Aug. 17, 1911

Present : Lascelles C.J. and Middleton J.

KARTHIKESU *et al. v.* PONNACHCHY.

215—*D. C. Jaffna*, 7,541.

Novation—New debtor a minor—Creditor may sue the original debtor.

Novation may take place, not only by express agreement, but also tacitly or by implication, the consent of the parties to the novation being implied from the circumstances and the conduct of the parties. In the latter event, however, the inference must be so probable and conclusive as to make it quite clear that the parties intended to recede from the original obligation and to replace it by another—in fact, it must be a necessary inference, the new obligation being inconsistent and incompatible with the continued existence of the original obligation.

Where a creditor with the *animus novandi* accepts a new debtor in lieu of another, and it turns out that the new debtor had no capacity to contract,—

Held, that the creditor could sue the original debtor.

THE facts are set out in the judgment of Lascelles C.J.

H. A. Jayewardene, for the defendant, appellant.—The learned District Judge has held that the execution of the second mortgage amounted to a novation. The effect of a novation is to extinguish the former debt. Novation has the same effect as actual payment. *Van der Linden* 268 ; *Pothier, vol. I., p.* 390 ; *Kader Saibu v. Teverayan.*[1] *Silva v. Silva*[2] does not apply to this case.

Tissaveerasinghe, for the plaintiffs, respondents.—If at the time of the delegation the person substituted was an insolvent, the creditor may, if the insolvency was unknown to him, sue the original debtor. *Pothier, vol. I., p.* 395 (*sec.* 568). The same principle would apply to this case.

The learned Judge was wrong in holding that the granting of the second mortgage by a person who had no capacity to grant it was a novation in law. There was, moreover, no declaration of an express intention to extinguish the old debt. *Van der Linden* 269. *Silva v. Silva*[2] is an authority in point.

Jayewardene, in reply.—The section quoted by the counsel for the respondents clearly shows that the creditor could not sue the original debtor in the case of the insolvency of the person delegated.

Cur. adv. vult.

[1] *(1900) 4 N. L. R. 165.*

[2] *(1909) 13 N. L. R. 33.*

August 17, 1911. LASCELLES C.J.—

The facts which have given rise to this appeal are the following. By mortgage bond No. 837 dated August 7, 1905, Velupillai Venasitamby and Ponnachchy mortgaged certain property to the plaintiffs to secure the payment of Rs. 1,000. By deed No. 1,245 dated November 28, 1906, Ponnachchy and her husband granted the mortgaged property by way of dower to their daughter Valliammai. On the same day Valliammai and her husband Ramalingam mortgaged the land comprised in the first mortgaged bond, and also a land belonging to Ramalingam, to the plaintiffs ; a surety also joined in the bond. It was admitted that in another action, D. C. Jaffna, No. 6,878, it was held that, so far as Valliammai was concerned, the second mortgage was invalid, on the ground that Valliammai was a minor and unmarried. The plaintiffs now bring this action against Ponnachchy on the original mortgage.

The District Judge has held that this is a case of novation ; that the second mortgage bond was given with the intention of discharging the first bond ; but he has decided on equitable grounds and on the authority of *Silva v. Silva*[1] that the plaintiffs are entitled in the circumstances to sue on the first mortgage bond. It has been contended that under the Roman-Dutch law the novation of a contract cannot be established, unless the assent of the creditor to the novation has been expressly declared, and a passage from *Van der Linden* (269) has been cited in support of this proposition. But the Constitution of Justinian (*C. VIII.*, 41), which insisted upon an express declaration of the creditor's assent, does not appear to have been strictly followed in modern Roman-Dutch law. Grotius (*G. XLIV.*, 4) states that transfer of debt is never presumed unless it clearly appears to have been the intention that the first debtor should be released. Maasdorp (*vol. IV., p.* 165) states the law on this point as follows :—

> By our law differing in that respect from the Roman law, *novatio* may take place, not only by express agreement, but also tacitly or by implication, the consent of the parties to the *novatio* being implied from the circumstances and the conduct of the parties. In the latter event, however, the inference must be so probable and conclusive as to make it quite clear that the parties intended to recede from the original obligation and to replace it by another—in fact, it must be a necessary inference, the new obligation being inconsistent and incompatible with the continued existence of the original obligation.

This passage, I think, indicates the principle which should be followed in considering the sufficiency of evidence to establish an agreement of novation.

In the present case there can, I think, be no question of the intention of the parties. The *animus novandi* is apparent from the

[1] *(1909) 13 N. L. R. 33.*

Aug. 17, 1911

LASCELLES C.J.

Karthikesu v. Ponnachchy

conduct of the parties. In the technical language of the Roman law, Ponnachchy, the surviving debtor, was the *delegans*, and Valliammai and her husband Ramalingam were the *delegati*, whose property was to be hypothecated to the creditor, with his consent, in substitution for the property comprised in the first mortgage bond. But it was an essential element in this agreement that Valliammai should be in a position to grant a valid legal mortgage of her property ; and this was clearly contemplated by the parties when the second mortgage bond was executed. But as the transfer to Valliammai and the second mortgage bond, so far as she was concerned, were inoperative, the agreement by which a novation of the debt was intended to be effected was, in my opinion, void. It was to follow the classification adopted in *Pollock on Contracts*, an agreement relating to a subject-matter, a right or title, contemplated by the parties as existing, but which in fact did not exist. The present case is analogous to the sale of an interest in land which both parties believed to exist, but which had been in fact defeated (*Hitchcock v. Giddings*[1]), or to an agreement made on the erroneous supposition that the tenant for life of a settled estate was alive (*Cochram v. Willis*[2]).

It is true that the second mortgage bond was not inoperative, so far as the personal liability of the debtors and their surety and the hypothecation of Ramalingam's land were concerned, but the agreement for a novation of the original debt depended principally on the mortgage of Valliammai's land. Without this security the plaintiffs would not have agreed to a novation of the debt.

The error, therefore, with regard to Valliammai's title was fundamental, and went to the root of the agreement. The agreement for the novation of the debt being void, there is nothing to prevent the plaintiffs from suing on the original mortgage bond. I agree with the result at which the District Judge has arrived, and would dismiss the appeal with costs.

MIDDLETON J.—

I agree, but I think also that the decision of the learned Judge may be upheld on the ground that the novation was conditional on the validity of Valliammai's title to mortgage and convey. In the deeds D 2 and D 3 there are special covenants by her, that she has title both to convey and mortgage. Her right to do so seems to me to have been the principal ground for the novation. That condition has failed by the decision in D. C. Jaffna, 6,768, and I think the plaintiffs would thereby be relegated to their former position and rights.

Appeal dismissed.

[1] *1 Dan 1.*

[2] *(1865) L. R. 1 Ch. App. 58.*