Present ; De Sampayo and Porter JJ.

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WICKREMESINGHE *et al.* *v.* ENSOHAMY *et al.*

184—D. C. Matara, 9,018.

Gift of share derived by purchase—Mortgage of share described as derived by inheritance—Smaller share derived by inheritance—Prior registration of mortgage—Is mortgage good for the entire share mortgaged ?—Recitals — Conveyancing — Estoppel — Vendor and Purchaser—Misdescription in Fiscal's conveyance of area of property sold under mortgage decree—Seizure.

A, who was entitled to a 1/18 of a land by inheritance and another share by purchase, donated a share to his children (the plaintiffs), describing it as property belonging to him by right of purchase. Subsequently, he mortgaged to S 1/3 share which he stated he was entitled to by inheritance. The mortgaged bond was registered first.

The plaintiffs contended that as the share mortgaged was described as the share acquired by right of inheritance, the mortgage did not come into conflict with the deed of gift which dealt with a share described as acquired by purchase.

Held, that the mortgage, in spite of the recital, was good for 1/3 share ; moreover, A was estopped from denying that he mortgaged 1/3 share of the land to S.

If a person sells a specific thing, even though his source of title to it is mistakenly stated, his title, however derived, passes to the purchaser. On the other hand, it is possible for the vendor, intending to sell the thing only so far as it belongs to him by some particular title, to execute a deed for that limited purpose, in which case the purchaser may not be entitled to the thing if that title fails.

The mortgage decree, the seizure, and the notice of sale correctly described the land. The Fiscal's transfer also described the land properly by boundaries, but stated the area as two acres instead of five acres.

Held, that the error did not materially affect the title.

" The decisive factor is the seizure in pursuance of which the sale takes place, and any misdescription in the Fiscal's conveyance is immaterial as long as the identity of the property is clear."

THE facts are stated in the judgment.

The mortgage bond was as follows :—

Debt and Mortgage No. 63.

Know all men by these presents that I, Cornelis Wickremasinhe, of Kadawedia, within the Four Gravets of Matara (hereinafter called the debtor), have demanded, borrowed, and received from Siddiaratchige Don Theadoris de Silva Appuhamy of Gabadawedia, within the Four Gravets of Matara aforesaid (hereinafter called the creditor), a sum of Rs. 80, lawful money of Ceylon, and bounded myself unto the said creditor for the payment of which said sum of Rs. 80.

Wherefore renouncing the benefit of the plea that the money was not counted and received, I, the above-named debtor, have hereby agreed and bound myself to pay the said principal sum, together with interest accruing thereon, at the rate of 30 per cent. per annum from the date hereof till payment on demand of the above-named creditor or his heirs, &c., and for security the payment of the above-mentioned principal sum and interest accruing thereon, I have mortgaged and hypothecated, as a first or primary mortgage to and with the said creditor and his afore-named heirs, the property described and mentioned in the schedule hereunder which is free from all encumbrances, such as security and mortgages with all its appurtenances, as *well as all my right, title, and interest in and to the same.*

And for the due fulfilment of the above set out agreements I, the debtor above named, for and on behalf of myself, my heirs, &c., are hereby further held and bound.

The Schedule above referred to.

The undivided ⅓ part which I, the debtor, hold and possess by right of paternal inheritance of the trees and of soil of the lands Disawagewatta and Weragodayawatta, both adjoining each other and formin

one land, in extent about 5 acres, situated at Gabadawedia and Kadawedia, respectively, within the Four Gravets of Matara, Matara District, Southern Province ; and bounded on the north by Tennakon Walauwewatta and Daluwattagewatta, east by the portion belonging to the heirs of Hewa Badjamage Don Dines of the land Disangewatta, south by the high road, and on the west by the portion belonging to the estate of Hewa Badjamage Don Mathes of the land Weragodayawatta.

In witness whereof, &c.

November 20, 1903.
Witnesses signed and attested.

Drieberg, K.C. (with him *Keuneman*), for plaintiffs, appellants.

A. St. V. Jayawardene, K.C. (with him *E. G. P. Jayetilleke*), for tenth and eleventh defendants, respondents.

The following cases were cited at the argument: *5 Bal. 75 ; 2 C. W. R. 242 ; 23 N. L. R. 283 ;* 402 D. C. Matara, 8,999, October 14, 1921 ; *22 N. L. R. 385 : 41 Cal. 590 ; 27 Bom. 334 ; (915) A. C. 900.*

February 3, 1922. DE SAMPAYO J.—

The plaintiffs brought this action for the partition of a land consisting of lots C and D in the plan dated July 8, 1876, and marked 10 D 7, and a contest arose between them and the tenth defendant, who is wife of the eleventh defendant. The land formerly belonged to Sinno Appu Wickremasingha Malawa Arachchi. He died intestate, leaving his widow Danohamy and nine children, of whom the fourth plaintiff was one. The widow, by deed No. 2,603 dated August 23, 1902, sold her half share to the fourth plaintiff and two others. Four of the other children by the same deed sold their shares to the fourth plaintiff and two others. So that the fourth plaintiff became entitled to 1/18 share by inheritance and to $\frac{1}{6}$ and 16/216 shares by purchase, all of which aggregate 64/216 or 16/54. By deed dated January 9, 1903, the fourth plaintiff donated to his children the first, second, and third plaintiffs 15/54 shares, describing it as property belonging to him by right of purchase on deed No. 2,603. Notwithstanding this gift the fourth plaintiff by bond dated November 20, 1903, mortgaged to Don Theodoris de Silva $\frac{1}{3}$ share, which he stated he was entitled to and possessed of by inheritance. It will be observed that by purchase he had not so much as $\frac{1}{3}$ share, but that need not be taken into account in considering the point arising in this connection. The bond, though subsequent in date to the deed of gift, was registered previous to it, and so the mortgagee's right prevailed over that of the donees. But it is contended, on behalf of the plaintiffs, that as the share mortgaged was described as the share acquired by right of inheritance, the mortgage did not conflict with the deed of gift

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which dealt with a share described as acquired by purchase. *Sandris v. Dinakahamy* [1] is relied on as authority on this point. I think that case must be taken to be based on the language of the particular deed which the Court had to construe. The general principle appears to me to be that if a person sells a specific thing, even though his source of title to it is mistakenly stated, his title, however derived, passes to the purchaser. On the other hand, it is, of course, possible for the vendor, intending to sell the thing only so far as it belongs to him by some particular title, to execute a deed for that limited purpose, in which case the purchaser may not be entitled to the thing if that title fails. I can only conjecture that the deed construed in *Sandris v. Dinakahamy* (*supra*) was or at all events was considered to be of this kind, for Middleton J., who delivered the judgment, said : " The identity of the subject-matter of the sale would not be the same so as to enable us to hold practically that a conveyance of Blackacre, which she did not possess, must be deemed to a conveyance of Whiteacre, which she did." I do not think that the decision is an authority beyond the circumstances of that case. It appears that it was followed in 402 D. C. Matara, 8,999, S. C. Min., October 14, 1921, but in *Tiyadoris v. Sadrishamy*,[2] *Sandris v. Dinakahamy* (*supra*) was commented on, and the point was dealt with in the same sense as I have above ventured to express. Reference may also be made to *Edoris v. Adrian*,[3] which, if I may say so, upholds the true principle in this matter. Moreover, the fourth plaintiff is estopped from denying that he mortgaged ⅓ share of the land to Don Theodoris de Silva, and from saying that he had no title to it. In *Gunatilleke v. Fernando*,[4] the Privy Council discussed the question of conveyance by estoppel, and pointed out that while under the English law the estoppel is derived from the recitals of title in the conveyance, and it is these recitals, and these only, which the grantor has to make good, the Roman-Dutch principle, which is applicable to us, is broader in its effect, and the estoppel does not rest upon the recitals only. That is to say, the grantor must make good the conveyance itself, whatever the recitals may be. This being so, Don Theodoris de Silva had a valid mortgage over ⅓ share of the land against the fourth plaintiff, and by reason of the prior registration of the bond against first, second, and third plaintiffs. The tenth defendant, who is a stranger purchaser in execution of a mortgage decree obtained by Don Theodoris de Silva, can even more strongly rely on the estoppel.

The other point in the case is as to the exact land, a share of which was conveyed to the tenth defendant by the Fiscal's transfer. To this transfer was attached a survey plan, which appears to describe not the whole of lots C and D, but parts of lots C and D.

[1] *(1910) 5 B. L. 75.*
[2] *(1921) 23 N. L. R. 283.*
[3] *(1919) 21 N. L. R. 124.*
[4] *(1921) 22 N. L. R. 385.*

This appears to have happened by reason of wrong boundaries being pointed out to the Fiscal's surveyor. The District Judge is inclined to think that the fourth plaintiff was responsible for wrong boundaries being pointed out. But for the purpose of this appeal it is not necessary to go so far as that. The Fiscal's transfer describes the land properly by boundaries, which clearly identify it with lots C and D, but at the end of it, where it means to give the extent, it states: " containing in extent 2 acres 3 roods and 26 perches as described in the diagram or map annexed to these presents," though the correct extent was 5 acres 1 rood and 32·26 perches. In my opinion the error does not materially affect the title. The mortgage decree, the seizure, and the notice of sale correctly described the land, and I think the error introduced by the diagram must be disregarded. In the Indian case (*Thakur Barucha v. Jiban Ram Marwari*[1]), the Privy Council observed " that which is sold in a judicial sale of this kind can be nothing but the property attached, and that property is conclusively described in and by the schedule to which the attachment refers." The decisive factor then is the seizure in pursuance of which the sale takes place, and any misdescription in the Fiscal's conveyance is immaterial so long as the identity of the property is clear. In this case, as I have said, the boundaries given in the Fiscal's conveyance itself establish the identity of the land with lots C and D.

In my opinion the appeal must be dismissed, with costs.

Porter J—I agree.

Appeal dismissed.

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[1] *I. L. R. 41 Cl. 590.*