* [13]. The equitable mortgage of English law is not recognized in Ceylon. Under the Roman-Dutch law a mortgage of movables unaccompanied by delivery does not create any rights *in rem.* The delivery of the share certificates in the present case is not the same thing as the delivery of the shares. A share certificate is merely of evidential value. A share is not a corporeal thing, and a symbolic delivery is possible only where physical delivery is possible. In the case of an incorporeal thing or right the form of delivery may vary according to the nature of the thing or right, and assignment or cession—Wille on Mortgage, pp. 127-8; Lee's *Introduction to Roman-Dutch Law (3rd ed.) p. 202.* In the absence of delivery of the shares to the plaintiff along with the mortgage bond,

[1] *L. R. 11 A. C. 20 at 29.*
[2] *L. R. 12 A. C. 29.*
[3] *(1863) 1 Moore's P. C. (N. S.) 386.*
[4] *(1928) 30 N. L. R. 27.*
[5] *S. A. L. R. (1879) 9 Buch. 17.*
[6] *(1872-6) Ram. 23.*
[7] *(1896) 2 N. L. R. 94.*
[8] *(1904) 2 Bal. 182.*
[9] *(1890) 1 C. L. Rep. 1.*
[10] *(1893) 3 C. L. Rep. 37.*
[11] *(1899) 4 N. L. R. 311.*
[12] *(1920) 8 C. W. R. 118.*
[13] *(1932) 33 N. L. R. 249.*

the third defendant who has obtained delivery of the shares in accordance with the prescribed rules is entitled to keep them—*Tatham v. Andree*[1].

The fact that the third defendant had, when she bought the shares at the execution sale notice of the mortgage in plaintiff's favour cannot affect her rights. A transfer or sale from the mortgagor stands on a different footing from a transfer at a Fiscal's sale. In the former, a purchaser with notice of the mortgage can be sued by the mortgagee, but in the case of an execution sale as against the mortgagor the mortgagee without possession cannot prevent the sale free from the mortgage and cannot follow the mortgaged goods into the hands of the purchaser—*Miller v. Young* (*supra*); *Adaicappa Chetty v. Perera* (*supra*). Where the sale is by the Fiscal the purchaser is not regarded as a privy of the debtor and gets his title solely by operation of law. See also *Silva v. Gimarah* [2].

What was sold to the third defendant was not the right, title and interest of the mortgagor in the shares but the shares themselves.

Nadarajah, K.C., in reply.—Execution purchaser is not in a better position than a purchaser at a private sale—Wille on Mortgage p. 259; *Coaton v. Alexander* (*supra*); Maasdorp's *Institutes, Vol. 2* (*5th ed.*) *p. 329;* Van der Keesel's *Select Theses* (Lorenz's Translation) p. 157.

No formal cession of the shares was necessary to constitute delivery of them—*National Bank of S. Africa, Ltd. v. Cohen's Trustee* [3]; *Bernstein v. Mankowitz's Assignee* [4]; *Colonial Bank v. Frederick Whinney* [5].

cur. adv. vult.

June 18, 1945. KEUNEMAN J.—

The plaintiff brought this action against the first and second defendants, respondents, as executors of the Last Will and Testament of H. Bastian Fernando, deceased, for a sum of Rs. 144,541.25 and further interest thereon, on bond marked A dated September 28, 1922. The bond purported to hypothecate 900 shares in the Chilaw Coconut Company, Ltd., now called H. Bastian Fernando Estates, Ltd., bearing Nos. 3501 to 3600 and 3701 to 4500 inclusive. The third defendant was added as a party to the action so as to be bound by the decree, on the footing that she, with notice of the mortgage above mentioned, had caused to be seized and sold and herself purchased the said shares.

The first and second defendants consented to judgment, and the action as against the third defendant was dismissed with costs, and the plaintiff now appeals against that judgment. The facts were not substantially in dispute in this appeal. It appeared in evidence that the share certificates of the shares mortgaged to the plaintiff were deposited with the plaintiff along with the bond A, and it is not now in dispute that these certificates have always been in the possession of the plaintiff up to date. It further appeared that the plaintiff notified his claim as mortgagee to the Company, and in the Company's Register (P 24) pencil notes were made against the relevant shares indicative of the mortgage created. It is clear, however, that under our law there is no provision that such a mortgage or pledge of shares should be registered. Ordinance No. 8 of 1871 and the later

[1] (*1863*) *1 Moore's P. C.* (*N. S.*) *386 at 409.*
[2] (*1903*) *7 N. L. R. 135 at 137-8.*
[3] *S. A. L. R.* (*1911*) *A. D. 235 at 246, 260.*
[4] *S. A. L. R.* (*1933*) *C. P. D. 466 at 469.*
[5] *L. R. 11 A. C. 426.*

Registration of Documents Ordinance (Cap. 101) which relate to the registration of bills of sale do not apply to shares in companies.

While these shares were subject to the above mortgage, Dr. C. S. P. Peiris who held a money decree in D. C., Colombo, No. 52,407, caused to be seized in execution on July 31, 1933, and to be sold on September 13, 1933, and himself purchased on behalf of his wife the third defendant a block of 2,540 shares in H. Bastian Fernando Estates, Ltd., registered in the name of the late H. Bastian Fernando. Fiscal's conveyance P 6 was issued to the purchaser whereby " all the right, title and interest of the defendants aforesaid in the said property " was transferred. " The defendants aforesaid " were the first and second defendants, the executors of the last will of H. Bastian Fernando. It may be added that although the share numbers were not given the 2,540 shares included all the shares registered in the name of H. Bastian Fernando in the Company and therefore would catch up the shares now in question. Thereafter the shares now in question were registered in the Company's Register under the name of the third defendant. This was done on October 30, 1942, shortly before the present action.

Several issues were framed at the trial, and the findings of the District Judge may be summarized as follows:—

(*a*) that the mortgage created by document A was a mortgage of an incorporeal movable and that there was no provision in law that a mortgage in respect of shares in a company be registered.

(*b*) that the law applicable to the matter was the Roman-Dutch law;

(*c*) that there was an absence of delivery to the plaintiff of the incorporeal thing mortgaged. The District Judge did not consider that the delivery of the share certificates amounted to delivery of the shares mortgaged;

(*d*) that as a consequence of (*c*) the mortgagee (plaintiff) could not prevent the sale of the movable property in execution of a third party's writ;

(*e*) that after the sale under the third party's writ the mortgagee could no longer follow the thing mortgaged but had merely a right to claim preference in the proceeds of that sale;

(*f*) that the rules laid down in the Roman-Dutch law with regard to the mortgage of corporeal movables also applied to the mortgage of incorporeal movables, more particularly the rules relating to delivery of the thing mortgaged;

(*g*) that the third defendant prior to her purchase at the Fiscal's sale had actual notice of the existence of the mortgage in favour of the plaintiff in respect of the shares in question;

(*h*) that under the law of Ceylon the finding on (*g*) did not make the third defendant's purchase of the shares at the Fiscal's sale subject to the mortgage in favour of the plaintiff;

(*i*) that the plaintiff's claim was not prescribed:

I may add that the findings with regard to (*a*), (*g*) and (*i*) were not disputed in appeal, and I am of opinion that they are correct.

As regards finding (*b*) of the District Judge, it appears from the judgment that in the court below it was " common ground " that the Roman-Dutch law applied to the rights of the parties. In appeal, however,

the argument was advanced that Cap. 66, section 3—or the previous Ordinance 22 of 1866—applied, as this was a question " with respect to the law of Joint Stock Companies ". and that this matter was governed by the English Law. In my opinion the present matter relates to the mortgage of movables and is not a matter with respect to Joint Stock Companies. In *Hong Kong and Shanghai Bank v. Krishnapillai* [1] a similar argument was advanced without success, and it was held that " the right of a pledgee to sell his security without recourse to a court of law is peculiar to the English law of mortgage and pledge, and the common law of the land in the matter of mortgage and pledge does not give place to the English law of mortgage and pledge, and the common law of the land in the matter of mortgage and pledge does not give place to the English law when the mortgage or pledge is a Bank ". Ordinance 22 of 1866 was considered in this connection.

Findings (*c*), (*d*), (*e*) and (*f*) of the District Judge may be considered together.

As long ago as 1863, in *Tatham v. Andree* (1 Moore's P. C. Cases 386 at p. 409; 15 English Reports 747, at 755)—this has also been referred to as *Ledward's Case*—it was held by the Privy Council, in the case of the mortgage or lien of movables in Ceylon, that " if the goods left in the possession of the mortgagor are sold or mortgaged by him to another person, they cannot be followed into the hands of such transferee for value but the contract is binding on the debtor and the goods themselves may be taken if they remain in his hands ".

Voet in his Commentary on the Pandects (20.1.12 and 13—Berwick's Translation, Revised Edition, pp. 285 *et seq.*) deals with this matter.

In the case of movables, Voet said, neither formal registration nor payment of the fortieth is required in order that they may be specially pledged, provided they are actually delivered to the creditor in security of the debt. Voet deals with the question of the possession being left with the debtor and of the debtor parting with the goods, and adds—" therefore a creditor must have actual possession of a movable to enable him to assert any right in it for himself, for, as already said, this kind of agreement " (viz. that the debtor should continue in possession on behalf of the mortgagee) " is now considered as only made in fraud of the custom which requires delivery to create a pledge of movables, and as a (fraudulent) circumvention of the other creditors ". Voet added that " a bare convention without delivery " does not affect the movable goods of a debtor, although the debtor has purported to bind them by a public instrument before a notary and witnesses. Voet cited in support of this the maxim *Mobilia non habent sequelam*.. (Section 12.)

In section 13 Voet reverts at the beginning to the mortgage of immovables and holds that they pass to any possessor subject to the incumbrance, and he adds this passage: " unless creditors are silent when the subject of an hypothec is sold by the Fisc and refrain from asserting their rights, in which case they are considered to have lost their rights of action *in rem*, for the trust reposed in a Fiscal's sale should not be lightly upset . . . . in which case, however, the price succeeds in the place of the thing, and it is lawful for a hypothecary creditor to contest with other creditors the right of preference in the price (realized by the

[1] *33 N. L. R. 249.*

sale) of the pledge ". Voet added that under the Civil law the same rule applied to movables, but that under "modern law" the principle *Mobilia non habent sequelam* was introduced. "Hence a creditor's security in movables specially bound and delivered to him only remains to him while he himself retains the possession delivered to him and holds the thing (pledged); and therefore if there be an alienation or a new mortgage of it by the same debtor to another person, accompanied by delivery, the creditor loses his right of pledge and preference, and the thing if alienated passes to the alience free of the incumbrance, or if it has again been given in pledge to another, that other has the right of preference ".

In Van Leeuwen's Commentaries (4.13.19—Kotze's Translation II. Edition, Vol. 2 p. 105) it is stated that "With respect to movable property there is no doubt that so soon as it comes by proper title into the possession of a third party, according to the custom of these countries it passes completely to him by virtue of the maxim *Mobilia non habent sequelam*, that is, movables cannot be followed up ".

In Grotius' Introduction (2.48.29, Maasdorp's Translation II. Edition p. 190) this passage occurs : "If the movable property has lawfully passed into the hands of a third party, such property will be free and unencumbered ". An exception recognized in Rhineland is however mentioned.

See also Van Der Keesel's Select Theses 2.48.29 (ccccxxxii) Lorenz's Translation p. 153 : "Movable property which has been pledged either generally or specially without delivery, if alienated by the debtor are discharged from the pledge, and this holds true also of securities even when they have been mortgaged, but not as regards those instruments called *Kusting-Brieven* ".

In a long series of cases decided in Ceylon it has been held that if the mortgaged goods left in the possession of the mortgagor are sold or mortgaged by him to another person, they cannot be followed into the hands of such transferee for value, but the contract is binding on the debtor and the goods themselves may be taken if they remain in his hands. But where the mortgagee has lost his right *in rem* to the goods, he was still entitled to claim preference with respect to the proceeds of sale realized in execution under an unsecured creditor's writ: vide *Miller v. Young*[1]; *Ramen Chetty v. Campbell*[2]; *Casy Lebbe Marikar v. Aydroos Lebbe Marikar ex parte M. M. Abdul Rahman*[3]; *Meera Saibo v. Muttuchetty*[4]; *Vellaiappa Cetty v. Pitche Maula*[5]; *Mohideen v. Abbubacker*[6]; *Adaicappa Chetty v. Perera*[7].

In all these cases corporeal movables were involved and all these movables were capable of delivery, but in point of fact they had not been delivered to the mortgagee, and were afterwards transferred by the debtor to a third party who obtained possession.

In the present case we are dealing with incorporeal movables. The first argument addressed to us was that there had been delivery of possession in consequence of the fact that the share certificates had been delivered to the mortgagee at the time of the mortgage and that this

[1] *Ramanathan (1872), 75, 76 p. 23.*
[2] *2 N. L. R. 94.*
[3] *1 C. L. Rep. 1.*
[4] *3 C. L. Rep. 37.*
[5] *4 N. L. R. 311.*
[6] *8 C. W. R. 118.*
[7] *30 N. L. R. 27.*

amounted to a symbolical delivery of possession of the thing mortgaged. I must confess that this is an attractive proposition but it is necessary to consider whether it is correct. The share certificate in question is P 17, and it is a certificate that H. Bastian Fernando is the holder of the shares in question. It contains this note: " A transfer of the above shares can be effected only by a transfer duly executed and registered in the books of the Company, and the name of the proposed transferee must be approved by the Board of Directors before the transfer can be made. Forms of the deed of transfer can be had at the Company's Office ". Two conditions were necessary for the transfer, viz.—(1) approval of the transfer by the Board of Directors, and (2) a transfer duly executed and registered in the books of the Company. Neither of these two conditions has been satisfied in the case of the plaintiff. The mere handing over to him of the share certificates did not appear to carry any legal consequences. The pencil notes made by the Company in the Register had also no significance. In what way can it be contended that possession had been delivered to the plaintiff ? The share certificates were not the same as the right which was mortgaged. They were " the proper (and indeed the only) documentary evidence of title in the possession of the shareholder "—vide *Societe Generale de Paris v. Walker* [1]. The right mortgaged being incorporeal was in its very nature incapable of physical delivery, and I do not think the physical delivery of " the documentary evidence of title can be said to constitute delivery of the right mortgaged ".

In South Africa it has been held in *Smith v. Farelly's Trustee* [2] that delivery of an incorporeal right can only be effected by the cession of the right, but later cases have modified this and laid down that the general practice in South Africa is to require in such cases a formal cession in favour of the person whom it is intended to secure with a necessarily implied obligation on his part under certain circumstances to return and account: see *Rothschild v. Lowndes* [3]; *National Bank v. Cohen's Trustee* [4].

I do not in the circumstances lay it down that the formal cession of the shares is the only form of delivery that is possible under the Roman-Dutch law, although delivery of possession is in fact made effective by cession. It is sufficient in this case to hold that the delivery of the share certificates, which were hedged round by restrictions, was not sufficient evidence of effective delivery of the shares mortgaged. The possession of the share certificates in this case did not give to the plaintiff such control and direction of the shares mortgaged as to be equivalent to possession in law of the shares mortgaged.

In the present case it is also necessary to consider the position of the third defendant. For it is not every alienation to a third party which defeats the right *in rem* of the mortgagee without possession. Voet lays it down (20.1.13) that the alienation to the third party must be " accompanied by delivery " in order to deprive the mortgagee of his right of pledge and preference. In my opinion the mere purchase at a Fiscal's sale by the third defendant of the shares mortgaged was ineffective to defeat the plaintiff's right as mortgagee. But in this case the third defendant has gone one step further. She has shortly prior to the action

[1] *L. R. 11 A. C. 20, at 29.*
[2] *(1904) T. S. at 954.*
[3] *(1908) T. S. at p. 498.*
[4] *(1911) A. D. at p. 246.*

succeeded in having her name registered in the Company's Register as the owner of the shares and, in my opinion, she must now be regarded as having obtained delivery of possession of the shares in question.

I may add one word on the argument that as regards delivery of possession the mortgagee of an incorporeal right stands on the same footing as that of a corporeal right. It is true that an incorporeal right is incapable of physical delivery, but it is also clear that possession may be given by cession of the right, if not in other ways. Further Voet, and in fact the other Roman-Dutch commentators too, do not put mortgages of incorporeal rights on any different footing in this respect. The necessity for delivery of possession arises from the fact that in the case of all movables the maxim *Mobilia non habent sequelam* applies, and this applies equally to corporeal and incorporeal movables.

One further point, viz.—finding (*h*) of the District Judge—remains to be considered, and that is a matter of importance. The matter may best be put in the language of De Villiers C. J. in *Coaton v. Alexander* [1].

" It is clear according to the law of Holland that a pledge, unless accompanied or followed by delivery of the goods to the creditor, creates no obligation by which the latter can resort to them in the hands of a third person. This is clearly laid down in Burge (Vol. III., p. 572) who gives the different authorities, and one of them is from the Dutch Consultations (Vol. III. Consultation 174) in which an elaborate opinion is given by the greatest lawyer of the time, Hugo Grotius; and it seemed that all the other authorities, in laying down this rule, simply took the authority of Grotius for the opinion which they gave. On looking into the Consultation itself, I find that Grotius there qualifies this doctrine by stating that where a purchaser obtains articles with a knowledge that they have been pledged, he has no greater right in regard to the pledged articles than the pledger himself; he stands in exactly the same position. All the authorities who follow Grotius lay down the general rule and omit this qualification which has such an important bearing upon this case."

The substance of this has now been embodied in the text of Maasdorp's *Institutes of South African Law* (*V. Edn. Vol. II-329*). Kotze's *Van Leeuwen* (*II. Edn. Vol. II. p. 105*) contains this note: " Grotius likewise says that where the purchaser or third party obtains property *with a knowledge* that they had been pledged, he has no greater right in regard to them than the pledgor himself. This opinion has frequently been approved and acted on in South Africa."

Wille in his book *Mortgage and Pledge in South Africa* (*p. 259*) states that the same rule applied where a judgment-creditor of the pledgor attaches the pledged property in execution. But he adds that by knowledge or notice of a notarial bond is meant actual and not merely constructive notice thereof. This opinion is based on decided cases.

It has been argued before us that an execution purchaser stands in this respect in a different position from a mere purchaser from the mortgagor. It has been contended that the execution-creditor buys against the mortgagor and not from him, and that he cannot be affected by knowledge of the mortgage. The District Judge inclined to this opinion. I do not think, however, that the argument can be sustained. Grotius in his opinion

[1] *(1879) 9 Buchanan 17.*

emphasized the *knowledge* of the purchaser at the time of the purchase and of the obtaining of the goods, and this would be applicable to all kinds of purchasers, including purchasers in execution. In principle I think it is equitable that any purchaser with knowledge of an existing mortgage should take subject to that mortgage.

In this case it has been established that the third defendant had knowledge of the mortgage before the purchase. It is a point, though not perhaps a very weighty point, that the Fiscal's transfer conveyed to her "the right, title and interest" of the executors in the shares. The interest of the executors was certainly subject to the mortgage. In all the circumstances of the case I hold that the third defendant did not stand in any better position in respect to the shares than the mortgagor himself, and that in consequence the plaintiff is entitled to resort to the shares themselves in the hands of the third defendant, and is not merely restricted to a claim on the amount realized at the execution sale. The decisions in South Africa are, in my opinion, equally applicable in Ceylon. It is true that no previous case on this point appears to have been decided in Ceylon. But, after all, the question we have to investigate is—What is the Roman-Dutch law applicable to the matter, and in the determination of that question the opinion of Hugo Grotius should, I think, be followed. There is nothing in Voet or the other commentators which is antagonistic to that opinion.

In the circumstances the appeal is allowed with costs in both Courts, as prayed for in the petition of appeal.

HOWARD C.J.—I agree.

Appeal allowed.