1956 *Present :* H. N. G. Fernando, J., and T. S. Fernando, J.

S. SALISHAMY, Appellant, *and* W. SALISHAMY *et al.*, Respondents

S. C. 115—D. C. Kalutara, 27,830

Estoppel—Sale of mortgaged property—Bids made by mortgagee—Mortgagee's right to enforce bond subsequently—Partition Ordinance, s. 12—Evidence Ordinance, s. 115.

Where a mortgaged land was put up for sale under a partition decree and the mortgagee, who was not a party to the action, made bids at the sale—

Held, that the making of bids by the mortgagee did not constitute an unequivocal representation by him that the land was not subject to a mortgage. The mortgagee, therefore, was not estopped by section 115 of the Evidence Ordinance from enforcing his mortgage bond subsequently.

APPEAL from a judgment of the District Court, Kalutara.

E. Gooneratne, for the plaintiff-appellant.

B. S. Dias, for the defendants-respondents.

Cur. adv. vult.

[1] *(1913) 16 N. L. R. 438.*

June 18, 1956. H. N. G. FERNANDO, J.—

The plaintiff-appellant was the mortgagee of two lands under a Bond dated April 23rd, 1945, which according to the plaint was duly registered. In April, 1950, he instituted this action for the recovery of the principal and interest due on the bond as well as for a hypothecary decree in respect of the two lands, joining as parties the two mortgagors, and also (for reasons which will presently appear) two other persons as the 3rd and the 4th defendants. The mortgagors did not contest the action and a money decree was entered against them. This appeal is only against the refusal of the District Judge to grant a hypothecary decree.

The first of the two mortgaged lands was the subject of a partition action D. C. Kalutara No. 26367 instituted by one of the mortgagors after the execution of the mortgage bond. The present plaintiff was not made a party to that action and did not intervene. Decree was entered for the sale of the land, and, in pursuance of a commission issued by the Court on 20th July, 1948, the land was sold by the Commissioner on 23rd October in that year by public auction and purchased by the present 3rd defendant, who obtained a certificate of sale on 21st March, 1949. The 3rd defendant is joined in the hypothecary action in view of his purchase of the land.

At the trial (in the words of the learned District Judge) "the mortgage was admitted"; and since no issue was raised as to the validity of the mortgage or the amount due thereunder or its due registration in order to bind subsequent incumbrancers, it must be presumed that the admission covered all these matters. The only issue tried was the one suggested on behalf of the 3rd defendant:—"Is the plaintiff estopped from enforcing his mortgage bond No. 32932 dated 23rd April, 1945 by the sale of Welawatte land No. 1 in the schedule to the amended plaint?".

It was clearly established by the evidence that the plaintiff was present at the sale and that he made the third bid (Rs. 450) at the auction. The 3rd defendant commenced to bid thereafter and ultimately became the purchaser at Rs. 770. Despite the evidence of the plaintiff and of the auctioneer that the plaintiff had informed persons present at the sale that the land was subject to the plaintiff's mortgage, the learned Judge has preferred to believe the evidence of the 3rd defendant to the effect, *firstly* that the mortgage was never mentioned, and *secondly* that the 3rd defendant would not have purchased the land if he had known of the plaintiff's mortgage. I should add that the plaintiff is the brother-in-law of the original mortgagor. Upon these facts, the learned Judge formed the conclusion that "any reasonable person would take such conduct (of the plaintiff) to mean that the plaintiff had no interest in the land" and held against the plaintiff on the issue of estoppel.

The question whether (to employ the language of section 115 of the Evidence Ordinance) "a person has by his declaration, act or omission intentionally caused or permitted another to believe a thing to be true and to act upon such belief", can rarely receive a summary answer such

as appears to have been given in this case; and the fine, though valid, distinctions which have been drawn in the decided cases show that difficult problems arise upon pleas of estoppel. For example *Theadoris de Silva v. Kalu Appu et al.* [1] which decided that a person who was the highest bidder at a Fiscal's sale, though he did not comply with the terms for completing his purchase, was not estopped from asserting his title against the person who was ultimately declared the purchaser at the sale, cannot be readily reconciled with *Tissahamy v. Perera* [2] where the plaintiff was held estopped from asserting title to a land on the ground that he had been a bidder at a Fiscal's sale of the same land.

The provisions of section 115 of the Evidence Ordinance are in effect a codification of the English Law on the subject which is stated in general form as follows :—" Where one person (' the representor ') has made a representation to another person (' the representee ') in words, or by acts and conduct, or (being under a duty to the representee to speak or act) by silence or inaction, with the intention (actual or presumptive), and with the result, of inducing the representee on the faith of such representation to alter his position to his detriment, the representor, in any litigation which may afterwards take place between him and the representee, is estopped, as against the representee, from making, or attempting to establish by evidence, any averment substantially at variance with his former representation, if the representee at the proper time, and in the proper manner, objects thereto ". (Spencer Bower on Estoppel by Representation p. 10). In the first place it has to be established that the act or omission relied upon was intentional, and it has been held in one of the leading cases (*Freeman v. Cook*) [3], per Baron Parke, that " if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation will be equally precluded from contesting its truth ; and conduct by negligence, where there is a duty cast upon a person, by custom of trade or otherwise, to disclose the truth, may often have the like effect ". The learned District Judge in this case has not found, and indeed upon the evidence could scarcely have found that the plaintiff actually intended the defendant to think that there was no mortgage in existence so that the ingredient of intention would not be established unless it can be said that the plaintiff's conduct would necessarily lead a reasonable man to conclude that a mortgage was not subsisting.

In regard to the fact that the plaintiff was a bidder at the Fiscal's sale, what has now to be established in order to estop him from asserting his mortgage is that the making of bids by a mortgagee at a sale of the mortgaged lands constitutes an unequivocal representation that the land is not subject to a mortgage. Ceylon cases such as those of *Caruppe Chetty v. Wijesinghe* [4] and *Tissahamy v. Perera* (supra) are not directly in point, because there the rule of estoppel was applied against persons who

[1] *(1916) 2 Matara Cases 183.*
[2] *(1942) 43 N. L. R. 405.*
[3] *(1848) 2 Exch. 654.*
[4] *(1910) 14 N. L. R. 152.*

asserted title and not merely encumbrances against purchasers at Fiscal's sales. But even where a claim of title was subsequently set up the mere fact that bids were made was not thought conclusive in *Thedoris de Silva v. Kalu Appu* (supra). There, upon the facts it was held that the bids were made merely in order to buy up the land and avoid future litigation and that the ultimate purchaser at the Fiscal's sale was not proved to have been induced to purchase by reason of the bids made by the person who subsequently set up title.

More directly in point is the case of *Tikiri v. Belinda* [1] where the plaintiff was present at an execution sale held under his own writ of a 4/6th share of the land and himself made bids. Upon these facts he was held to be estopped from setting up a prior registered usufructuary mortgage of the entire land in his favour. A special feature of that case referred to by de Sampayo J. was that " the plaintiff was himself a writ holder and was present at the sale in that capacity and as a bidder ", and it was held (apparently for the reason that he was a writ holder) that a duty lay on him to speak and to disclose the mortgage. On those grounds de Sampayo J. distinguished the case from that of *Caruppen Chetty v. Wijesinghe* (supra) which he had earlier decided himself. In the decision last mentioned the same learned Judge observed that " in the case of a mortgagee or lessee the duty to notify his right is less apparent seeing that notwithstanding the mortgage or lease the land may still be sold ". While therefore a person who himself has *title* may well have a duty either to warn or else not to mislead others to whom the land is being offered for sale, such a duty does not so clearly arise in the case of a person the existence of whose interests would not prevent the passage of title to another. In the present case the land was put up for sale under a partition decree and all the parties must be presumed to have been aware of the provisions of section 12 of the Partition Ordinance which expressly preserves the rights of a mortgagee of land which is the subject of the partition or sale. In view of the provisions of that section and of the fact that acquisition by mortgagees of lands subject to their own mortgages is not unusual (merger being a recognised legal form of the extinction of mortgages), it cannot in my opinion be said that the conduct of the plaintiff in bidding at the sale amounted to an unequivocal representation that there was no existing mortgage. If, as I think, the act of bidding does not work an estoppel, still less can the failure of the plaintiff to disclose his mortgage prevent him from now asserting his interest. But it would perhaps be useful to add a few observations on this matter as well.

Silence or inaction can only count as a representation if there is a legal duty (not merely moral or social) owed to a party to make the disclosure, the omission of which is relied on to create the estoppel, (Spencer Bower p. 65 sec. 75). Baron Parke in *Freeman v. Cooke* (supra) observed that the omission to disclose will only estop a person if " there is a duty cast on him by custom of trade or otherwise, to disclose the truth ". Many of the cases show that the rule of estoppel by silence or acquiescence is usually applicable when there is some dealing or trans-

[1] *(1916) 19 N. L. R. 281.*

action between the parties or where "a person stands by" and permits another to incur expenditure the benefit of which he subsequently seeks to keep for himself. Apart from such cases a person who has a title, right or claim, has a duty to disclose it to another who conducts himself with reference to the property in a manner inconsistent with that title, right or claim. But where a land which is already subject to a mortgage is being sold to some third party, the acquisition of title by the third party is not inconsistent with the interests of the mortgagee and therefore does not involve any such violation of the mortgagee's rights as would render any disclosure necessary.

For these reasons the provisions of section 115 of the Evidence Ordinance are not in my opinion applicable in the circumstances of this case. The ordinary principle that the plaintiff's prior registered mortgage prevails over the subsequent Fiscal's conveyance must therefore be applied.

To turn now to the plaintiff's claim for a hypothecary decree in respect of the second land. According to the pleadings the 1st defendant who was the original mortgagee sold the second land to the 4th defendant. But it was also stated in the plaint that according to the Interlocutory decree entered in Case No. 26520 D.C. Kalutara, the interests of the 1st defendant in the second land are now described in the manner set out in the second schedule to the plaint. The learned Judge found however that the description in the plaint of the second land was confusing; and a hypothecary decree over the second land was denied to the plaintiff by the Judge on the ground that there was no evidence before him of the conversion of the second land described in the mortgage bond into the land as described in the Interlocutory decree in Case No. 26520. But it is by no means clear that any of the defendants contested the right of the plaintiff to the hypothecary decree. The 1st and 2nd defendants filed no answer and were not represented at the trial. The 4th defendant also filed no answer but he was represented, and the proceedings of 9th November, 1954, would seem to indicate that the mortgage was admitted by the parties who were represented at the trial and that the only issue actually raised was the one with which I have already dealt.

The question whether the second land was correctly described in the plaint or not, appears to have been raised for the first time by the learned District Judge in his judgment. In these circumstances I think the dismissal of the plaintiff's action in respect of the second land without his being given any opportunity either to identify the land in respect of which he claimed a decree or to lead evidence in support of his claim was quite unjustified.

In the result the plaintiff's appeal must succeed in regard to both lands. Hypothecary decree must be entered in his favour in respect of the land described in schedule No. 1 in the amended schedule to the plaint which is attached to the amended plaint marked "C". As to the second land which is described in schedule No 2 in the amended schedule to the plaint, the case is remitted to the District Court with a direction that the plaintiff be given an opportunity to identify the land so described with the land

No. 2 described in the schedule to the mortgage bond P1, including an opportunity to lead any further evidence considered necessary. If he so identifies the land to the satisfaction of the District Judge, a hypothecary decree should be entered in the plaintiff's favour in respect of the second land as well. That part of the decree of the District Court which dismisses the plaintiff's action against the 3rd and 4th defendants is set aside. The 3rd defendant will pay to the plaintiff the costs of the proceedings in the District Court and of this appeal.

T. S. FERNANDO, J.—I agree.

Judgment set aside.