

In their Lordships' opinion the appellant has failed to show any right to appeal to His Majesty in Council, and the appeal should be dismissed with costs, save only that the costs of preparing and lodging the respondents' case must be borne by the respondents themselves, as the objection was only taken at the hearing. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellant: *T. L. Wilson and Co.*

Solicitor for respondents: *H. S. L. Polak.*

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SKINNER (PLAINTIFF) v. NAUNIHAL SINGH (DEFENDANT.)

J.C.*

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March, 19.

[On appeal from the High Court at Allahabad.]

Indian Limitation Act (IX of 1908), articles 134, 140—Mortgage—Reversioner's suit to redeem—Transfer of possession by mortgagee.

When a mortgagee has transferred possession of the mortgaged property for a valuable consideration, a suit to redeem by a plaintiff who at the date when the mortgagee transferred possession had a contingent interest in remainder in the property is governed by article 140, and not by article 134, of the Indian Limitation Act, 1908; the suit consequently is not barred if it is brought within twelve years from the date when the plaintiff's estate falls with possession, even though it is brought more than twelve years after the date of the transfer under which the defendant claims.

Decree of the High Court, I.L.R., 47 All., 803, reversed.

APPEAL (No. 86 of 1927) from a decree of the High Court (March 27, 1925) reversing a decree of the Subordinate Judge of Muzaffarnagar (January 20, 1923).

The suit was brought by Alice Georgina Skinner to recover possession of five villages by redemption of a mortgage executed in 1863 by her father. The plaintiff

*Present:—Lord CARSON, Lord ATKIN and Lord SALVESEN.

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had become entitled to the villages in 1919 under her father's will upon the successive deaths without issue of her three brothers. The defendant purchased the villages in 1904 from the Nawab of Rampur to whom the mortgagees, acting as absolute owners, had mortgaged, and had subsequently sold them, in 1898 and 1903 respectively. The plaintiff died before the appeal to the High Court; the present appellant was her executor.

The facts appear fully from the judgement of the Judicial Committee.

The effect of the will of the plaintiff's father and the position as to mortgages created by him were dealt with by the Board in 1913 in *Skinner v. Naunihal Singh* (1).

The Subordinate Judge made a decree in favour of the plaintiff; he held that article 140 of the Indian Limitation Act, 1908, applied, and that consequently the suit was not barred by adverse possession as the defendant had pleaded.

Upon appeal to the High Court the defendant raised the contention that the suit was barred by article 134. The learned Judges (LINDSAY and KANHAIYA LAL, JJ.) held that that article applied and that it controlled both article 140 and article 148; the appeal was therefore allowed and the suit dismissed. The appeal is reported at I.L.R., 47 All., 803.

1929. February 21, 22, 25. *DeGruyther, K.C.* and *Kenworthy Brown*, for the appellant:—When the mortgagees were put into possession and when they transferred the property the plaintiff had an interest in remainder which was not thereby affected. The suit being by a remainderman is governed by article 140 and therefore is not barred. That view is supported by *Runchordas v. Parvatibai* (2). The plaintiff cannot

(1) (1913) I.L.R., 35 All., 211; (2) (1899) I.L.R., 23 Bom., 725; L.R., 40 I.A., 105. L.R., 26 I.A., 71.

have lost her right to redeem before she became entitled to do so. The view in the High Court renders article 140 of no effect. But in any case article 134 applies to a mortgaged property only when a mortgagee in possession under the mortgage has purported to transfer an absolute interest. Here the mortgagees at the date of the transfer were not in possession under the mortgage of 1863, but under a defective absolute title, and transferred that title. [Reference was made also to *Husaini Khanam v. Husain Khan* (1), *Ram Piari v. Budh Sen* (2) and *Bhup Singh v. Zain-ul-abdin* (3).]

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Upjohn, K.C. and *Dube*, for the respondent:— Article 134 applies exactly to this case. More than twelve years before the suit there was a transfer of possession by a mortgagee for valuable consideration. In *Radanath Doss v. Gisborne* (4) Lord CAIRNS, in referring to the corresponding provision of the Act of 1859, says it means a purchaser of “a *de facto* mortgage upon a representation made to him, and in the full belief, that it is not a mortgage, but an absolute title.” That language applies, if not to the mortgage of 1898, to the sale of 1903. The respondent is supported by *Husaini Khanam v. Husain Khan* (1) and cases there cited. Article 134 is to be regarded as an exception out of article 148. Article 140 does not apply. The article applies only to reversionary interests created by a settlement. In India an equity of redemption is not an estate; see Transfer of Property Act, 1882, section 60. Here the wrongful possession occurred while a person entitled in fee had the right to sue; time began to run, and under section 9 continued to do so. The plaintiff was not a reversioner for the purpose of article 140; *Kashi Prasad v. Inda Kunwar* (5).

Kenworthy Brown replied.

(1) (1907) I.L.R., 29 All., 471. (2) (1920) I.L.R., 43 All., 164.

(3) (1886) I.L.R., 9 All., 205. (4) (1871) 14 Moo. I.A., 1 (16).

(5) (1908) I.L.R., 30 All., 490 (498).

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March, 19. The judgement of their Lordships was delivered by Lord ATKIN :—

This is an appeal from the High Court at Allahabad in a suit brought by Mrs. Alice Georgina Skinner against the respondent for the redemption of five villages specified in the plaint. The question that has to be determined by this Board is whether the defendant is protected by article 134 of the Limitation Act of 1908. The suit involves the dispositions of the property of the plaintiff's family which have been the subject of litigation in India on previous occasions. For the present purpose it is necessary to state the material facts in order of date.

In September, 1863, Thomas Skinner, the plaintiff's father, mortgaged the villages in suit together with other property to Seth Lakshmi Chand and Seth Gobind Das for the sum of Rs. 50,000. It was a simple mortgage, with a covenant to pay the principal on the 31st of December, 1863, and to put the mortgagees in possession if there was default in payment of principal and interest. The principal was not duly paid; but it does not appear that the mortgagees took possession at any rate during the mortgagor's lifetime. In October, 1864, Thomas Skinner made a will by which in the events that happened he left successive life interests to three of his sons with ultimate remainder to his daughter, the plaintiff. Each interest was contingent on the holder of the prior estate dying without male issue; but the three sons who were successively life tenants did die without lawful issue. In November, 1864, Thomas Skinner died, and his eldest son, Thomas Browne Skinner, became tenant for life. In fact, however, Thomas Browne Skinner assumed an absolute interest in the property: it was not until the will of his father received interpretation from this Board in 1913 in a suit brought by the second son that the limited interests were judicially ascertained.

Acting as absolute owner in November, 1867, Thomas Browne Skinner mortgaged the property which was the subject of the original mortgage of 1863 to Seth Gobind Das for the sum of Rs. 50,000, which was expressed to include Rs. 43,294 due on the original mortgage. The principal sum and interest was to be paid in eight years. The name of Seth Gobind Das was to be entered in the revenue papers as mortgagee and that of Thomas Browne Skinner as proprietor; the mortgagor was to continue to collect the rents under the supervision of agents of the mortgagee and the proceeds less agreed deductions were to be applied to reducing the amount due. In 1872, money decrees were obtained against Thomas Browne Skinner and his equity of redemption in the villages in suit was sold in execution and bought by Seth Lakshmi Das, who therefore entered into possession of them on the footing of being absolute owner. It will be observed that the above transactions took place in the names of Gobind Das, and Lachman Das respectively, but it has been assumed throughout, no doubt accurately, that the parties duly represented the original mortgagees of the mortgage of September, 1863. On the 26th of December, 1898, Lachman Das, purporting to be absolute owner, mortgaged with possession the five villages with much other property to the Nawab of Rampur for Rs. 15,00,000 "with all the proprietary and zemindari rights." On the 24th of September, 1903, the Collector of Muttra, acting as guardian of the infant sons of Lachman Das, sold the whole of the mortgaged property together with jewellery, which had been the subject of a previous mortgage, to the Nawab of Rampur in satisfaction of all claims under the mortgages. The conveyance transfers all the estate right, title and interest of the wards in the property which included, of course, the five suit villages. On the 11th of April, 1904, the Nawab of Rampur sold the five villages to the respondent, Naunihal Singh, for

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Rs. 1,77,000. The purchaser had the prudence to take what appears to be a warranty of title, for which he may ultimately have occasion to be grateful. Meantime, in 1900, Thomas Browne Skinner died. He was succeeded by his brother, Richard Ross Skinner, who, in 1906, commenced a suit against the present respondent, amongst others, to recover possession of the suit villages and other property. In this suit it was decided by this Board, reversing the decision of the High Court, that under the will of Thomas Skinner, his son, Thomas Browne Skinner, took only a life interest, and therefore respondent's predecessors in title could not have acquired through him an absolute interest. They held, however, that though Lachman Das did not acquire an absolute interest from Thomas Browne he yet, notwithstanding the terms of the mortgage of 1864, must be held to be still entitled to his rights under the mortgage of 1863 created by Thomas Skinner. These rights, it was held, passed to the subsequent purchasers, and therefore the plaintiff Richard Ross Skinner was not entitled to recover possession of the property except on condition that he redeemed the mortgage security. The suit was remitted for this condition to be performed, but in 1913 Richard, the plaintiff, died and the suit abated. He was succeeded by his brother George who, in 1917, filed a suit for redemption against the present respondent and others in respect of the five suit villages and other property. However, in 1919, George died and his suit abated. He was succeeded by his sister Alice, who brought her suit for redemption against the present respondent and others for recovery of possession and redemption of the suit villages and other property. In the course of the proceedings Mrs. Alice Skinner, the plaintiff, died, but as she had acquired an absolute interest this suit was not abated, and is continued by

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James Skinner, her executor, the present appellant. By their written statement the defendants disputed the plaintiff's title and claimed to have been in adverse possession by themselves or their predecessors since 1872. The learned Subordinate Judge found in favour of the plaintiff's title as to which there is now no dispute. He held that the defendants could not avail themselves of adverse possession both because the time for redemption was, by article 148 of the Limitation Act, 60 years which had not expired, and because in any case, by article 140, the plaintiff's right to sue did not arise until 1919, when after the death of the tenants for life she, by virtue of the remainder to her, became entitled to possession. The learned Judge therefore decided in favour of the plaintiff and made a preliminary order on the 28th of February, 1922, that the defendants should within a month deliver accounts of the income received from the villages during their possession in order that he might arrive at a fixed sum. This order not being appealed, on the 20th of January, 1923, the learned Judge made a preliminary decree for redemption in which he fixed the sum due to the defendants on account of principal, interest and costs to be Rs. 1,09,641, and decreed that if the plaintiff paid that sum into Court before the 3rd of July, 1923, the defendants should re-transfer the property to her and that on default by the plaintiff the property should be sold. From this decree an appeal was brought and by permission of the High Court a further appeal was entered from the order of the 28th of February, 1922. On the hearing before the High Court the defendants for the first time raised the defence that they were entitled to succeed by reason of the provisions of article 134, which fixed the period of limitation for a suit, "to recover possession of immovable property conveyed or bequeathed in trust or mortgaged and afterwards transferred by the trustee or mort-

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gagee for a valuable consideration," at 12 years from the date of the transfer.

No evidence had been given in the Court below to support the plea. Such evidence must include all the documents of mortgage and sale which have been set out above, and which had not been proved or printed. The learned Judges, however, came to the conclusion that as there could be no doubt as to the material facts and as the necessary documents had been printed before in the case decided by the Privy Council in 1913 they should allow the point to be argued. Their Lordships cannot approve of this decision, which appears to have been made against the protests of the then respondents. It appears to their Lordships to be highly irregular for any Court either to assume without the admission of all parties that material facts are not in dispute or to proceed to draw inferences from those facts where no evidence of them has been placed before the Court. The position is not improved where the matter is mooted for the first time in an appellate Court on a point not taken before the trial Judge. Their Lordships would have felt a difficulty in permitting the respondent to rely upon this ground before them were it not that before the Board the appellant consented to the question being raised on the materials placed before the High Court. With this expression of opinion upon the procedure below their Lordships therefore proceed to determine the appeal.

When the facts and documents are examined it appears that the defence founded on article 134 cannot be supported. The transfer of property mortgaged contemplated by article 134 is admittedly something other than an express transfer of the original mortgage. The article contemplates a transfer by a mortgagee purporting to transfer a larger interest than that given by the mortgage or at any rate an interest unencumbered by a

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mortgage. Such an interest purported to be transferred by Lachman Das mortgage to the Nawab of Rampur in 1898 where the mortgagor purported to mortgage as absolute owner; and also purported to be transferred by the sale in September, 1903, under which the respondent claims his absolute title. Their Lordships have little doubt that had Thomas Browne Skinner had the absolute title to the equity of redemption at the time when Lachman Das purported to transfer the absolute title to the Nawab the case would have been brought within section 134.

The appellant sought to put a limited construction on the article by contending that it only applied where the transfer took place while the mortgagee was mortgagee, or at any rate transferred possession which he had obtained as mortgagee. It did not apply, they said, where, as here, the mortgagee had apparently ceased to be mortgagee by getting in the equity of redemption, and had obtained possession not under the mortgage but under the purchase of the equity in 1872. Their Lordships see no reason for accepting this view. It appears to them to be immaterial that the mortgagee should have thought he was absolute owner if in fact he was mortgagee; and immaterial whether he got possession before, under or after the mortgage if in fact he purported to transfer the property to the transferee. But in the present case the transfer which is *ex concessis* ineffective to give the absolute title was made during the existence of the particular estate vested in Thomas Browne Skinner, and in such a case the provisions of article 140 apply. It was, indeed, faintly contended by the appellant that the plaintiff claiming only an equity of redemption did not come within the meaning of a remainderman. It appears to their Lordships that so to hold would be to do violence to the language and

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reasoning of this Board in *Skinner v. Naunihal Singh* (1), and would be inconsistent with the ordinary meaning of the term.

Whether Thomas Skinner settled the estate subject to the incumbrance or whether he settled the equity, in either case he created a contingent remainder which vested in the plaintiff in possession in 1919 on the death of the last of her brothers without issue. So far, therefore, as the defendant relies upon the enjoyment of the absolute title for 10 years from the transfers from Lachman Das and his successors in 1898 and 1903 he is defeated by the provisions of section 140. It is unnecessary to add that if the transfer ultra the mortgage interest had taken place in the lifetime of Thomas Skinner, the settlor, so that time had begun to run in his lifetime, article 140 would not have availed the plaintiff. This is in accordance with section 9 of the Limitation Act which itself follows the provisions of the English law. As it is, however, the defendant is defeated in his enjoyment of the absolute title by the provisions of article 140. He then has to fall back upon the transfer to him of the mortgage interest of Lachman Das in the original mortgage of 1863 which, according to the decision of the Privy Council in 1913, was *quoad tantum* transferred to him in the folds of the larger title which he thought he was getting. But if he has to rely upon a mortgage title then he must take it subject to the obligation of all mortgage titles, viz., the obligation to be redeemed. It is conceded and is plain that article 134 does not protect the transferee of a mortgage by express transfer, and it appears to their Lordships idle to suppose that it protects a person who has taken a transfer only of a mortgage, but has taken it without his knowledge mistakingly supposing that he was getting something better in circumstances like the present, where he cannot maintain his

(1) (1913) I.L.R., 35 All., 211; L.R., 40 I.A., 105.

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superior title by reliance on any period of limitation. Resting as he does on the interest of mortgagee he is liable to be redeemed. The period of redemption began, it is true, in the lifetime of Thomas Skinner, and article 140 has no application but the statutory period runs for 60 years and had not expired when the plaintiff filed the present suit.

Their Lordships therefore are of opinion that this appeal should be allowed with costs here and below and the order of the Subordinate Judge restored, and that the case should be remitted to the High Court to make such additions to the decree as may seem just to the plaintiff in view of the fact that possession has been withheld from him and his testatrix since the date fixed in the preliminary decree. The right to possession will be governed by the preliminary decree with which, as their Lordships are informed, the plaintiff has complied. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellant: *Chapman-Walker and Shephard*.

Solicitors for respondent: *Douglas Grant and Dold*.

MISCELLANEOUS CRIMINAL

Before Mr. Justice Dalal.

EMPEROR v. BHAIRON PRASAD.*

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July, 24.

Criminal Procedure Code, sections 190, 197, 202, 561A—Cognizance—Jurisdiction of Magistrate to take cognizance—Search and seizure of property by District Magistrate on complaint of an offence requiring sanction under section 197—High Court's power of interference—Act (Local) No. II of 1916 (U. P. Municipalities Act), section 82(1)—Public servant.

Where a District Magistrate, on receipt of a complaint that a member of a Municipal Board had by contravening section 82(1) of the U. P. Municipalities Act committed an

*Criminal Miscellaneous No. 178 of 1928.

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