1943 *Present :* **Hearne and de Kretser JJ.**

DON VALENTINE SAMARANAYAKE, Appellant, *and* KALU ARATCHIGEY CORNELIS *et al.*, Respondents.

146—D. C. Negombo, 12,234.

Registration—Conflict between transfer of property by testator and that by devisee—Competition between deeds from the same source—Priority.

Juan Amarasekere sold the land in dispute to the plaintiff in 1918, who registered his deed in 1930. Juan died leaving a last will by which he devised all his undisposed of property to John Amarasekere, who transferred the land to the defendants, whose deed was registered in 1928.

Held, that the defendants' deed prevailed by reason of prior registration.

James et al. v. Carolis et al. (*17 N. L. R. 76*) followed.

THIS was an action for partition of a land called Mirigahakanda. The plaintiff's case was that R. S. Peiris and Juan Amarasekere became entitled to this land in equal shares under a Crown grant. The present dispute is in respect of Juan Amarasekere's half share which he transferred to the plaintiff on deed No. 8,908 of November 12, 1918—P 3—and which deed was registered on December 12, 1930. The defendants contend that Juan Amarasekere died leaving a last will whereby his son John Amarasekere became entitled to the said half share as the sole devisee who transferred the same to the defendants on deed No. 3,309 of February 22, 1928—2D4—which was registered on February 25, 1928. They claimed the benefit of prior registration which was upheld by the District Judge.

The last will of Juan Amarasekere contained the following words:—"I do hereby devise and bequeath all my undisposed property movable and immovable of what kind or nature soever wherever found or situate in possession or expectancy, in remainder or in reversion nothing whatsoever excepted unto such Don John Amarasekere Appuhamy and I appoint Don Louis Wijeywardene executor of this last will and testament."

A. R. H. Canekeratne, K.C. (with him *S. R. Wijayatilake*), for plaintiff, appellant.—The defendants cannot claim priority as John Amarasekere under the last will did not get title to this land. The testator expressly bequeathed only his *undisposed of property*. At the time of making his will he had already disposed of this land in 1918 by his deed No. 8,908—P 3. Even the inventory filed in the Testamentary Case—P 7— does not

[1] *4 Cr. App. R. 228.*

include this property. John Amarasekere was neither the executor nor the administrator and he was not an heir of the deceased Amarasekere. He is only an adopted son. The persons who can succeed to the legal personality of a deceased are the executor or the administrator. In the case of an intestacy, the Roman-Dutch law recognizes the heirs as the representatives of the deceased. The law in Ceylon too recognizes this. On the other hand a devisee does not represent the deceased. John Amarasekere therefore succeeded to what was devised to him under the will and not to all the rights and liabilities of the decased. *James v. Carolis*[1] can be distinguished. There the Supreme Court went on the footing that an intestate heir steps into the shoes of the deceased and there is a continuation of the legal *persona*. Similarly, in the case of a testacy the executor would represent the deceased but a devisee succeeds only to the specific property devised to him. The mere fact that in this case John Amarasekere is the sole legatee does not alter the position. The defendants therefore could not claim priority as the competing deeds are not from the same source. An analogous situation arose in *Appuhamy et al. v. Holloway*[2]. John Amarasekere in deed No. 3,309 refers in the recital to the fact that the land in question is possessed by virtue of the last will and that the will is not forthcoming. It is obvious that the grantor was fully aware of the circumstances. The learned District Judge has misdirected himself by applying the principles laid down in *Punchirala v. Appuhamy*[3], *James v. Carolis* (*supra*). Section 7 (1) of the Registration of Documents Ordinance does not apply to the facts of this case as there is no competition between two deeds from the same source.

N. E. Weerasooria, K.C. (with him *M. I. M. Haniffa*), for defendants, respondents.—The object of the Registration of Documents Ordinance is to protect an innocent purchaser. If a party who obtains a deed does not register it, he does so at his own risk. The subsequent purchaser who registers his deed gets a superior title not because the vendor had any title left to convey but because by a legal fiction created by the Ordinance he is regarded as still having the title. The decision in *James v. Carolis* (*supra*) enunciates the correct principle. The competing deeds are from the same source.

Cur. adv. vult.

September 15, 1943. DE KRETSER J.—

Juan Amarasekere sold the land in dispute in 1918 to the plaintiff who did not register his deed till 1930. Juan died leaving a last will by which he devised all his property to John Amarasekere and the latter transferred this land to the defendants, who registered their deed in 1928.

The learned District Judge held that defendants' deed prevailed by reason of prior registration, and the plaintiff appeals.

It is conceded that if Juan or his executor or intestate heir or a legatee to whom the property had been specifically devised, had sold to defendants, their deed would prevail, and it is alleged that the reason for this is that the transfer would then be traceable to Juan or those carrying

[1] *17 N. L. R. 76.* [2] *44 N. L. R. 281.*
[3] *7 N. L. R. 102.*

on his *persona*, but that John did not carry on his *persona* and only had limited rights, viz., rights to such property as Juan had not disposed of in his lifetime.

If an intestate heir, who inherits only what has not been disposed of can convey and the purchaser may acquire a superior title by registration, I fail to see why a sole legatee, who is, one may say the testate heir, should be in a different position.

The same difficulty troubled de Sampayo J. apparently and led to a Divisional Bench of three Judges deciding in *James v. Carolis* [1], that a transfer by an intestate heir if prior registered gave superior title, and de Sampayo J. came to the conclusion that—

> "The truth is that such title (in the purchaser) is created not because any right or power is still left in the previous owner, but because the law intervenes and protects an innocent purchaser who has paid consideration." He went on to say that the same reasoning applied to an heir.

He found the real answer to the question in the case of *Warburton v. Loveland* [2] decided by the House of Lords viz., that in the matter of registration, the transfer of what would have been the right and title of the person granting the second conveyance but for the prior unregistered deed prevails.

Applying that rule to this case, but for the earlier deed John Amarasekere would have had title to the land, and the transfer of his hypothetical right is converted into a conveyance of title in fact through the medium of prior registration. The House of Lords said—"but as by the non-registration of that deed the grantees suffered him, as to the world at large, to have the appearance of right, neither they, nor any claiming under them, are at liberty to set up the deed in opposition to the persons who have been deluded by the appearance of right in the husband." Substitute "John Amarasekere" for "husband" and you have the whole question in a nutshell.

Lascelles C.J. who in *Peris v. Perera* [3] had stated the object of the Registration Ordinance, held that the same principles applied to the Ceylon Registration Ordinance as were found in *Warburton v. Loveland* (*supra*), and said—"If an intending purchaser finds on the register no adverse deed affecting the property, he is placed in the same position, as regards his title to the land as if no such deed in fact existed. On the other hand, the grantee under the prior unregistered deed is penalized for his failure to put his deed on the register. He is taken to have given out to the world at large that his deed did not exist, and is prohibited from setting it up against the registered deed of the subsequent purchaser for valuable consideration."

The Ordinance does not expressly penalize the purchaser who did not register nor was that its object probably, for it aimed at protecting the innocent second purchaser, but the result is that the first purchaser pays the penalty.

[1] *17 N. L. R. 76.* [2] *(1831) 2 Dow & Clark 480.*
[3] *10 N. L. R. 33.*

Pereira J. said—"The policy and effect of our law of registration are such that the mere fact that a person who had conveyed property had no title to it is insufficient to deprive the conveyance of priority by reason of prior registration." (P. 79).

The argument that the competing deeds must come from the same source is quite correct if properly understood. It does not mean that they must come from the same person or *persona*. As de Sampayo J. put it in *Bernard v. Fernando*[1], "The truth, I think, is that the expression 'adverse interest' refers only to cases where two persons claim interests traceable to the same origin", *i.e.*, the lines of title must not be parallel but must intersect at some point and so produce the clash of interests.

For the reasons I have given, I think the judgment in this case is correct and I dismiss the appeal with costs.

HEARNE J.—I agree.

Appeal dismissed.