1953 *Present :* **Rose C.J. and Pulle J.**

M. S. PERERA (Assistant Government Agent, Kandy), Appellant, *and* UNANTENNA *et al.*, Respondents

S. C. 9–10—D. C. Kandy, X 1,397

Mortgage—Land Redemption Ordinance, No. 61 of 1942, as amended by Ordinance No. 62 of 1947—Section 3 (1) (b)—" Transfer "—Includes voluntary conveyance of mortgaged property subsequent to date of hypothecary decree—Hypothecary decree—Does mortgage become merged in decree ?

Where a land is mortgaged and the mortgage is put in suit and decree is entered against the mortgagor for the payment of the amount due on the mortgage bond, a subsequent voluntary conveyance by the mortgagor in favour of the mortgagee, the consideration for which is set off in full settlement of the amount due on the said decree, is a transfer as contemplated in section 3 (1) (*b*) o the Land Redemption Ordinance. In such a case it cannot be contended that, notwithstanding that the charge on the land created by the mortgage bond existed even after the decree, the debt due from the mortgagor personally to the mortgagee became merged in the decree and ceased to exist and that the land, therefore, was not a land which was " transferred by its owner . . . to any other person in satisfaction or part satisfaction of a *debt* which was due from that owner . . . to that other person *and which was secured by a mortgage of that land subsisting immediately prior to the transfer* " within the meaning of the section.

APPEALS from a judgment of the District Court, Kandy.

Walter Jayawardene, Crown Counsel, with *V. Tennekoon*, Crown Counsel, for the plaintiff appellant in Appeal No. 9, and respondent in Appeal No. 10.

N. E. Weerasooria, Q.C., with *G. T. Samarawickreme*, for the petitioner appellant in Appeal No. 10.

H. V. Perera, Q.C., with *C. Thiagalingam, Q.C.*, and *N. M. de Silva*, for the 1st and 3rd defendants respondents in both appeals.

Cur. adv. vult.

May 22, 1953. ROSE C.J.—

There are two appeals in this case. The first appeal is by the plaintiff who is the Assistant Government Agent for Kandy. It turns upon the interpretation of section 3 (1) (*b*) of the Land Redemption Ordinance,

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No. 61 of 1942, as amended by the Land Redemption (Amendment) Ordinance, No. 62 of 1947. The relevant part of the amended section reads as follows :—

> " 3. (1) The Land Commissioner is hereby authorised to acquire on behalf of Government the whole or any part of any agricultural land, if the Land Commissioner is satisfied that the land was, at any time before or after the date appointed under section 1, but not earlier than the first day of January, 1929—
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> (*b*) transferred by its owner or his executors or administrators to any other person or the heirs, executors or administrators of any other person in satisfaction or part satisfaction of a debt which was due from that owner or his predecessor in title to that other person and which was secured by a mortgage of that land subsisting immediately prior to the transfer."

The facts are sufficiently set out in the judgment of the learned District Judge.

A point was taken by Mr. Thiagalingam on behalf of the 1st and 3rd defendants respondents that the authorization of the Assistant Government Agent by the Land Commissioner under section 2 (3) of the principal Ordinance was invalid. This matter, however, was not pressed in appeal and, therefore, it is unnecessary to advert to it further. Similarly claims for declaration of title, ejectment and damages made by the 1st and 3rd defendants were not pressed and it is unnecessary to make any observations in that regard.

The question to be decided in this case is whether it would be correct to hold that, where a land is mortgaged and the mortgage is put in suit and decree is entered against the mortgagor for the payment of the amount due on the mortgage bond, a subsequent voluntary conveyance by the mortgagor in favour of the mortgagee, the consideration for which is set off in full settlement of the amount due on the said decree, is not a transfer as contemplated in section 3 (1). (*b*) of the Land Redemption Ordinance, No. 61 of 1942 in that, notwithstanding that the charge on the land created by the mortgage bond existed even after the decree, the debt due from the mortgagor personally to the mortgagee became merged in the decree and ceased to exist and the land, therefore, was not a land which was " transferred by its owner . . . to any other person in satisfaction or part satisfaction of a *debt* which was due from that owner . . . to that other person *and which was secured by a mortgage of that land subsisting immediately prior to the transfer* " within the meaning of the section.

Perhaps it may be convenient first to dispose of a point taken by learned Counsel for the Assistant Government Agent that the District Judge in any event is not empowered to go behind the determination of the Land Commissioner or his delegate. On this matter I prefer the respondents' contention that the function of the Land Commissioner or any delegate of his consists of two components : first, the correct formulation of the

question to be decided and, secondly, the answering of that question in relation to the particular land. I agree that the second finding, which is one of fact, cannot be canvassed, but I am of the opinion that an incorrect formulation of the question to be decided is open to challenge.

On the main issue support for the Assistant Government Agent's view is to be found in two judgments of Bonser C.J., the first in a case reported in *Appendix B of 1 Browne's Reports of Cases at page XL* and the second in *Madar Lebbe v. Nagamma* [1]. In these two cases Bonser C.J. adopts a view contrary to that previously expressed in *The Government Agent v. Hendrick Hamy* [2]. This position appears to have been accepted by Middleton J., in *Ramanathan Chetty v. Cassim* [3] where he says at page 180—

> " The doctrine of merger of the mortgage bond in a judgment laid down in *The Government Agent v. Hendrick Hamy* [4] has been repudiated apparently by the judgments of this Court in *Madar Lebbe v. Nagamma* [5] and *O. L. Meera Saibo Lebbe v. M. B. Mohamadu Ibrahim* [6]."

In *Madar Lebbe v. Nagamma* [7], Bonser C.J. says at page 23:—

> " The District Judge dismissed the action on the ground that it was covered by a case (*Government Agent v. Hendrick Hamy*) reported in *3 C. L. R. 86*, where it was held that the mortgage was merged in the judgment, and that if the judgment was not registered before a subsequent conveyance, both the mortgage and the decree were gone, and the purchaser could hold the land free from all encumbrances. But as both the Judges who took part in the judgment in the case upon which the District Judge relied were subsequently parties to judgments which were entirely inconsistent with the decision in that case, I think we are free to consider that the judgment has been overruled, and is not to be considered any longer as law. It seems to me that there is no merger of the mortgage in the decree, as I said in the case reported in *Appendix B of 1 Browne's Reports, p. 11*. In that case I said that the personal remedy against the mortgagor upon the mortgage bond was gone, but that the charge on the land still existed, and the decree merely confirmed its existence."

If the view stated above, which was accepted by the learned District Judge, is correct, it, of course, disposes of the contention which was urged on behalf of the respondents that a mortgage is necessarily transformed by a decree. Moreover, an inference may perhaps be drawn from the fact that *Mr. Lee* in his book on the *Introduction to Roman Dutch Law* makes no mention of any transformation or change of nature on the part of a mortgage after decree. The judgment of Buchanan J. in *Estate*

[1] *(1902) 6 N. L. R. 21.*
[2] *(1894) 3 C. L. Rep. 86.*
[3] *(1911) 14 N. L. R. 177.*
[4] *(1894) 3 C. L. R. 86.*
[5] *(1902) 6 N. L. R. 21.*
[6] *(1901) 2 Browne 210.*

[7] *(1902)*

Turnbull v. Cowley[1] has perhaps some bearing on the point. Moreover, *Wille* in *Principles of South African Law* (*1937 edition, page 192*) does not support the contention that a decree entered in a mortgage action has the effect of extinguishing the mortgage. According to him a sale in execution must follow the decree in order that the mortgage may be extinguished. In dealing with the law as to how by a decree of court a mortgage may be extinguished the learned author does not even suggest that the bare entering up of a decree in an action to enforce the mortgage has the effect of terminating it.

Mr. H. V. Perera for the respondents contended that while it is true that the passages in Bonser C. J.'s judgments appear to support the view now contended for by the appellants, nevertheless it should not be assumed that he would have intended his observations to apply to such a case as the present one, in that he had not considered the matter in the present context. Mr. Pereraalso contended on the authority of the case of *Saravanamuttu v. Solamuttu*[2] that upon a decree being entered in a mortgage action a new charge on the land is imposed which displaces the charge created by the mortgage sought to be enforced. In the case cited neither the mortgage action nor the decree was registered. Between the date of decree and the sale in execution the mortgagor sold the land mortgaged to the plaintiff who registered the deed of sale. Thereafter the defendant who was the mortgagee became the purchaser at the sale in execution of the decree obtained by him and registered his conveyance. The question for decision was whether by reason of the non-registration of the mortgage decree the conveyance by the mortgagor to the plaintiff after decree and before execution prevailed against the defendant who was the purchaser at the sale in execution by reason of priority of registration. It was argued for the defendant, *inter alia*, that the mortgage decree was purely declaratory and did not create an interest affecting land within the meaning of section 16 of the Registration of Documents Ordinance, 1891. Dealing with this argument Bertram C.J., said at page 392—

> " On the institution of *lis pendens*, the mortgaged land becomes liable to be affected by the judgment, upon decree it becomes actually so affected. By the operation of the same principle, the order for the sale is binding upon any subsequent purchaser until the order has been finally carried out. It thus imposes a charge which prejudicially affects him."

In my opinion one cannot by implication read into this passage that because the decree imposes a charge the necessary result of that charge is to extinguish the mortgage.

While fully appreciating that it is not difficult to formulate a powerful argument in favour of an alternative view, I prefer to adopt the view of the appellants in this matter which would not seem to offend against any fundamental principle and would enable the provisions of this section

[1] *Cape Supreme Court Reports 23 (Cape of Good Hope) 244 at 245.*
[2] *(1924) 26 N. L. R. 385.*

to apply to a case such as the present, for the exclusion of which from the provisions of the Ordinance no good reason would appear to exist. I quite agree with the learned Counsel for the respondents that it is hazardous, when in doubt about a question of interpretation of a statute, to be guided by one's views of the intention of the legislature, which views may to some extent be based upon conjecture. While paying full heed to this consideration I am none the less comforted by the reflection that the view which I propose to adopt, without doing violence to the actual language used in the section, enables the benefit of the Ordinance to be given to a class of transaction which, it seems to me, must have been within the contemplation of the legislature.

Counsel for the respondents further contends that in the present matters there is no "debt" within the meaning of the sub-section in that a debt is an obligation enforceable by action. Counsel for the Assistant Government Agent on the contrary contends that a debt means any obligation to pay money and would include an obligation to pay money as a result of the position set up by a hypothecary decree. Here again it is possible to present attractive arguments leading to contrary conclusions but I consider that the words of this sub-section are, at the least, capable of the meaning ascribed to them by the Assistant Government Agent and that the matter therefore falls within the well known principle laid down in *Heydon's Case*[1] and *Hodsoll v. Baxter*[2] where Williams J. says in considering the meaning of the word "debt" :—

> "I think the judgment must be affirmed. The claim is within the spirit of the enactment; it is out of the question to suppose that the legislature intended to omit such a case as this. If, then, the language of the section can be construed so as to include the case, it ought to be so construed."

For these reasons appeal No. 9 of the Assistant Government Agent is entitled to succeed. The judgment of the District Judge dated the 17th November, 1950, is set aside, with costs here and below payable by the 1st and 3rd defendants, and the case is remitted to the District Court for the adjudication of the remaining issues.

Appeal No. 10 is by the mortgagor from an order dated the 23rd February, 1951, by which an application made by him to intervene in the action was dismissed. There is no reason for interfering with that order with the result that appeal No. 10 will be dismissed with costs payable to the 1st and 3rd defendants.

PULLE J.—I agree.

Appeal No. 9 allowed.

Appeal No. 10 dismissed.

[1] *76 English Reports 637.* [2] *120 English Reports at page 739.*