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defendant's case that he was elected mahant on the morning of the 24th of February, 1905.

The High Court has found that the majority of the persons present on the morning of the 24th of February who were qualified to elect a mahant of this temple were in favour of the defendant; that in point of numbers and of influence the defendant received more support than the plaintiff did; that the election of the defendant must have taken place before that of the plaintiff; and that there was no attempt on the part of the defendant to conceal the arrangements which he had made for the 24th of February, 1905. It has not been shown to their Lordships that the High Court came to a wrong conclusion on any one of these points. An election by *dasnam bhik* of a mahant to be a valid and effectual election must be by a majority of the *dasnam bhik* assembled for that purpose. A separate election by a faction of the *dasnam bhik* is not a valid and effectual election. Their Lordships have come to the conclusion that the plaintiff has failed to prove that he was elected a mahant.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellant must pay the costs of this appeal.

Appeal dismissed.

Solicitor for the appellant:—*Edw. Delgado.*

Solicitors for the respondent:—*Barrow, Rogers & Nevill.*

J. V. W.

APPELLATE CIVIL.

Before Mr. Justice Chamier and Mr. Justice Piggott.

1915
March, 8.

BADAN (JUDGEMENT-DEBTOR) *v.* MURARI LAL AND ANOTHER (DECREE-HOLDERS)*

Mortgage—Two mortgages executed by the same mortgagor—Mortgagor becoming by inheritance owner of decree for sale on prior mortgage—Effect of, on rights of puisne mortgagees.

Held that a mortgagor who had become by inheritance the owner of a decree against himself on a prior mortgage was not entitled to hold up such prior mortgage as a shield against the decree of a subsequent mortgagee.

*Second Appeal No. 493 of 1914 from a decree of L. Johnston, District Judge of Meerut, dated the 11th of February, 1914, reversing a decree of Kalika Singh, Additional Subordinate Judge of Meerut, dated the 10th of May, 1913.

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from himself. *Otter* v. *Vaux* (1), *Platt* v. *Mendel* (2) and *Baju Chowdhury* v. *Chunni Lal* (3) referred to.

THE facts of this case were as follows :—

One Badan mortgaged his property first to one Umrao Singh and afterwards to one Bhup Singh. Umrao Singh sued on his mortgage without impleading Bhup Singh, the puisne mortgagee, and obtained a decree for sale, which he transferred to the mortgagor's brother Bahal. Subsequently Bhup Singh transferred his mortgagee rights to the present respondents who obtained a decree for sale subject to the prior mortgage. Bahal died leaving the mortgagor as his sole heir. The respondents applied for the execution of their decree, and claimed to be entitled to bring the property to sale free from the prior mortgage, on the ground, that when Bahal died and the benefit of the prior mortgage passed to the mortgagor, that mortgage merged in the mortgagor's proprietary right and was extinguished. The mortgagor on the other hand contended that no merger took place. The court of first instance allowed the mortgagor's objection. On appeal the lower appellate court reversed the decree. Thereupon the mortgagor appealed to the High Court.

Mr. *Nehal Chand*, for the appellant.

The Hon'ble Dr. *Tej Bahadur Sapru* and Dr. *Surendro Nath Sen*, for the respondents.

CHAMIER and PIGGOTT, JJ.—The question for decision in this appeal is whether the respondents are entitled, as held by the lower appellate court, in execution of a decree on a mortgage to bring the property to sale free from a prior mortgage. The appellant mortgaged the property first to Umrao Singh and afterwards to Bhup Singh. Umrao Singh sued on his mortgage without impleading Bhup Singh and obtained a decree for sale which he transferred to the appellant's brother Bahal. Bhup Singh transferred his mortgage to the respondents who obtained a decree for sale subject to the prior mortgage. Bahal died leaving the appellant as his sole heir. The respondents have now applied for execution of their decree, and they claim to be entitled to bring the property to sale free from the prior mortgage, on the ground that, when Bahal died

(1) (1856) 6 D. M. and G., 638. (2) (1884) L. R., 27 Ch. D., 246.
(3) (1906) 11 C. W. N., 284.

and the benefit of the prior mortgage passed to the appellant, that mortgage merged in the appellant's proprietary right and was extinguished. The appellant on the other hand contends that no merger took place. The first court held with the appellant but the lower appellate court accepted the contention of the respondents. Hence this appeal.

Section 101 of the Transfer of Property Act was referred to in the course of the arguments, but that section appears to apply only to the converse case of the owner of an encumbrance becoming the absolute owner of the property, though it is not easy to see why the words "is or" were inserted in the section. There being no legislative provision on the question for decision, the case must be decided according to broad principles of equity and good conscience, with such assistance as may be afforded by reported decisions of the courts. We have not been referred to any case that is precisely in point, but there are several cases which bear more or less closely on the point now before us. The question whether an encumbrance acquired or paid off by the absolute owner of the property is to be considered extinguished or kept alive for his benefit is, according to a long line of authorities, generally one of intention. In the case of *Thorne* v. *Cann* (1) Lord MACNAGHTEN said :—"Nothing, I think, is better settled than this, that when the owner of an estate pays charges on the estate which he is not personally liable to pay, the question whether those charges are to be considered as extinguished or as kept alive for his benefit is simply a question of intention. You may find the intention in the deed or you may find it in the circumstances attending the transaction, or you may presume an intention from considering whether it is or is not for his benefit that the charge should be kept on foot." The decision in *Johnson* v. *Webster* (2), shows that the rule is the same where the owner of an estate inherits a charge thereon. In the absence of expressed intention to the contrary it will be presumed that when a person claiming to be absolute owner of property acquires or pays off a mortgage thereon, and there is no subsequent incumbrance, he intends to extinguish the mortgage, but where there is an incumbrance intermediate between the mortgage paid off or acquired and the

(1) (1895) L. R., A. C., 11. (2) (1854) 4 D. M. and G., 474.

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ownership of the property the presumption is the other way, see *Johnson* v. *Webster* (1), *Mohesh Lal* v. *Mohunt Bawan Das* (2), *Adams* v. *Angell*, (3), *Gokul Das* v. *Ram Bakhsh* (4). It would be very much to the advantage of the appellant to keep the first mortgage alive, and in various ways which need not be detailed he has shown that he wishes to keep it alive. The question is whether the rule stated above, which is founded on the clearest equity and has, as we have shown, been applied by their Lordships of the Privy Council to Indian cases, applies to the case before us in which both mortgages were made by the owner of the property, who however wishes to hold one up against the other. In England and also in India it has been held that if the owner of an estate creates and pays off a mortgage the mortgage merges in the owner's estate, and that an owner who has paid off a prior incumbrance cannot set it up against his own mortgage see *Otter* v. *Vaux* (5), the dictum of Chitty, J. in *Platt* v. *Mendel* (6) and *Bhaju Chowdhury* v. *Chunni Lal* (7). Like the general rule, this exception to it seems to us to be founded on the plainest equity. Does the fact that the appellant inherited the prior mortgage furnish any ground for distinguishing the present case from the cases last referred to? We think not. Indeed we are inclined to think that the fact that the appellant acquired the rights of the prior mortgagee without having to pay for them makes the case somewhat stronger against him than it would have been if he had paid for them. It seems to us that it would be inequitable to allow the appellant to set up a mortgage which he himself created, but on which he has had to pay nothing, against a subsequent mortgage which he undertook personally to discharge. Acquisitions by a mortgagor enure as a rule for the benefit of his mortgagee, thereby increasing the value of his security, see *Raja Kishen Datt* v. *Raja Mumtaz Ali Khan* (8) and *Ajudhia Prasad* v. *Man Singh* (9). On the whole we are of opinion that the decision of the lower appellate court is correct. To avoid misapprehension we may add that it has not been

(1) (1854) 4 D. M. and G., 474.
(2) (1884) L. R., 10 I. A., 62.
(3) (1876) L. R., 5 Ch. D., 634.
(4) (1883) I. L. R., 10 Calc., 1035.
(5) (1856) 6 D. M. and G., 638.
(6) (1884) L. R., 27 Ch. D., 246.
(7) (1906) 11 C. W. N., 284.
(8) (1879) I. L. R., 5 Calc. 198 (210).
(9) (1902) I. L. R., 25 All., 46.

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shown that the appellant's brother left any debts. The prior mortgage would of course be liable in the hands of the appellants for the debts of his brother. There could be no question of merger to the prejudice of the brother's creditors.

The appeal is dismissed with costs.

Appeal dismissed.

Before Mr. Justice Chamier and Mr. Justice Piggott.

1915
March, 16.

MAHARAJ NARAIN SHEOPURI AND ANOTHER (DEFENDANTS) *v.* SHASHI SHEKHARESHWAR ROY (PLAINTIFF)*.

Civil Procedure Code (1908), *section* 9—*Act No. I of* 1877 (*Specific Relief Act*), *section* 42—*Suit for declaration that the plaintiff is the Honorary Secretary of an association—Suit maintainable—Jurisdiction.*

Although the fact that an office is of a purely honorary nature may not by itself be sufficient to render a suit respecting such office unmaintainable in a Civil Court, yet where a plaintiff complained of his eviction from the office of secretary to a society, which was an honorary office and his continuance wherein depended upon rules which the society had power to alter at any moment, it was *held* that a Civil Court ought not to entertain a suit for a declaration that the plaintiff had been illegally deprived of such office, inasmuch as such Court could not give any decree in his favour which might not be immediately rendered nugatory by the action of the society. *Chunnu Datt Vyas* v. *Babu Nandan* (1) referred to.

THE facts of this case were as follows:—

The plaintiff was the Chief Secretary of the Pratinidhi Sabha (Board of Representatives) of a registered Association called the Sri Bharat Dharma Mahamandal. His office was purely honorary. He brought the present suit for a declaration that a certain meeting of the Association had been convened in a manner contrary to the rules and constitution of the Association and that the resolution passed by the meeting removing him from office was null and void. During the pendency of the suit the Association appointed another Chief Secretary in his stead. The court of first instance held that the suit did not come within the provisions of section 9 of the Civil Procedure Code and was not cognizable by a Civil Court. In appeal before the District Judge the defendants raised a further objection that the suit was barred by section 42 of the Specific Relief Act inasmuch as the plaintiff had not claimed any injunction against the newly appointed Chief Secretary who had been added

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* First Appeal No. 135 of 1914 from an order of B. J. Dalal, District Judge of Benares, dated the 29th of June, 1914.

(1) (1910) I. L. R., 32 All., 527.