1920.

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

RODRIGO *et al. v.* KARUNARATNA *et al.*

263—D. C. Negombo, 12,936.

Estoppel—Evidence Ordinance, s. 115—Intentionally—Ignorance of the truth of fact misrepresented—Must connection between action and misrepresentation be direct?—Civil Procedure Code, ss. 643 and 644—Husband party to mortgage action—Is wife bound by decree?

A obtained a transfer of a land which was subject to a mortgage. The mortgagee obtained judgment against the mortgagor without making A a party, and A was consequently not bound by the decree. After decree A approached the first defendant, and persuaded him to take a transfer of the decree, with a view to securing him time to pay off the judgment debt. On A not paying the amount due on the decree, the first defendant assigned the decree to R, who subsequently bought the land at the Fiscal's sale in execution. Thereafter first defendant bought the land from R.

In a contest between the first defendant and A,—

Held, that A was not estopped from denying that she was bound by the mortgage decree.

To establish an estoppel, it must be proved that the action taken by the party seeking to establish the estoppel was directly connected with the false impression caused by the representation or conduct of the party sought to be estopped. The representation or the conduct producing the impression must be, in effect, an invitation to the person affected by it to do a particular act.

But it need not be proved that the party sought to be estopped knew the truth about the facts which he by his statement or his conduct misrepresented.

THE plaintiff brought this action for the partition of an allotment of land alleging that he was entitled to twenty-five/thirty-second share, and that the first defendant was owner of seven/thirty-second share. The fourth and fifth defendants (appellants) claimed this seven/thirty-second share. The District Judge held in favour of the first defendant. The facts are fully set out in the following judgment of the District Judge:—

The question to be decided at this trial is whether the first defendant became entitled to seven/thirty-second share by purchase? For the purposes of deciding the present dispute, it is sufficient to state the following facts:—

David became entitled to seven/thirty-second of this land, and he transferred that same share to Leonard. Leonard, subsequently mortgaged that share to Suppramaniam Chetty, who put the mortgage bond in suit. After certain transactions that share devolved on the

first defendant. Some time after the mortgage referred to there was a partition deed between Leonard and his brother Wilfred, in which this mortgage bond was ignored. Subsequently there was a deed of exchange executed between Leonard and David's wife Annie, whereby the land in question was given away to Annie. Subsequently Annie and her husband David mortgaged twenty-five/thirty-second of lot Z 2 to the plaintiff in this case.

Admittedly Leonard was a minor at the time of the mortgage in favour of Suppramaniam Chetty. Within a few months after the execution of the mortgage bond he became a major. The question is whether that mortgage bond was void and of no effect. The law on this point has been rather doubtful, but the last decision reported in *19 N. L. R. 426* lays down that a contract by a minor is not void but voidable and holds good, unless within three years after the minor attaining majority a Court of law sets aside that contract. The argument, therefore, that Leonard entered into subsequent transactions which impliedly cancelled the mortgage bond is not sound. In the absence of a cancellation of the mortgage bond by the Court within the period already mentioned, the mortgage bond must be held to have been ratified and binding.

In the mortgage bond action brought by Suppramaniam Chetty, Annie, the subsequent purchaser, was not made a party, and, therefore, her title was not affected by the mortgage decree.

But it was argued that the transfer by David to Leonard was in trust, and that Annie, who derived title from Leonard, get no better title than him, and that the notice to David in the mortgage action was sufficient. I am not, however, satisfied about the alleged trust. It was also urged that notice to David was equivalent to notice to his wife Annie. This argument also fails. It was also urged that Annie lost her title by estoppel, she having by her conduct made the first defendant believe that the mortgage bond and the decree and the sale under it were valid. I am satisfied that the evidence given by first defendant that David, Leonard, and Annie, all of them, came to him and endeavoured to stop the sale under the decree, &c., is true. I am also satisfied that what Mr. Kurera, the auctioneer, says is true, namely, that at the time of the first sale under the mortgage deed David was actually present; that sale took place near the house in which Annie was living. He says that some ladies were present at the sale. But he is not able to say whether Annie was present or not. The first sale under the decree was not completed. There was another sale after that, at which David was not present apparently. There, too, certain ladies were present. Mr. Kurera's evidence does not establish an estoppel as effectually as the evidence of the first defendant. But it is to be noted that, according to the contesting defendants, Leonard and David had not title whatever to any share of the entire land, and the seven/thirty-second which Mr. Kurera proceeded to sell belonged to Annie. Therefore, if Annie was present in her house and did not protest against the sale, her conduct gave rise to an estoppel.

There is no conclusive proof, however, that she was present in her house on the occasion of either sale. But the conduct of David on the occasion of the sale corroborates the evidence of the first defendant as to his wife Annie having asked him to stop the sale, &c. For it is obvious that David was satisfied that the mortgage bond, the mortgage

1920.

Rodrigo v. Karunaratna

decree, and the sale under it were all valid. Otherwise he would have protested at the sale. If he was satisfied as stated, it follows that his wife Annie must have been of the same opinion. It is, therefore, probable she interfered as stated by first defendant. Then first defendant's evidence is also corroborated by the fact that Annie and David mortgaged only twenty-five/thirty-second of Z 2. It is said that they mortgaged only that share, because the creditor, a Chetty, noticed the encumbrancer in respect of seven/thirty-second share. But I would have expected better evidence than that called to prove this explanation. The Chetty himself might have been called. On the whole, the conclusion is irresistible that Annie or David never for a moment thought that the mortgage of seven/thirty-second share and the decree on that mortgage bond were of no value. They were not aware that there was a flaw by reason of the omission to notice Annie.

I hold that the first defendant is entitled to seven/thirty-second share. The costs of this trial of the first defendant should be paid by the fourth and fifth defendants.

The rest of the trial is postponed for to-morrow.

H. V. Perera (with him *Canakeratne*), for the appellants.—The fourth defendant's conduct in requesting the first defendant to take an assignment of the mortgage decree creates no estoppel against her. Her conduct does not amount to a representation that she had no interest in the property adverse to that of the mortgagee. The first defendant himself says that he was asked to take an assignment of the decree in order that the judgment-debtor, the fourth defendant's brother, may be given an opportunity of paying off the mortgage debt. In the circumstances, the fourth defendant's conduct amounts to nothing more than a representation that there was a mortgage decree capable of execution at the decree-holder's pleasure. Where the question is whether a person's conduct gives rise to an estoppel, it is not legitimate to give such conduct a larger meaning than that which must necessarily be given to it.

Even if the fourth defendant's conduct amounts to a representation that she had no interest in the property, the representation was made with the intention that the first defendant should act on it in a particular way, namely, by taking an assignment of the decree. It was not made with the intention that the first defendant should buy the property at the execution sale or from the execution purchaser, the transaction by which the first defendant acquired the interest he is now setting up was not even in contemplation at the time when the representation was made. The first defendant was in no way prejudiced by acting in the way in which the fourth defendant intended him to act, that is, by taking an assignment of the decree; he subsequently assigned the decree to Raman Chetty, and had nothing more to do with it. It is true that in buying the property from the execution purchaser he acted to his prejudice, but as he was not intended to act in this way when the representation was made, he cannot now rely on the representation, and set up a plea of estoppel against the fourth defendant.

The purchaser at the execution sale does not say that he was misled by anything said or done by the fourth defendant. No estoppel, therefore, arises with reference to the execution sale.

Counsel cited *Carr v. The London and North-Western Railway Company;*[1] *Gillmen, Spence & Co. v. Carbutt & Co.;*[2] *Swan v. North British Australasian Co., Ltd.;*[3] *Abdulla v. Ameresekara.*[4]

A. St. V. Jayawardene (with him *Samarawickrema* and *Croos-Dabrera*), for respondent.—The request of the fourth defendant made to the first defendant to take an assignment of the decree clearly amounted to a representation that the decree was binding on her, and that she had no interest in the property mortgaged. By reason of such representation the first defendant acted to his prejudice, and the fourth defendant Annie is estopped from now questioning his title. The first defendant was justified in making use of such representation even in a subsequent transaction, whatever the intention of the fourth defendant may have been. The fourth defendant's conduct was such that a reasonable man would believe that she intended to assert that she had no interest in the property mortgaged. The word "intentionally" in section 115 of the Evidence Ordinance does not mean that the person whose acts or declarations induced another to act in a particular way must have been under no mistake himself, or must have acted with an intention to mislead or deceive. The principle is if a person by a representation made or by conduct amounting to a representation has induced another to act as he would not otherwise have done, the person who made the representation should not be allowed to deny or repudiate the effect of his former statement to the loss and injury of the person who effected it.

If the representation made by the fourth defendant was one suggesting an absence of adverse interest, and the first defendant acted on it and took an assignment of the decree, she is estopped as against him. Any purchaser on a sale on such decree is entitled to avail himself of such estoppel.

The fourth defendant's husband having been made a party to the mortgage action, she is bound by the decree. Notice to the husband is notice to her, and she having failed to intervene, she is bound by the decree under section 644 of the Civil Procedure Code.

Counsel cited *Gunasekera v. Dissanayake;*[5] *Sarat Chunder v. Gopal Chunder;*[6] *Banda v. Patterson.*[7]

Cur. adv. vult.

[1] *(1875) 31 L. T. R. 785 ; 10 Com. Pl. 307.*
[2] *61 L. T. R. 281, C. A.*
[3] *(1862) 7 H. & N. 603.*
[4] *(1914) 2 B. N. C. 50.*
[5] *(1912) 16 N. L. R. 123.*
[6] *(1892) 20 Cal. 296.*
[7] *(1919) 21 N. L. R. 134.*

1920.

Rodrigo v. Karunaratna

February 4, 1920. BERTRAM C.J.—

This case raises a question of importance with regard to the law of estoppel. The material facts are briefly these. In 1910 the family to whom this land belonged had occasion to raise some money, and Leonard, one of the members of the family, executed a mortgage in favour of one Suppramaniam Chetty for his share of the land, which was seven/thirty-seconds of the whole. Subsequently to this mortgage, by a family arrangement, which need not be particularly described, Annie, a sister of Leonard, under a deed of exchange, received a transfer of a portion of the land of which Leonard had mortgaged his share. This transfer to Annie being subsequent to the mortgage was subject to the mortgage. Ultimately the mortgage bond was put in suit and the land was sold. Annie, however, was never made a party to the action. The case does not come within the provisions of sections 643 and 644 of the Civil Procedure Code, inasmuch as the mortgage never registered his mortgage in accordance with the provisions of the Code. The decree, therefore, did not bind the interest which Annie had obtained by the deed of exchange. This question arises in a partition suit. A purchaser from Annie sets up a claim to the land which Annie obtained under the deed of exchange. The matter for decision in this action is whether, in fact, Annie and the purchaser claiming through her are estopped by the previous conduct of Annie in regard to the matter.

Now let us ask, what is the conduct which is relied on as working an estoppel. There is no question that Annie knew all about the mortgage. It was a family transaction, of which she would naturally be cognizant, and when the mortgage bond was put in suit, she, in common no doubt with the other members of the family, was concerned as to the possible result. She and her husband David appear to have approached the first defendant and persuaded him to take a transfer of the decree, with a view to securing them time to pay off the mortgage debt. The first defendant took that course. Annie and David did not act upon the opportunity thus secured to them, and he accordingly assigned his decree to one Raman Chetty.

Now it is said that the action of Annie, in invoking the aid of the first defendant, amounted to a representation to him that she at any rate had no interest in the land which she could set up adversely to the mortgagee, or to any person purchasing under the sale. This seems to me a very legitimate proposition. I have very little doubt that her action would naturally suggest this fact to the mind of the first defendant. But, as I have said, the first defendant freed himself from responsibility with regard to the property by assigning his decree. He afterwards appears to have continued to carry away the original impression that Annie had no interest in the land. Subsequently the Fiscal's sale took place. In the first instance,

there was an abortive sale. The land was sold to a stranger, but the sale did not prove effective. There is nothing to show that Annie knew anything of this sale, but her husband David is said to have been present. Ultimately a formal sale took place, and the land was bought by Raman Chetty, but subsequently sold to the first defendant. The first defendant says: "I should never have bought this land from Raman Chetty but for the impression you produced upon my mind at the time, when, at your request, I took an assignment of the decree. You, therefore, are now estopped as against me from saying that you have an interest in the land." That is the question which we have to determine.

Now, the interpretation of this question depends upon section 115 of the Evidence Ordinance, and that section has been submitted to a very careful and close judicial consideration. The word which causes a difficulty is the word "intentionally." The section says "when one person has by his declaration, act, or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief."

Now, it has been determined by a series of decisions that the apparent meaning of the word "intentionally" is not its real meaning. We, I think, are bound by these decisions. There are passages in the English authorities which would appear at first sight to suggest that our Ordinance deliberately departed from the English law. For example, the rule is thus stated by Bramwell B. in *Cornish v. Abington* [1]: "The rule is that if a man so conducts himself, whether intentionally or not, that a reasonable person would infer that a certain state of things exists and acts on that inference, he shall be afterwards estopped from denying it."

It appears, however, that when our own Ordinance used the word "intentionally," and when Bramwell B. said "whether intentionally or not," they both, though apparently at variance, meant the same thing. The gist of these decisions is that it does not matter whether a person knows the truth about the facts which he by his statement or his conduct misrepresents. Whether he knows the truth or not, if he speaks or acts in such a way as to create an impression, he must take the consequences of the impression he so creates.

But that is with regard to the first step in the creation of an estoppel. There is another step which remains to be considered. The first step is the creation of the impression. The next step is the action upon the impression. The Ordinance says that a man in order to be bound by an estoppel must intentionally cause or permit another person to act upon his belief. Now, in regard to that, I cannot help feeling that the principle of the English law is clear. The action taken upon the belief must be directly connected with the false impression caused by the representation or conduct. Put it in

[1] *(1859) 4 H. & N. 549.*

1920.

BERTRAM C.J.

Rodrigo v. Karunaratna

another way. The representation or the conduct producing the impression must be, in effect, an invitation to the person affected by it to do a particular act. In other words, it must be shown that the person against whom the estoppel is asserted actually contemplated the thing to be done, or at least that he ought reasonably to be treated as having contemplated it. He must be conscious that it is impending, or the circumstances must be such that he ought reasonably to be treated as conscious that it is impending. It does not do to say that at one period in the history of the particular matter an impression was produced, and that then at some subsequent time the person on whom the impression was produced did a thing on the faith of the impression, a thing which could not have been to the contemplation of the person who originally created the representation. It seems to me that it must be shown that the person sought to be made responsible was conscious or ought reasonably to be treated as conscious of what the other was about to do. What are the English authorities for that proposition?

The law of estoppel was at one time carefully formulated by a very eminent English Judge, Lord Esher, then Brett J., in the case of *Carr v. The London and North-Western Railway Company*.[1] That learned Judge there drafted a series of four propositions, and the third of these propositions is as follows: "Another proposition is that, if a man, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts, and that it was a true representation, and that the latter was intended to act upon it in a particular way, and he, with such belief, does act in that way to his damage, the first is estopped from denying that the facts were as so represented."

Now, if that is a correct proposition, in order to succeed in this case, the first defendant must show that the action of Annie was such that any reasonable man would take her conduct to mean that she had no interest in the property, and that he was intended to act upon it in a particular way, that is to say, by a purchase of the property. But at the time when that representation by conduct was made, there is nothing whatever to show that any purchase by the first defendant was in contemplation.

Now, is that a correct statement of the law according to the other authorities? Those propositions were considered by Lord Esher in a subsequent case (*Seton, Laing & Co. v. Lafone* [2]), and he there said: "Before framing the propositions in *Carr v. The London and North-Western Railway Company*,[1] I had referred, I think, to nearly all the cases on the subject, and sought to derive from them the different propositions relating to the law of estoppel." He there shows the origin of the particular proposition there under consideration. He draws attention to the fact that it appeared to be suggested by the defendant's counsel that the proposition was inaccurate,

[1] *(1875) 10 Com. Pl. 307.* [2] *(1887) 19 Q. B. D. 68.*

but he said with regard to that proposition: "It has, therefore, been twice recognized in a Court of Appeal, and I think we must take it to be a correct proposition of law."

It is clear, therefore, that these propositions of Lord Esher were not only carefully considered, but have been treated as authoritative. There are also expressions in some of the other cases to which I may refer. In *Swan v. The North British Australasian Company, Ltd.*,[1] Cockburn C.J. makes these observations: "To bring a case within the principle established by the decisions in *Pickard v. Sears and Freeman v. Cooke*, it is, in my opinion, essentially necessary that the representation or conduct complained of, whether active or passive in its character, should have been intended to bring about the result whereby loss has arisen to the other party, or his position has been altered." Further, in the same case, Blackburn J. speaks as follows with reference to a judgment of Parke B.: "In the considered judgment of the Court, Parke B. lays down very carefully what are the limits. He says that to make an estoppel it is essential, if not that the party represents that to be true which he knows to be untrue, at least, that he means his representation to be acted upon, and that it is acted upon accordingly."

Now, these seem to be the principles of the English law, and whatever may be the effect of the decisions of the Courts of this Colony and of India and of the Privy Council upon the meaning of section 115, they certainly lay down this, that the object of the section was to enact legal principles which were to be identical with those in force in England. I take it, therefore, that this section must be interpreted in accordance with the principles of the English law to which I have just referred. Our only difficulty in so interpreting it proceeds upon a decision of this Court in the case of *Gunasekera v. Dissanayake*.[2] It there appeared that the conduct relied upon as producing an estopped was conduct by a widow, who throughout a series of dealings with the estate had acted on the supposition that she was only entitled to one-seventh share on the same footing as her children, and that she had no special rights by virtue of the fact that she was married in community. It appears that the plaintiff in that action had purchased at an execution the one-seventh share of one of the children, and it appears to have been thought that he would not have purchased that share but for the impression produced by the conduct of the widow to which I have referred. Lascelles C.J. in that case said: "It cannot be disputed that here the conduct of the first defendant and the other contesting defendants in their dealings with the estate generally, and especially in their dealings with the plaintiff's wife and the plaintiff himself, was the proximate cause of the plaintiff purchasing on the footing that the first defendant had renounced her widow's share in her husband's estate."

[1] *(1862) 7 H. & N. 603.*

[2] *(1912) 16 N. L. R. 123.*

1920.

BERTRAM C.J.

Rodrigo v. Karunaratna

That observation appears at first sight to suggest that, in considering whether a person is estopped with regard to a particular transaction, it is legitimate to consider the dealings of that person generally with the matter in question in the past. I am by no means sure, however, that this is what the Chief Justice really meant. We have not the full facts of the case before us. It may very well be that the widow knew of the intention of the plaintiff to purchase the one-seventh share at the Fiscal's sale; that she was conscious that it was impending; and that she took no action to correct his false impression. At any rate, I do not think that the judgment can necessarily be read as laying down any general legal proposition. It must be taken, I think, as the view expressed upon the facts of that particular case, which were considered to be distinct from the facts in the authorities cited before the Court. Nor do I think that the observations of Pereira J., to the effect that the word "intentionally" must be interpreted in the manner he there indicates, are necessarily inconsistent with the principles of the English law. He says that the result of the authorities is that intention to have a representation acted upon may be presumable as well as actual. That is perfectly consistent with the proposition of Lord Esher in *Carr v. The London and North-Western Railway Company*,[1] that it must be shown that the person acting upon the representation reasonably supposed that he was intended to act upon it in a particular way.

Mr. Jayawardene has raised a further point, and that is, that on the facts Annie must be taken to be constructively a party to the mortgage action, and would, therefore, be bound by the decree. I do not think that that point is sound, but I leave the law on that point to be stated by my brother De Sampayo.

For these reasons, I am of opinion that the appeal should be allowed, with costs.

DE SAMPAYO J.—

I agree. With regard to the second point taken by Mr. Jayawardene, I do not think it is supported by any authority. Under the Roman-Dutch law, a puisne encumbrancer or person in possession of the mortgaged property must be a party to the mortgage action so as to be bound by the decree. The Civil Procedure Code provides for registration of addresses, and in a case where a puisne encumbrancer has so registered his address, the mortgagee, when he brings the mortgage action, need only give him notice of the action. In my opinion the decree in the mortgage action in question did not bind Annie under either system of law. Mr. Jayawardene, however, contends that Annie was virtually a party to the mortgage action because her husband David was. But David was joined in the

[1] *(1875) 10 Com. Pl. 307.*

action not as representing Annie, but in his capacity as surety on the bond. Moreover, I do not think that, even if the mortgagee purported to join David in the action as husband of Annie, the requirement of the Roman-Dutch law would have been satisfied. Mr. Jayawardene next contends that Annie had sufficient notice of the action as provided by the Civil Procedure Code, and relies on *Rowel v. Jayawardene*, [1] in which neither party had registered an address, but the mortgagee had given full notice of the action to the puisne encumbrancer, and it was held that the puisne encumbrancer was bound by the decree. That decision, however, is no authority in this case, because no notice whatever was given to Annie. What Mr. Jayawardene means is that her husband David having been a party to the action, she must necessarily have come to know of the pendency of the action. But personal knowledge of this kind, even if the inference of such knowledge under the circumstances is sound, is not the same thing as a notice to be given by the mortgagee in pursuance of the requirements of the law.

In my opinion Mr. Jayawardene's contention cannot be sustained.

Appeal allowed.