has had the custody of the child committed to her by the plaintiff. There is no reason why the principle applicable to the Mufassal of "Equity and good conscience" should not be applied to determine whether the infant should be given over to the custody of a natural guardian leading an immoral life and by whose example the morals of the child are likely to be corrupted. The Minors' Act IX of 1861 recognizes the authority of the Principal Civil Courts in India of original jurisdiction to determine on petition questions as to the custody of infants. On the ground of pecuniary benefit alone to the child, the plaintiff could not be deprived of her right to the custody. But the Courts of Law in England and Ireland, in cases where immoral conduct and character is proved against even a mother of a legitimate child, interfere with the ordinary legal right of the mother to the custody of the child. See *Reg.* v. *Clarke*(1) and *Skinner* v. *Orde*(2).

It would be against equity and good conscience to deliver the infant into the custody of the plaintiff whom the Munsif has found to be a person who receives visits from men for immoral purposes and to be of immoral character. Moreover, the plaintiff delivered over the infant almost from her birth to the defendant, a respectable woman in good circumstances, who has since nurtured the child for upwards of two years, and to whom the child is affectionately attached, while she is a stranger to her mother. Under these circumstances we reverse the decree of the Lower Appellate Court and restore that of the Munsif. No costs.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

COOLING AND ANOTHER (DEFENDANTS), APPELLANTS,

and

SARAVANA (PLAINTIFF), RESPONDENT.*

1888. July 30. August 14.

Lien on land created by agreement—Sale to stranger without notice—Purchaser bound.

D mortgaged certain land to S to secure repayment of a loan, and covenanted that in a certain event S might realize the money from the house of D. D sold this house to C, who purchased without notice of the covenant.

Held, that C could not resist the claim of S to have the house sold under the covenant.

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(1) 7 E. & B., 186. (2) 14 M.I.A., 309.

* Second Appeal No. 1112 of 1887.

COOLING v. SARAVANA.

APPEAL from the decree of S. T. McCarthy, District Judge of Chingleput, confirming the decree of C. Suri Ayyar, District Munsif of Chingleput, in suit No. 618 of 1885.

The facts necessary for the purpose of this report appear from the judgment of the Court (Muttusami Ayyar and Wilkinson, JJ.).

Mr. *Subramanyam* for appellants.

Srirangacharyar for respondent.

JUDGMENT.—The house in dispute belonged to one Varada Desikachari, and in August 1879 he mortgaged some land to the respondent with possession. The instrument of mortgage (Exhibit A) contained a covenant in the following terms:—"If any 'halal' (danger or peril) be occasioned by the temple people whilst you are in enjoyment of the land under mortgage, you are at liberty to realize the money from my tiled house." The respondent entered into possession of the land mortgaged by document A, and, in May 1881, Varada Desikachari, the mortgagor, sold the house in suit to the appellants who purchased it *bonâ fide* for value without notice of the covenant contained in document A. The temple authorities mentioned in that document brought original suit No. 455 of 1885 to eject the respondent, who thereupon instituted the present suit to recover the mortgage debt by the sale of the house in dispute. The debt was found to be neither immoral nor vicious, and the District Munsif considered it to be binding upon defendants 1 to 3, who are the sons of the mortgagor since deceased; they have preferred no appeal from his decision.

The fourth and fifth defendants, who are the appellants before us, resisted the claim on the ground (1) that the suit was premature; (2) that document A created no lien on the house; (3) that they were *bonâ fide* purchasers for value without notice; and (4) that the mortgagee forfeited his lien on the house, if any, by laches in original suit No. 455 of 1885.

Both the Courts below considered that the pleas set up by the appellants could not be upheld and decreed the claim, and the contention in second appeal is that they ought to have been upheld.

As regards the first contention, viz., that the suit is premature, our decision must depend on the construction of the stipulation contained in document A. We agree in the opinion of the Courts below that, according to the true construction of the clause in A relating to the house in question, actual dispossession or eviction

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from the land is not a condition precedent to the accrual of respondent's right to proceed against the house. In their ordinary sense the words "if any halal supervenes from the action of the temple authorities," whilst the respondent is in enjoyment of the land mortgaged, do not import actual eviction by the establishment of adverse title, but they only signify any disquieting or menacing action which places the mortgagee's right of possession in peril. The first contention must be over-ruled.

Another contention is that as *bonâ fide* purchasers for value without notice the appellants are not bound by the stipulation in document A. This Court has already held that a subsequent purchaser makes the purchase subject to a pre-existing encumbrance, although he may have had no notice of such encumbrance *Golla Chinna Guruvuppa Naidu* v. *Kali Appiah Naidu*(1). The substantial question then is whether document A created no lien on the house in dispute because it was to have arisen on a contingency. When that document was executed, Varada Desikachari was competent to encumber his property either at once or subject to a contingency, and a subsequent purchaser who can only stand in his place takes the property subject to such restrictions as would attach to him as owner if he never parted with the property. In the absence of a special provision of law, we do not see how a *bonâ fide* purchase can operate to secure a larger interest than the vendor himself had and was competent to transfer. It was suggested by the appellant's pleader that the stipulation ought to be treated as a personal covenant giving a right to claim compensation for its breach from the mortgagor's heirs, and not as a covenant running with the house. We are referred to no authority in support of the suggestion which, if adopted, would defeat the intention of the parties to the contract of mortgage, namely, that of securing the mortgage debt on the house in the event of the mortgagee's right to treat the land as primary security being placed in peril. As to the question of laches, we see no reason to doubt the correctness of the conclusion to which the District Judge has come.

We are of opinion that the second appeal cannot be supported, and we dismiss it with costs.

(1) 4 M.H.C.R., 434.