plaintiff will not be entitled to base his suit on his title to the inam.

The costs of this and the lower Appellate Court will be provided for in the revised decree.

BENSON, C.J., AND KRISHNASWAMI AYYAR, J.

MUVVULA SEETHAM NAIDU v. DODDI RAMI NAIDU.

1909. March 11, 25. November 15, 16.

APPELLATE CIVIL.

Before Mr. Justice Miller and Mr. Justice Munro.

SESHAGIRI AIYAR (PLAINTIFF), APPELLANT,

v.

VYTHILINGA PILLAI AND OTHERS (FIRST DEFENDANT, SECOND DEFENDANT'S REPRESENTATIVE NOS. 3, 4, 6 TO 19, AND L.R. OF THE TWELFTH AND EIGHTEENTH DEFENDANTS), RESPONDENTS.*

Contribution, right to, of purchaser of mortgaged property—Mode of calculating amount as between purchasers of different items of mortgaged property.

M mortgaged 3 items of property to one *S* for 1,300 rupees. Two of these items were sold to two persons for Rs. 1,200, and the deeds of sale provided that the amounts for which the profits were sold should be paid to the mortgagee. The sale of the third item was for cash, but the property was not sold free of encumbrance and there was no contract between *M* and the third purchaser that the lands sold to the other purchasers should be liable for the 1,200 rupees of the mortgage money. *S* assigned his mortgage and the assignee obtained a decree for the full amount due on the mortgage and in execution the properties sold to the third purchaser were brought to sale and the third purchaser paid up the amount to avoid the sale. In a suit by the third purchaser for contribution, it was contended by the third purchaser, that the amount of 1,200 rupees should be borne by the other two purchasers and the rateable contribution on all the properties should be only in respect of the balance left after deducting such amount:

Held, that the contribution must be calculated on the footing that all the properties were liable for the full amount.

The benefit of the covenants in the sale-deeds to the other two purchasers did not run with the land and the third purchaser could claim the benefit of such covenants only on a contract with the mortgagor giving him such benefit.

SECOND APPEAL against the decree of T. M. Rangachariar, Additional Subordinate Judge of Tanjore, in Appeal Suit No. 1052 of 1903, presented against the decree of C. V. Visvanatha Sastriar, District Munsif of Shiyali, in Original Suit No. 102 of 1902.

* Second Appeal No. 46 of 1905.

MILLER AND MONRO, JJ.

SESHAGIRI AIYAR v. VYTHILINGA PILLAI.

The facts for the purpose of the report are sufficiently set out in the judgment.

K. Srinivasa Ayyangar and *T. Natesa Ayyar* for appellant.

V. Purushotham Ayyar for The Hon. The Advocate-General for 1st, 4th, 6th to 9th, 12th, 13th, 16th, 18th, 19th, 22nd and 23rd respondents.

JUDGMENT.—Of the whole property mortgaged in 1889 to Sabapati for Rs. 1,300, three parcels were sold by the mortgagors on the 16th of April 1892; one parcel to the third defendant's father for Rs. 1,000, one to the fourth defendant for Rs. 200 and one to the plaintiff for Rs. 500. The plaintiff paid cash for his purchase, but the other purchasers each undertook to pay the price to the mortgagee towards the mortgage. Subsequently, Sabapathi's assignee brought to sale the property purchased by the plaintiff; and the plaintiff, to save it, paid up part of what was due on the mortgage. He now seeks contributions from the present owners of the other two parcels and the first question for our determination is as to the correct method of calculating the contribution.

The plaintiff claims that the third and the fourth defendants being bound to pay Rs. 1,200 towards the mortgage must be held liable for that amount and the rateable distribution over all the property should be made only for the balance. Section 40 of the Transfer of Property Act was relied on by Mr. Srinivasa Aiyangar on the plaintiff's behalf; but, as we understand that section, it could apply to this case only if there were found to be a contract between the plaintiff and his vendors that the land sold to other purchasers should be liable for Rs. 1,200 of the mortgage money —and it is not found that there was such a contract.

Mr. Srinivasa Aiyangar placed his chief reliance on an equitable rule propounded as follows in Jones on Mortgages (6th edition, section 743).—"A purchaser of a portion of the estate subject to a mortgage has no equity to have his land relieved of the burden of the mortgage as against a subsequent purchaser, when it was a part of his contract of purchase that he should pay the purchase money directly in satisfaction of the mortgage. On the contrary the subsequent purchaser has an equitable right to have the purchase money so applied in exoneration of his own land."

In some cases, the Courts in applying this rule have, it would seem, based it on the ground that the benefit of the covenant by the prior purchaser may be regarded as running with the title,

and so passing to the subsequent purchaser of another part of the land (see foot-note No. 99, page 761 of Jones on 'Mortgages,' 6th edition). But the decisions from which extracts are given in foot-notes 102 and 103 on the next page take a different ground. In the latter case *Pearson* v. *Bailey*(1) the Chief Justice said "the benefit of the contract as a contract goes to the plaintiff (the subsequent purchaser) no more in equity than by the common law. The promise in its entirety does not concern the plaintiff's interests. The only question is whether the plaintiff can get any help from it to relieve her land . . . . if the mortgagor had seen fit to convey his land as free from the mortgage the plaintiff would have taken it free as against the defendant (a prior purchaser who assumed the mortgage) not on the ground of succession to the mortgagor, but because in no other way could the rights of the mortgagor be made effectual . . . . That was what was decided in *Jager* v. *Vollinger*(2)." This last appears to be the case from which an extract is given in foot-note 102, in which the same learned Judge (Holmes, C.J.) is reported to have said: "The successor to Ballon's" (the mortgagor's) "title in the Hatfield land" (the land last sold and sold free of encumbrances) "in like manner succeeded to the benefit of the agreement" (by which the prior purchaser of another parcel of the land assumed the whole mortgage). Though succession is here mentioned it would seem that the Court did not intend to put the subsequent purchaser in the shoes of the mortgagor, judging from the extract we have given from the judgment in the later case.

The difference between the two cases was that in the latter case the mortgagor did not convey the parcel last sold free of encumbrances although the first purchaser had assumed the whole mortgage, and the Chief Justice deals with the distinction as follows.

"In the present case (*Pearson* v. *Bailey*(1)) . . . . the mortgagor conveyed his other lot subject to the mortgage. He did not see fit to avail himself of the estoppel against the defendant . . . . in order to enhance the consideration which he received by conveying the land as unencumbered. It follows that the plaintiff cannot claim the benefit of an estoppel of the defendant as against the mortgagor when it is not necessary to give it to her in order to preserve any of the mortgagor's rights."

(1) 177 Mass., 318, 320 (*vide* foot-note 103). (2) 174 Mass., 521.

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From this it is clear that in the opinion of the Court the benefit of the covenant did not pass, with the title, to the mortgagor's assignee, but might be accorded to the assignee if the Court should find it necessary in order to make effectual and preserve any rights of the mortgagor.

Now Mr. Srinivasa Aiyangar in asking us to apply the rule laid down in Jones on 'Mortgages' did not, if we understood him aright, base his request on the ground that the benefit of the covenant ought to be held to pass to the plaintiff with his title; and it is not clear to us that he could hope to succeed on this ground in a case like the present where it has not been ascertained whether the sale to the plaintiff was before or after the sales containing the convenant in question and when the plaintiff purchased subject to the mortgage.

If the case be put on the other ground, the plaintiff must equally in our opinion fail. The Subordinate Judge finds that the plaintiff must be taken to have purchased subject to the mortgage, and if that is so, he cannot claim the *benefit* of the agreement between the third defendant and the mortgagors because, to quote again the decision in *Pearson* v. *Bailey*(1), it is not necessary to give it to him in order to preserve any of the mortgagor's rights. The mortgagors did not care to ask the plaintiff to pay the price of the land calculated on the footing that the mortgage money would be reduced by Rs. 1,200, and the liability on the land would be reduced to the same extent. The plaintiff cannot therefore claim the benefit of a right in them to deal with the property as they have not attempted to deal with it. This seems to be the effect of the decision to which Mr. Srinivasa Aiyangar invited our attention, and it does not in the circumstances help him.

Nor can he succeed on the ground that we have here a suit for contribution in which all the parties, the mortgagors included, are before the Court; and we can therefore, without leaving the plaintiff to a suit against the mortgagors and the mortgagors to a suit against the purchaser—defendants' decree against the purchaser—defendants or the mortgagors or both payment of the amount which in our opinion the plaintiff ought as the final result of all possible litigation to receive.

(1) 177 Mass., 318, 320 (*vide* foot-note 103).

Here again the plaintiff is met with the finding that his purchase was subject to the mortgage. He has paid for the equity of redemption of the land purchased by him and he has no equity having paid nothing more, to demand from the other purchasers any portion of that share of the mortgage debt for which his lands are liable.

The decree of the Subordinate Judge therefore seems to be right except upon the question of valuation. As the parties seemed to be agreed that whatever changes have occurred in the value of land since the date of the mortgage have evenly affected all the mortgaged lands, it does not matter much what date is chosen for the valuation, provided that the same date be chosen for all; but the Subordinate Judge has valued the defendants' lands as at the date of the sales (the 16th April 1892) and the plaintiff's lands at the date of the trial. This is clearly wrong, and we must have a re-valuation. The date of the sales will be a convenient date to choose, because the value of the defendants' land on that date has already been determined, it remains only to determine that of the plaintiff's land.

The necessary finding will be called for within six weeks and seven days will be allowed for filing the objections.

In compliance with the above order, the Subordinate Judge submitted the following

FINDING.—The High Court has remanded the above case for a finding on the following issue, viz., "What is the value of plaintiff's land calculated as on the date of the sale, viz., the 16th April 1892?"

2. The pleader for the plaintiff (appellant) and the pleader for the respondents, 1, 4, 6 to 11 and 13 to 17 (the other respondents not being present either in person or by vakil), are agreed that the value of plaintiff's land on the date of sale, viz., the 16th April 1892, should be fixed at Rs. 500 (*vide* Exhibit H). I therefore find accordingly on the issue remitted to this Court.

This second appeal again coming on for final hearing after the return of the Lower Court's finding the Court delivered the following

JUDGMENT.—Accepting the finding we modify the decree of the Subordinate Judge by directing that the sixth defendant pay to the plaintiff Rs. 103-4-0; the seventh defendant Rs. 54-11-0 the eighth, ninth and tenth defendants jointly and severally

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Rs. 266-4-0; the eleventh defendant Rs. 6-10-6; the twelfth defendant Rs. 46-10-0; the thirteenth defendant Rs. 78-12-0; the fourteenth defendant Rs. 87-13-6; the fifteenth defendant Rs. 206-10-0; the sixteenth defendant Rs. 68-13-6; the seventeenth defendant Rs. 161-9-0; the eighteenth defendant Rs. 129-3-6 and the nineteenth defendant Rs. 175-6-0 with interest in each case at 6 per cent. per annum from the date of plaint to the date of payment. The amounts have been fixed by agreement between the parties. We also give the plaintiff a decree for sale of the lands held respectively by the defendants in the event of non-payment within four months from this date.

The parties will pay and receive proportionate costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Miller.

1909. October 27.

VENKATASAMI CHETTI (PLAINTIFF), PETITIONER,

v.

SUPPA PILLAI (DEFENDANT), RESPONDENT.*

Registration Act III of 1877, s. 17 (d) and proviso—Lease not reserving a yearly rent not within the exemption.

The proviso to section 17 (*d*) of the Registration Act will apply only in the case of leases which reserve an annual rent. A lease for a term of 3 years which reserves no annual rent but only provides for the payment of a lump sum, is compulsorily registrable even when such lump sum is less than the aggregate of three annual instalments of Rs. 50.

PETITION, under section 25 of Act IX of 1887, praying the High Court to revise the decree of T. Jivaji Rao, District Munsif of Periakulam, in Small Cause Suit No. 1965 of 1908.

The facts are fully stated in the judgment of the lower Court, the material portion of which is as follows:—

"I think the lease in question is compulsorily registrable and is invalid for want of registration. The lease on which the suit is based is for a term of three years and the rent Rs. 56-4-0 and 10 bundles of betel leaves is payable in one lump about the middle of the term. The lease is terminable on non-payment of rent.

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* Civil Revision Petition No. 29 of 1909.