

1918.

Present : Bertram C.J. and De Sampayo J.

ADICAPPA CHETTY v. NEGRIS.

77—D. C. Colombo, 48,520.

Mortgage of movables—Subsequent acquisition of ownership—Second mortgage—Priority—Ordinance No. 8 of 1871.

A executed a mortgage of a printing press in favour of B before the property in the press had actually passed to him (A). After becoming owner, A again mortgaged the press to C. Both mortgages complied with the requirements of Ordinance No. 8 of 1871.

Held, that the mortgage in favour of B was entitled to priority.

Where a person who is not the owner of a movable property mortgages it and subsequently acquires ownership the mortgage becomes valid.

THE facts appear from the judgment.

A. St. V. Jayawardene, for the appellant.

Bawa, K.C., for the respondent.

October 22, 1918. BERTRAM C.J.—

The question to be determined in this case is a question of priority between two mortgagees of movable property. It relates to a printing press which was purchased by one Vince, and mortgaged by him successively, in the first place, to the claimant, and, in the second place, to the plaintiff. The first mortgage was dated September 9, 1916, and the second mortgage March 7, 1917. With regard to both mortgages, the requirements of Ordinance No. 8 of 1871 were complied with. The first mortgage in favour of the claimant was executed before the property in the printing press had actually passed to Vince. The second mortgage was executed after the property had so passed by virtue of a formal transfer on January 10, 1917.

The question is, Which of these two mortgages under the circumstances is entitled to priority? The question is settled definitely and expressly by a statement of the law in *Voet 20, 4, 31: Quod si priori a non domino pignus devinctum fit, posteriori autem illud ipsum ab eodem, sed jam domino facto, adhuc prior potior est: eo quod ipso primo dominii acquisiti momento firmatum priori fuit pignoris ius*. I quote from Berwick's translation: "But if a *pignus* has been first bound to one person by one who was not the

owner, and then again to another person by the same mortgagor, but subsequently to his having become the owner, the first mortgagee is still preferential, because the right of pledge was confirmed to the first mortgage from the moment of the mortgagor's acquisition of the ownership."

It will be thus seen that the passage cited from *Voet* is directly in point. The passage enunciates an example of a principle of the Roman law, sometimes referred to as that of the "convalescence" of mortgagees. That principle is that if a mortgage of movable property is executed by a person who is not the owner, that mortgage is legally invalid. If, however, the mortgagor subsequently acquires the ownership, that invalidity is removed. The mortgage gathers force, and from the moment of the acquisition of the ownership it becomes good. That is the recognized principle of the Roman law.

The next question is, Whether that is in any way affected by local legislation? It is contended by Mr. Bawa that, in view of the provisions of Ordinance No. 8 of 1871, that principle is no longer in force in Ceylon. He urges that on the analogy of certain decisions given by this Court with regard to Ordinance No. 7 of 1840, we should hold that, unless a mortgage is given in accordance with the conditions of Ordinance No. 8 of 1871, and is also in fact otherwise valid at the time when it purports to comply with those conditions, it can have no effect. It is not necessary for us to discuss the conflicting decisions under Ordinance No. 7 of 1840. We need only confine ourselves to Ordinance No. 8 of 1871. I am not able to give it the construction which Mr. Bawa contends for. It seems to me that all that Ordinance No. 8 of 1871 does is to lay down certain requirements of form. It requires either that the property mortgaged shall be delivered, or that the mortgage shall be carried out in a particular way, and shall be registered in a particular way. The Ordinance is not concerned in any way with the validity of a mortgage apart from these requirements. If a mortgage complies with these requirements, the Ordinance has nothing whatever to say to it. It seems to me, therefore, that there is nothing in the Ordinance inconsistent with the principle of the Roman law known as that of the "convalescence" of mortgagees. If a mortgage, previously invalid, may, in certain circumstances, acquire validity, then, if it is executed and recorded in the manner prescribed by this Ordinance, there is nothing in the provisions of the Ordinance to interfere with that process. So much for the effect of Ordinance No. 8 of 1871.

Another question has been raised, namely, the question of estoppel, Mr. Jayawardene contended that even if he had not priority by virtue of this principle of the Roman law, nevertheless the second mortgagee, as a person claiming from the mortgagor, was estopped by the conduct of that mortgagor from alleging that that mortgagor

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had not a title at the date of the mortgage. It is unnecessary for us to decide that question, inasmuch as it is clear that, under the principle above explained, the claimant has a prior right by virtue of his priority in date.

For the reasons I have explained, I would allow the appeal, with costs.

DE SAMPAYO J.—I agree.

Appeal allowed.

