Present: Ennis J. and De Sampayo A.J.

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DANIEL *et al. v.* SILVA *et al.*

326—D. C. Galle, 1,151.

Deed of 1836—Copy filed in an action in 1862—Deed not registered under Ordinance No. 6 of 1866—Deed inadmissible—Prescription—Emphyteusis.

By deed dated December 24, 1836, A granted to B and C a perpetual lease of a field on the terms that they should cultivate it and deliver one-third of the crops to the landowner as ground share. The lease was not registered as required by Ordinance No. 6 of 1866. In 1862 a copy of the lease was filed in a District Court action brought by B against A and others in consequence of an ouster; the lessees were held in that action entitled to possession, provided they fulfilled the condition of the lease. In the present action brought by the successors in title of A against the heirs of B and C, it was held that the lease was not admissible in evidence.

The interest created by the deed is one in the nature of an emphyteusis, and such an interest may be acquired by prescription.

THE facts appear from the judgment.

A. St. V. Jayewardene (with him *Jayatileke*), for appellants.

E. W. Jayewardene, for respondents.

Cur. adv. vult.

November 14, 1913. ENNIS J.—

In this action the plaintiffs claim title to a field called Hathaulkumbura, which originally belonged to one Gallegey Henderick. Henderick, in 1836, gave a perpetual lease to two persons, Aberan and Daniel, on condition that they cultivated the field and gave one-third of the profits to him. The defendants claim through Aberan, but it appears that Aberan and Daniel's deed of 1836 was never registered, and one of the issues in the case was its admissibility in evidence. It appears that in 1862 Daniel brought an action No. 20,810 in the District Court of Galle against Henderick and his brother Girigoris for the possession of part of this field and for a declaration of title in terms of the deed of 1836, Henderick and Girigoris having ousted him from possession. Decree was entered in 1863, the Court finding on the construction of the deed of 1836 that both Aberan and Daniel had jointly covenanted to cultivate the field, that no forfeiture had been incurred, and that the ouster of the plaintiff (Daniel) was illegal.

It appears that the original deed of 1836 was not filed in that case, a certified copy only having been put in. It was not, therefore, utterly beyond the power of the defendants' predecessors to have

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registered the deed, which remained in their possession and has been produce by them in this case. The old case leaves no doubt as to the genuineness of the deed of 1836, and it seems to me a highly technical objection in this particular case to urge the effect of the Ordinance No. 6 of 1866, which was intended to prevent the production of false deeds in evidence, to defeat the defendants.

Technically, I consider the deed of 1836 is not admissible, and no issue has been raised as to whether the defendants have acquired by prescription the rights they claim. I think, in the circumstances of this case, such an issue should be framed now, and the parties heard thereon. I would accordingly frame an issue: " Have the defendants acquired by long possession a right to possess and take two-thirds share of the crops? " and send the case back to the District Court for the trial of that issue. The costs of the appeal should be costs of the cause.

DE SAMPAYO A.J.—

One Henderick Silva was admittedly the owner of three-fourths of the field called Hathaulkumbura. By deed dated December 24, 1836, he granted to two persons named Dangamuwege Daniel and Pathiranage Aberan a perpetual lease of the field, on the terms that they should cultivate it and deliver one-third of the crops to the landowner as ground share. Henderick Silva by deed dated February 15, 1862, sold the field to his brother Frederick *alias* Girigoris, whose heirs by deed dated June 25, 1912, sold it to the plaintiffs. The action is brought for possession and damages against the defendants, who are the heirs of Pathiranage Aberan. The defendants set up their right under the deed of 1836, and are met by the objection that the deed is not admissible in evidence by reason of its not having been registered under the Ordinance No. 6 of 1866. It appears that in 1862 the other cultivator, Daniel, asserting right under the deed in question, brought the action No. 20,810 of the District Court of Galle against Henderick and Girigoris and two others in consequence of an ouster from a portion of the field which, apparently by some arrangement between him and Aberan, he had cultivated. His rights were upheld by the Supreme Court in appeal, which decided that the lessees were entitled to possession provided they fulfilled the conditions of the lease, and dissented from the opinion of the lower Court that they could only sue Henderick Silva for damages for breach of contract. The District Judge in this case admitted the document in evidence on two grounds: (1) because he considered that it was not a document creating " title " within the meaning of section 2 of the Ordinance No. 6 of 1866, and (2) because the document having been filed in the action No. 20,810, and having since remained these, the defendants might claim the benefit of the proviso of section 7 of the Ordinance. As regards the first point, I do not think the District Judge is right.

In my opinion the word "title" is not used in the sense of *dominium*, but in the larger signification of " right " or " interest " in land. This is more clearly seen by reference to section 6, which speaks of persons claiming " interest under any such deed," &c. The other reason given for the reception of the deed is more substantial. In the Kitulpe Sannas case (D. C. Ratnapura, 1,111 [1]), where a similar question was raised with reference to a sannas which had been produced in an action No. 2,618 prior to the enactment of the Ordinance of 1866, it was pointed out that the document could not be brought within the proviso to section 7, because, since the person claiming under it might have taken steps under section 6 to have the document registered, notwithstanding the fact of its being in the custody of the Court, it could not be said that the failure to register was due to a cause utterly beyond the control of that person. The District Judge's second ground for receiving the deed of 1836 in evidence in this case, therefore, does not seem to be tenable. But in the Kitulpe Sannas case the instrument was admitted in evidence by this Court for another reason, which was stated by Wendt J. as follows: " I agree with the contention of the plaintiff's counsel that the Ordinance does not apply to this sannas. Before it was enacted, the genuineness of the sannas became the subject of a judicial trial, and the instrument was made part of the evidence and therefore part of the record. The decree pronounced it genuine. It ceased to be a document in private hands. The Ordinance, as pointed out by Lawrie A.C.J. in the case last cited (*i.e.*, *Attorney-General v. Kiriya* [2]), applies only to such documents. It does not affect public records, thombus, &c., the public archives, nor the decrees of Court and the like. There is no provision for the registration of decrees. The decree in case No. 2,618 is, therefore, admissible in evidence. How is the Court to ascertain what sannas was upheld by that decree unless the instrument is produced? For these reasons I think that the second sannas ought to have been received in evidence." This ruling might apply to the present case but for two facts, viz., that the inquiry and decision in the old action No. 20,810 were not as to the genuineness of the document, and that what was there produced was not the document itself but a certified copy of it. The Kitulpe Sannas case was itself commented upon by Wood Renton J. in *Kalu v. Aruma*,[3] and the case under appeal was distinguished from it on the ground that, in the old case depended on for the purpose of admitting the " sittu " there in question, the evidence had no reference to the document, and the judgment, which in so many words dismissed the plaintiff's case, could not be regarded as having affirmed the genuineness of the document. The judgment of Wendt J. in the Kitulpe Sannas case was no doubt influenced by

[1] *S. C. Min., Nov. 11, 1903.*

[2] *(1897) 3 N. L. R. 81.*

[3] *See p. 484.*

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the consideration that the Ordinance No. 6 of 1886 was enacted for the purpose of excluding false documents, and that the genuineness of the sannas being the very point of decision in the case, the object of the Ordinance was attained once for all. In the case No. 20,810, however, the genuineness of the deed of 1836 was not in question—it was in fact admitted—and the decree was only concerned with the construction of it. In this state of facts I am not prepared to hold that the deed was properly admitted in evidence. But it would be hard to deprive the defendants of their rights under the deed upon this highly technical ground if they could establish those rights in some other way. The interest created by the deed is one in the nature of emphyteusis, and such an interest may, I think, be acquired by prescription. I agree that the case should be sent back for the determination of the issue formulated in the judgment of my brother Ennis.

Sent back.

KALU *v.* ARUMA.

November 27, 1911. WOOD RENTON J.—

It is quite clear, and it was admitted at the argument before me by Mr. Tambyah, the plaintiff-appellant's counsel, that the contest between the parties in the present case is one that depends on paper title, and on that alone. The plaintiff-appellant cannot succeed unless he is in a position to rely on the " sittu " of 1815, which is specially referred to both in his plaint and in his replication to the defendant-respondent's answer. The " sittu," being a document executed before February 1, 1840, was inadmissible as evidence at the trial in the present case, unless it was registered in conformity with the provisions of section 2 of Ordinance No. 6 of 1866, or is exempted from such registration. It was admittedly not so registered, and the only point that Mr. Tambyah was able to make in support of his contention that it could now be taken account of by the Commissioner of Requests at all was that it had been set out in the pleadings and relied upon by a predecessor in title of his client in an action (D. C. Kandy, No. 32,985) brought against him by a predecessor in title of the defendant-respondent, which had been disposed of before January 1, 1868, the date at which, by section 7 of Ordinance No. 6 of 1866, it was necessary that all old deeds of the class to which it belongs should be registered. In support of that contention Mr. Tambyah referred me to 305—D. C. Ratnapura, No. 1,111 (*S. C. Min., Nov. 11, 1903*), in which Wendt J., whose judgment was concurred in by Grenier J., held that a sannas, which would otherwise have been void under section 7 of Ordinance No. 6 of 1866, but whose genuineness had been upheld by a judicial decree before the enactment of Ordinance No. 6 of 1866, was admissible in evidence. " The decree," said Wendt J., " pronounced it genuine. It ceased to be a document in private hands." It may be noted that an application made to the Court, subsequent to the trial, by the parties who produced the sannas that it should be returned to them was refused. I do not consider it necessary to consider further the grounds of the decision in 305—D. C. Ratnapura, No. 1,111, for, in my opinion, they cannot be made applicable to what took place in D. C. Kandy, No. 32,985. I have called for and examined the record. In that case Kirie, daughter of Tikiri Yamana, one of the sons of Aruma Duraya, through whom the defendant-respondent claims, sued Unga Duraya, a predecessor in title of the plaintiff-appellant, claiming a declaration of title to certain lands, not including the land in suit in the present action. Unga Duraya relied by way of defence (1) on the " sittu " from Ella Duraya, whom the appellant alleges

to have been the original owner of the land, and (2) on prescription. The "sittu" and a certified translation of it were filed with the answer. Kirie died during the pendency of the suit, and her daughter was substituted as plaintiff. The plaintiff's counsel examined the defendant, and then called several other witnesses. The evidence dealt with possession alone. I find in it no reference to the "sittu" and the judgment—which was as follows: "Plaintiff's case finally dismissed with costs"—cannot be regarded as having affirmed its genuineness. But D. C. Kandy, No. 32,985, differs in yet another point from the facts in 305—D. C. Ratnapura, No. 1,111, in that it appears from the journal entry in the former case under date August 19, 1867, that the Court allowed the "sittu" itself to be removed from the record. The "sittu" then passed again into the hands of the appellant's predecessor in title and could have been registered still. It was not so registered, nor was it subsequently registered, though the time limited for registration was extended to February 1, 1875 (see note, *9 S. C. C. 103*).

Mr. Tambyah asked that, in any event, he might still be allowed an opportunity of bringing the appellant within the proviso to section 7 of Ordinance No. 6 of 1866, which enables unregistered old deeds to be received in evidence on proof that the non-registration was due to causes "utterly beyond the control" of the persons producing them. I cannot now accede to this application. It appears from the judgment of the Commissioner of Requests, notwithstanding the words "deeds admitted" in the record, that the reception in evidence of the "sittu" was objected to at the trial on the ground of non-registration. That was the proper time for Mr. Tambyah's present application to me made. It was not made. The point is not taken in the petition of appeal. Nor does the appellant now say that he is in possession of evidence to satisfy the proviso in question.

The appeal must be dismissed with costs.