

view I take of the proper construction of the will it is necessary to consider this point. There can be no doubt that as testator's wife by repute first defendant is sufficiently indicated by the will, and the bequest to her is good in the absence of any suggestion that there was any fraud upon the testator in the matter of her former marriage. It is clear that he was fully cognizant of all the facts about it.

The costs of all parties to be taxed as between attorney and client will come out of the estate.

Branson and Branson—Attorneys for plaintiff.

Carr—Attorney for defendant No. 1.

D. Grant—Attorney for defendant No. 2.

Wilson and King—Attorneys for defendants Nos. 3 and 4.

ADMINIS-
TRATOR-
GENERAL
v.
WHITE.

ORIGINAL CIVIL.

Before Mr. Justice Shephard.

MADRAS BUILDING COMPANY (PLAINTIFFS),

v.

ROWLANDSON AND ANOTHER (DEFENDANTS).*

1890.
April 30.

Transfer of Property Act—Act IV of 1882, ss. 78, 101—Priority of mortgages—Gross negligence—Extinguishment of charges—Registration Act—Act III of 1877, ss. 17(d), 48—Notice by registration.

In a suit for declaration of priorities of mortgages and for foreclosure, it appeared that the mortgage premises were mortgaged to defendant No. 2 in 1879 and to the plaintiff in 1883, and again in 1884, and were conveyed absolutely by the mortgagor to defendant No. 2 in 1886. The mortgagor executed a rent agreement to the plaintiff on the occasion of each of the mortgages of 1883 and 1884. The above mortgages were registered, but the plaintiff and defendant No. 2 had no actual notice at the date of their mortgage and conveyance, respectively, of the previous incumbrances. The plaintiff received the title-deeds to the estate from the mortgagor on the execution of the mortgage of 1883; defendant No. 2 alleged that he had held them under a prior incumbrance which was consolidated in the mortgage of 1879, and that previous to the execution of that mortgage the mortgagor had obtained them from him for the purpose of obtaining a Collector's certificate and had told him that the Collector had retained them, in order to account for their not being replaced in his custody :

Held (apart from the question whether the mortgage of 1879 had been extinguished by the conveyance of 1886), that the conduct of defendant No. 2 in

* Civil Suit No. 8 of 1889.

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permitting the title-deeds to remain in the possession of the mortgagor amounted to gross negligence within the meaning of Transfer of Property Act, s. 78, and that the registration of the mortgage to defendant No. 2 did not affect the plaintiff with constructive notice of its existence, and that accordingly the subsequent mortgages to the plaintiff were entitled to priority.

SUIT by the plaintiff company for a declaration of the priority of their two mortgages over a mortgage of December 1879, under which defendant No. 2 claimed to be interested in the same premises, and for foreclosure. The mortgagor, Mrs. Anne Smith, was an insolvent, and defendant No. 1 was the Official Assignee of Madras, and, as such, assignee of her estate.

The further facts of the case appear sufficiently for the purposes of this report from the judgment.

The first five issues originally framed in this suit were as follows :—

- (1) Did Mrs. Anne Smith execute to the plaintiff mortgage, and, further charge, and what is due ?
- (2) Had plaintiff notice of alleged mortgage of 5th December 1879 at date of execution of their mortgages ?
- (3) Was second defendant guilty of fraud or gross neglect in allowing Mrs. Smith to remain in possession of the title-deeds ?
- (4) If so, did defendant No. 2 lose his priority ?
- (5) Did Mrs. Smith execute in favor of second defendant mortgage of 5th December 1879 ?

An additional issue was framed at the hearing as to the question whether the alleged mortgage of 5th September 1879 was merged in, or extinguished by the subsequent conveyance by the mortgagor to defendant No. 2.

The *Advocate-General* (Hon. Mr. *Spring Branson*) and Mr. *K. Brown* for plaintiffs.

Mr. *Norton* and Mr. *R. F. Grant* for defendant No. 2.

Cur. ad. vult.

JUDGMENT.—This is a suit upon a mortgage, in which the defendant No. 1 is the Official Assignee, representing the estate of the mortgagor, and defendant No. 2, another mortgagee of the same property, and the question arises between the plaintiff and the defendant No. 2 which of the two mortgages is to have priority. A further question is raised by the fact that defendant No. 2, subsequently to the date of the plaintiff's mortgage, purchased the

property already mortgaged with him. The facts of the case, for the most part undisputed, are these. It appears that the property subject to these mortgages before 1878 belonged to a Muhammadan family. There is a Court certificate filed, in favor of two Muhammadans, dated 14th April 1874. The representatives of one of these two Muhammadans appear to have mortgaged the property on the 5th August 1876 to Agarchund, defendant No. 2. The same persons on the 16th January 1878, with the concurrence of the mortgagee, Agarchund, conveyed the property to the insolvent Anne Smith by name. The consideration for that conveyance being the amount due on the mortgage to Agarchund, and a further sum of Rs. 3,500 payable to the vendors. These three documents, the Court certificate, the mortgage to Agarchund and the conveyance to Anne Smith, together with the Collector's certificate of 1877, constituted the title-deeds at that time, and they all appear to have been handed over to Mrs. Smith in 1878. Defendant No. 2 says that Mrs. Smith executed two mortgages of the same property in his favor, one in February and the other in October. These mortgages are not proved, except by the word of defendant No. 2 and his gumastah. The documents themselves are not forthcoming. In May 1878, Mrs. Smith obtained a new certificate from the Collector; on the 5th of December 1879 she mortgaged the same property to Agarchund. That mortgage is said to have been in consolidation of the two prior mortgages of 1878; but it is noticeable that there is no recital of these prior mortgages. On the 10th of October 1883, Mrs. Smith applied to the plaintiff for a loan, and her request was complied with, and money was advanced to her in or about the month of October or later to the extent of Rs. 10,000 upon the security of a mortgage of the property. In that mortgage she purports to deal with the property as unincumbered, and she does not disclose Agarchund's mortgage of 1879. The same day the plaintiffs took a rent agreement from her. In August 1884, the plaintiff advanced a further sum of money, and a further charge was effected to secure it, and again a rent agreement was taken from the insolvent. When advancing the money on the mortgage of 1883, the plaintiffs' officers obtained from the insolvent the three title-deeds which I have already mentioned, namely, the Court certificate, the mortgage to Agarchund and the conveyance to the insolvent. No Collector's certificate was handed over to the

MADRAS BUILDING CO. v. ROWLANDSON. plaintiffs, and no search was made by the Company's officers in the Registration Office. In 1886 a suit was brought by Agarchund against the insolvent upon his mortgage. The suit was withdrawn on Mrs. Smith consenting to sell her property, which she did by a conveyance of the 19th August 1886. Apart from the question whether the plaintiffs had notice of Agarchund's mortgage by reason of its registration, it admitted that the plaintiff had no actual notice of Agarchund's mortgage, and it is equally admitted that Agarchund when he took this conveyance in 1886, had no notice of the plaintiff's mortgage. These are the admitted facts of the case. It is clear from the recital that the title-deeds of the property were not in October 1883 with the person with whom they should naturally have been, namely, with Agarchund, the mortgagee, either he never obtained them when the mortgage was executed in his favor or he gave them up. The question then arises whether his conduct with reference to the title-deeds can be said to amount to fraud or gross negligence within the meaning of section 78 of the Transfer of Property Act. If there was such fraud or gross negligence, there can be no doubt that it was in consequence of that fraud or gross negligence that the plaintiffs were induced to advance money on the security of their mortgage. Now, several cases have been cited with regard to the question of what constitutes evidence of such fraud or negligence as to deprive a first mortgagee of the priority which he ordinarily enjoys. In *Northern Counties of England Fire Insurance Company v. Whipp*(1) is given a summary of the law on the subject at page 494 of the report. It is there said that the authorities justify the following conclusion "that the Court will postpone the prior legal estate to a subsequent equitable estate; whether the owner of the legal estate has assisted in or connived at the fraud which has led to the creation of a subsequent equitable estate without notice of the prior legal estate, of which assistance or connivance, the omission to use ordinary care in inquiry after or keeping title-deeds may be, and in some cases has been, held to be sufficient evidence, where such conduct cannot otherwise be explained." One of the cases which that passage referred to is the case of *Hewitt and Loosemore*(2). There the law is laid down in these terms:—"That the legal mortgage is

(1) 26 Ch. D., 482.

(2) 9 Harc, 449.

"not to be postponed to a prior equitable one upon the ground of
 "his not having got in the title-deeds unless there is fraud or gross
 "or wilful negligence on his part, and the Court will not impute
 "fraud or gross or wilful negligence to the legal mortgagee if he
 "has *bonâ fide* inquired for the title-deeds and a reasonable excuse
 "is given for the non-delivery of them to him. But the Court will
 "impute fraud or gross or wilful negligence to the mortgagee
 "if he omits all inquiry as to the deeds." Now the question then
 is whether there has been given by Agarchund a reasonable
 explanation for his not having these title-deeds with him. His
 explanation is that he did obtain the title-deeds when his first
 mortgage of January 1878 was effected in his favor, but that he
 gave them up a month or two afterwards, in order that Mrs. Smith
 might obtain a Collector's certificate. He says that she required
 them for that purpose, and for that purpose he gave them to her.
 She did obtain the Collector's certificate in the month of May, and,
 on his asking her to give up the title-deeds which she had taken,
 he was told that the Collector had retained them. He got the new
 certificate, but he never got the title-deeds which he had given up
 in the early part of the year. All this happened in 1878, some
 months before the mortgage, now in question of 1879. As far as
 the mortgage of 1879 is concerned, it is admitted by Agarchund
 that he never had the title-deeds at all. Assuming that it is true
 that there were these two mortgages, of which, as I have said,
 there is no evidence except his own statement and that of his
 gumastah, and assuming that on the first mortgage being executed
 he obtained these title-deeds, there is no evidence whatever that he
 ever had the title-deeds in connection with the mortgage of 1879.
 It appears to me to make very little difference whether the case is
 one of a man who never had the title-deeds or a man who had
 them and subsequently gave them up. In either case he has to
 show some reasonable excuse for his conduct. I must find that the
 explanation given is not a reasonable one and that the defendant
 No. 2 has failed to show them that he *bonâ fide* made inquiries for
 the title-deeds and that a reasonable excuse for not delivering these
 to him was given to him. It appears to me absurd to suppose that
 defendant No. 2, an experienced sowcar, can really have believed
 Mrs. Smith when she told him, if she ever did tell him, that the
 Collector was in the habit of retaining the title-deeds which had
 been lodged with him for the purpose of issuing a new certificate.

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I am, therefore, of opinion that Agarchund has failed to explain satisfactorily his conduct with reference to these title-deeds, and on the authority of the cases I have cited, I must find that he has been guilty of such fraud or gross negligence as to entitle the plaintiffs to the benefit of section 78 of the Transfer of Property Act.

But another question has been raised by the defendant. It is said that the plaintiffs had notice of the prior mortgage of Agarchund. If that notice was proved as a matter of fact, I apprehend there can be no doubt that section 78 would have no application. It is not proved as a matter of fact, but it is argued that notice is to be assumed because the prior mortgage to Agarchund was registered and might have been discovered by the plaintiff's officers had they taken the trouble to make a search. It is contended as a matter of law that the registration of a document conveys a notice to all subsequent purchasers and reliance is placed on the authority of some Bombay cases, and also on some observations made in the case of *Kettlewell v. Watson*(1). Now as regards the Bombay cases, I am of opinion that they do not justify me in holding that such effect ought to be given to registration. Professedly the opinion of the Bombay High Court in *Lakshmandas Sarupchand v. Dasrat*(2) is founded on its own judgments and on the doctrine obtaining in America only. It is admitted that neither in England nor in Ireland is it held that mere registration can amount to notice to subsequent purchasers. Besides the authority of these and other cases referred to in the judgment, there is, as far as I have learnt, no authority in this country to the effect that registration operates to give notice to subsequent purchasers. This absence of authority appears to me a strong indication that the doctrine does not obtain here, and there is further a negative authority on the point in the case referred to in the arguments of *Madras Hindu Union Bank v. Venkatrangiah*(3), in which the prior document was registered, and yet no point with regard to notice was taken. The case of *Kettlewell v. Watson*(1)—I am also of opinion has no application to the present facts. That is a case in which the contest was not between the legal mortgagee and a later mortgagee, but between two persons having merely equitable titles. In that state of things mere negligence on the

(1) 21 Ch. D., 685.

(2) I.L.R., 6 Bom., 168.

(3) I.L.R., 12 Mad., 428.

part of one or the other would have the effect of turning the scale against him. It may well be that here in a like case, for instance, supposing the contest to be between one claiming a lien for unpaid purchase money and an equitable mortgagee, omission to search the register would be imputed as negligence with the consequence of postponing the claim of the party guilty of it, but it does not follow that the party guilty of such omission can be treated as having had notice and therefore precluded from asserting the priority to which he is otherwise entitled. For these reasons I must decline to hold that in point of law the plaintiff had notice of Agarchund's mortgage of 1879.

It is unnecessary to express any opinion on the additional issue with regard to which the contention on the part of the plaintiffs was that inasmuch as Agarchund when taking the conveyance was unaware of the plaintiff's mortgage and hopeless of realizing his money by his own mortgage, no other intention could be attributed to him than that of extinguishing his mortgage. The question must be taken on the construction of the last words of section 101 of the Transfer of Property Act, and I would only observe that if those words demand the adoption of the plaintiffs' contention, it would seem to follow that a purchaser without notice is now in the position occupied by a purchaser with notice under the rule in *Toulmin v. Steere*(1), or in a less favorable position than such purchaser. In my opinion the plaintiffs are entitled to a finding in their favor on the 1st, 2nd, 3rd and 4th issues and consequently to a decree in the terms of the plaintiff Defendant No. 2 must pay the plaintiffs' costs.

Branson & Branson, Attorneys for plaintiffs.

Champion & Short, Attorneys for defendant No. 2.

(1) 3 Mer., 210.