

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of Gauder
v. Dassenaïke and others, from the Supreme
Court of the Island of Ceylon ; delivered 31st
July 1897.*

Present:

LORD MACNAGHTEN.

LORD MORRIS.

MR. WAY.

SIR HENRY DE VILLIERS.

SIR HENRY STRONG.

[*Delivered by Sir Henry de Villiers.*]

THIS is an Appeal brought by the trustee under an antenuptial deed of settlement against a judgment of the Supreme Court of Ceylon. By that deed, executed in 1865, Frances Gomes, the intended wife, purported to convey to the trustees thereby appointed, upon certain trusts, land belonging to her and situated in Ceylon. The marriage was duly entered into but the deed was not registered as required by the 38th section of the Land Registration Ordinance VIII. of 1863. After the marriage the husband, Jonathan Gauder, and his wife, acting jointly, specially mortgaged portions of the land in favour of the respondents for valuable consideration and the wife specially renounced all privileges to which she would otherwise be by law entitled. The mortgage bonds were duly registered. In 1889 the question was raised before the special Commissioner under the Land Registration Ordinance 1877 whether the Appellant, who was then sole trustee under the settlement, held an unincumbered title to the land, or whether his title was subject to the incumbrances in favour of the

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Respondents. The Commissioner decided in favour of the mortgagees and his decision was affirmed, on appeal, by the Supreme Court of Ceylon.

The 33th section of the Land Registration Ordinance VIII. of 1863 enacts that every deed or other instrument of transfer, assignment, or mortgage of any land shall be registered in the branch office of the district in which such land is situate. The 39th section then enacts that "every deed . . . or other instrument as " aforesaid, unless so registered, shall be deemed " void as against all parties claiming an adverse " interest thereto on valuable consideration, by " virtue of any subsequent deed . . . or " other instrument which shall have been duly " registered as aforesaid. Provided, however, " that fraud or collusion in obtaining such last- " mentioned deed or other instrument, or in " securing such prior registration, shall defeat " the priority of the person claiming thereunder." It has not been suggested before their Lordships that there has been any fraud or collusion on the part of the Respondents in obtaining the mortgages or in securing their prior registration.

The main question, therefore, to be determined is whether the claims of the Respondents are founded upon interests adverse to those of the Appellant, and upon this question their Lordships entertain no doubt whatever. The antenuptial settlement, upon which the Appellant's claim is founded, purports to convey to him an unincumbered title to the land, whereas the mortgage bonds, by virtue of which the Respondents claim a priority of interest in the land, purport to create incumbrances in their favour upon the land. The interests claimed by them are therefore obviously adverse to those claimed by the Appellant. Some stress was laid by the Appellant's counsel on the fact that the mortgages

were executed by the husband and wife, and not, as the prior deed of settlement had been, by the wife alone, but this circumstance cannot affect the decision of the case. The wife was a party to the execution of both deeds and she could not, by joining her husband with her in the execution of the mortgages, defeat the operation of the ordinance which gives registered deeds priority over unregistered deeds affecting the same land. The Respondents, before they advanced money on the security of the land could only ascertain by means of a search in the registry whether any prior adverse interest had been created by the wife as owner. Finding that her title remained unincumbered they, for valuable consideration, obtained from her the mortgages in question. Those mortgages were good in point of form whether or not the marriage had been in community of property. If community existed, the execution of the deed by the husband as being also the representative of his wife, would have been sufficient, but the deed would not be invalid by reason of the wife being a formal party to it. If community did not exist the formal assistance of the husband was required, but the wife would be a necessary party to the deed. It is unnecessary to inquire what difference it would have made if Mrs. Gauder had not joined her husband in the execution of the mortgages. She was in law and in fact a party to the execution of the unregistered deed of settlement as well as of the registered mortgages affecting her land, and the 39th section of the ordinance is clearly applicable. The result is that in their Lordships' opinion the Appeal should be dismissed, and they will humbly advise Her Majesty accordingly. The Appellant will pay the costs of the Appeal.

