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in such cases, do not fill the same character and therefore rule 18 can have no application. The interpretation which we place on rule 20 is that it permits one mortgage decree to be set off against another mortgage decree; but it has no application to a case where one party has a decree for payment of money and the other a decree for sale or for enforcement of a charge. We are further of opinion that in order to attract the provisions of rule 18, order XXI, it is necessary that the decrees sought to be set off against each other must be decrees for payment of money.

This being our view, we are of opinion that the order passed by the court below is correct. We accordingly dismiss the appeal with costs.

Before Sir Shah Muhammad Sulaiman, Chief Justice, and Mr. Justice Bennet

1936 *February,* 19

RAM SARUP (DECREE-HOLDER) *v.* SAHU BHAGWATI PRASAD AND ANOTHER (OBJECTORS)*

Limitation Act (IX of 1908), *section* 19—*Acknowledgment—"Person through whom he derives title"—Acknowledgment by mortgagor not binding on a mortgagee who derived title prior to the acknowledgment—Transfer of Property Act (IV of* 1882), *sections* 52, 74, 92—*Subrogation—Third mortgagee paying off first mortgage after second mortgagee's decree—Fresh period of limitation does not accrue*—Lis pendens—*Vakalatnama giving name of one vakil but signed by another who was in fact appointed—Formal defect immaterial.*

Where there is an acknowledgment by a mortgagor, that acknowledgment can only bind a mortgagee who derives his title subsequent to the acknowledgment, but it can not bind a mortgagee who derives title prior to the acknowledgment. The words, "person through whom he derives title", in section 19 of the Limitation Act mean a person through whom he has derived title after the date of the acknowledgment. So, an acknowledgment of the first mortgage contained in the deed of third mortgage can not operate as against the second mortgagee.

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*Second Appeal No. 247 of 1934, from a decree of Lachhman Prasad, Additional Subordinate Judge of Bijnor, dated the 4th of November, 1933, reversing a decree of Raghunandan Saran, Munsif of Nagina, dated the 8th of May, 1933.

The payment by a third mortgagee of the amount due on the first mortgage to the first mortgagee subrogates him to the rights of the first mortgagee but does not give him a fresh period of limitation, as from the date of such payment, for enforcing the rights under the first mortgage.

Where, after the second mortgagee has obtained a decree for sale on his mortgage, a third mortgage is made and the third mortgagee pays the amount due on the first mortgage to the first mortgagee, the third mortgagee is prevented by section 52 of the Transfer of Property Act from claiming priority in respect of the first mortgage as against the second mortgagee decree-holder.

Where a vakalatnama was signed by the vakil who was intended to be appointed by the client, and such vakil acted for the client, but it was found that the body of the vakalatnama did not contain the name of this vakil but that of another vakil, it was *held* that this formal defect was immaterial and that the vakil had validly acted on behalf of the client.

Messrs. *G. S. Pathak* and *R. N. Sen*, for the appellant.

Mr. *Vishwa Mitra*, for the respondents.

SULAIMAN, C.J., and BENNET, J.:—This is an execution second appeal by a decree-holder, Ram Sarup. The facts are somewhat complicated and are as follows. Jagannath and his son, Ram Sarup, made three simple mortgages as follows:—(1) on the 26th of July, 1917, in favour of Gopi Nath, (2) on the 16th of November, 1922, in favour of Raghubir Saran, (on this mortgage a decree has been obtained by Raghubir Saran on the 11th of January, 1926) and (3) on the 28th of July, 1926, in favour of Sahu Bhagwati Prasad and Sahu Jagdish Prasad, the respondents. One point to be noted is that the mortgage in favour of the respondents was executed at a date subsequent to the decree on the second mortgage, which is now the decree under execution. It is, therefore, claimed that the provisions of section 52 of the Transfer of Property Act apply in favour of the decree-holder. The third mortgage contained a provision that Rs.2,100 were left for payment to Gopi Nath on the first mortgage, and on the 29th of July, 1926, the same was actually paid to Gopi Nath,

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amounting to Rs.2,151-14 in full discharge of his first mortgage, by the mortgagee of the third mortgage. The present appellant made an application on the 13th of January, 1931, for substitution of his name, and on the 14th of March, 1931, substitution was made. He then made an application on the 10th of November, 1932, for execution. One point which has been held against him by the lower court is that in these applications there was no proper vakalatnama, because the vakalatnama bore the name of a certain vakil and that vakil was not in fact the one who made the application, but another vakil made the application. The vakalatnama was signed by the appellant and also by the vakil who made the application. It was apparently by an error that the name of another vakil remained in the document. Under order III, rule 4(1) it is provided that no pleader shall act in any case unless he has been appointed for the purpose by such person by a document in writing and signed by such person. The question is whether actually this vakil was appointed by the appellant. The document in question was signed by the appellant, and we are satisfied that he intended to appoint the vakil who made the application. The mere mistake that the name of some other vakil remained in the body of the document does not make any difference. In actual fact the vakil in question has been acting throughout for the appellant, and it is a mere quibble to hold, as the learned Subordinate Judge has held, that he was not entitled to make this application. There have been recent pronouncements of this Court to the effect that where the vakil is actually intended by a party to act on his behalf, and does so act, formal defects of this nature are of no importance. This was the main ground on which the lower court has held against the appellant. We hold that the decision of the lower court was wrong.

A further point which was raised by the respondents against the claim of the appellant for execution was that

the respondents were entitled to priority on account of their payment of Rs.2,151-14 to the first mortgagee. This question has been very briefly dealt with by the court below in a dozen lines, and the court considered that the claim of the respondents was well founded. The matter is one of considerable difficulty and cannot be so briefly disposed of. On the 2nd of February, 1931, the respondents brought a suit on the third mortgage. This mortgage had no doubt the item of consideration of Rs.2,100 for the first mortgage, but the suit was based on the third mortgage and not at all on the first mortgage. The second point which is to be noted is that the respondents did not implead Raghubir Saran, the mortgagee on the second mortgage in suit, although he had actually obtained a decree on the second mortgage; nor did they implead the appellant to whom the decree had been sold on the 30th of December, 1930, and who had the substitution made for his name on the 14th of March, 1931.

We consider that it was a great defect in the suit that Raghubir Saran or his transferee was not made a party. The decree was passed in favour of the respondents on the 20th of July, 1931, the decree being against the mortgagor only. In execution of this decree the respondents had the property put up to sale, and the respondents purchased the property themselves on the 15th of October, 1932; and on the 19th of July, 1933, the respondents obtained possession through the court. The respondents, therefore, prayed that at the time of the execution application which was made on the 10th of November, 1932, they were the purchasers by auction sale, although they had not obtained possession until a date subsequent to the judgment of the Munsif in this case, which was on the 8th of May, 1933. Now much argument has been made as to the fact of the payment by the respondents on the 29th of July, 1926. On behalf of the appellant it is claimed that the whole transaction of mortgage No. 3 of the 28th of July, 1926,

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cannot have any effect on his rights because under section 52 of the Transfer of Property Act he can claim that the transfer by the mortgagor made subsequent to the decree of the 11th of January, 1926, in favour of Raghubir Saran is a transfer which cannot affect the rights of the decree-holder under that decree. On the other hand the respondents claim that they are persons who are subrogated under the provisions of section 92 of the present Transfer of Property Act, or under the provisions of section 74 of the Transfer of Property Act as it stood at the time of their purchase on the 29th of July, 1926. Learned counsel for the respondents argued that on that date, 29th of July, 1926, they paid off the prior mortgage of the 26th of July, 1917, and therefore acquired rights of subrogation under that mortgage. Now what were those rights? Under section 74 as it stood at that date it was provided "that the subsequent mortgagee shall on obtaining such receipt acquire in respect of the property all the rights and powers of the mortgagee as such to whom he has made such tender". The provision in the present section 92 for subrogation is practically the same. Learned counsel argued that this right which he acquired in 1926 should extend for a period of 12 years from that date. We are of the opinion that this contention is not correct, and that the language of section 74 limits him to the rights and powers of the mortgagee of that date. Now the mortgage of the 26th of July, 1917, provided that payment should be made within one year, and the period of 12 years' limitation from that year would terminate on the 26th of July, 1930. The rights acquired, therefore, terminated on that date in 1930, and cannot be taken to extend the period of 12 years from 1926. No suit was brought by the respondents on the first mortgage, and therefore in our opinion their rights under that mortgage have become time barred.

An argument has been addressed to us at considerable length to the effect that time would be extended by

an acknowledgment made by a mortgagor, the acknowledgment in question being the execution of the mortgage of the 28th of July, 1926, in favour of the respondents as that deed contains an admission that Rs.2,100 were due to Gopi Nath. The question which arises for consideration is whether a mere acknowledgment by a mortgagor can operate under the provisions of section 19 to extend limitation not only against himself, but also against a puisne mortgagee who has acquired his puisne mortgage prior to the acknowledgment in question. In this connection a distinction is to be drawn between rulings under section 20 where there is a payment by the mortgagor and rulings under section 19 where there is an acknowledgment by the mortgagor. The language of these two sections is different; and the considerations to which they give rise are also different. In section 20 it is provided that where there is a payment by the person liable to pay the debt, that is sufficient to extend the period of limitation. The section presumes that a person will not make a payment unless he has a legal liability to make the payment. In section 19 the provisions are that "an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed or by some person through whom he derives title or liability". The acknowledgment has not been made by the appellant but it has been made by his mortgagor. It cannot be said that the acknowledgment by the mortgagor is one by a person through whom the appellant derives title or liability. The title or liability of the appellant arises from the mortgage executed by the mortgagor in favour of Raghubir Saran on the 16th of November, 1922. It was on that date and by virtue of that mortgage that the title or liability of the appellant arose. He has had no further connection since that date with the mortgagor and it cannot be said that he derived title from the

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mortgagor by any transaction subsequent to 1926. We consider that the plain language of section 19 means that the person through whom he derives title or liability must be a person through whom he has derived title or liability at the time of the acknowledgment. Now it was four years prior to the acknowledgment that he derived his title or liability. The mortgagor in 1926 was not the person through whom the appellant derived title or liability. He was a person through whom the appellant had derived title and liability four years previously. We are of the opinion that this distinction is essential to section 19 and that the acknowledgment by the mortgagor in 1926 cannot in any way extend limitation against the appellant who derived his title from that mortgagor in 1922.

We now come to the case law on the subject. In the years 1918 and 1919 there were two rulings of this Court on this subject, but as these rulings were of a period within about nine months it is apparent that the learned Judges who made the later ruling did not have the benefit of seeing the earlier ruling. The earlier of these rulings was of August, 1918, in *Roshan Lal* v. *Kanhaiya Lal* (1), by a Bench composed of PIGGOTT and WALSH, JJ. In that case it was held that a payment by a mortgagor did save limitation in case of a claim against a subsequent mortgagee; but a distinction was drawn by the Bench on the difference between an acknowledgment under section 19 and a payment under section 20, and the Bench took the same view which we have enunciated. We then come to the later case of the 6th of May, 1919, in *Arbindakeb Rai* v. *Jageshar Rai* (2). One member of the Bench was the same, WALSH, J., and the other member was STUART, J. The finding of the Bench was extremely brief. It was a case where there was an acknowledgment, and the Bench held that the acknowledgment was sufficient against the mortgagee, although the mortgagee in question had obtained his mortgage

(1) (1918) I.L.R., 41 All., 111. (2) (1919) 17 A.L.J., 763.

prior to the acknowledgment. There was no discussion of the case law on the subject. There was some reference to a Calcutta case, not by name, which was under section 20 of the Limitation Act; and that section, as we have shown, is essentially different in regard to this point from section 19.

We now turn to some English rulings, which have been cited by the courts in India, and which have been relied on by the decision of this Court in 1918. One of the earliest of these rulings is *Bolding* v. *Lane* (1), in 1863, by WESTBURY, L.C., and that case was directly in point, and he held that an acknowledgment by a mortgagor does not preclude a puisne mortgagee from relying on limitation where the mortgage had been taken previous to the acknowledgment. This ruling has been quoted with approval in subsequent rulings, one of which is *Lewin* v. *Wilson* (2), where there is a discussion on this point. These are rulings of 1863. On page 645 a distinction was drawn between the case by their Lordships of the Privy Council and the case of *Chinnery* v. *Evans* (3). That was a case of payment and it was pointed out that a payment raised different considerations from an acknowledgment.

From the weight of the English cases where the law is similar, and of the ruling of 1918 of this Court, we consider that the proposition is well established that where there is an acknowledgment by a mortgagor that acknowledgment can only bind a mortgagee who derives his title subsequent to the acknowledgment, but it cannot bind a mortgagee who derives title prior to the acknowledgment. We, therefore, think that the claim of the respondents that the period of limitation on their rights under the first mortgage would be extended by the acknowledgment contained in the third mortgage is a claim which is not established. Therefore in our view the respondents have got no rights left

(1) (1863) 1 De G.J. & S., 122. (2) (1886) 11 App. Cas., 639.
(3) (1864) 11 H.L.C., 115.

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under the first mortgage, and they are persons who are deprived of any claim they might have had against the appellant because the provisions of section 52 of the Transfer of Property Act are against them. We, therefore, consider that the objection which the respondents have made in regard to their payment of Rs.2,151-14-0 on the 29th of July, 1926, cannot be sustained. Therefore we allow the appeal, set aside the order of the lower appellate court, and restore the order of the Munsif, and we dismiss the objection of the respondents with costs throughout.

REVISIONAL CRIMINAL

Before Mr. Justice Allsop

1936
February, 20

EMPEROR *v.* KUNJ BEHARI DAS AND OTHERS*

Criminal Procedure Code, section 145, *clauses* (4), (9)—*Summoning of witnesses named by a party—Discretion of court—Duty of court to summon witnesses, not imperative in all kinds of cases—Revision—Substantial justice.*

Sub-section (4) of section 145 of the Criminal Procedure Code has to be read with sub-section (9), which leaves it entirely to the discretion of the Magistrate, in a proceeding under that section, whether he will or will not summon any witness or witnesses, on the application of either party.

There is no general duty upon a court in all kinds of proceedings to issue process to compel the attendance of witnesses desired by the parties; special rules are laid down in the Criminal Procedure Code in this respect according to the nature of the inquiry with which the Magistrate is dealing. Having regard, obviously, to the fact that a proceeding under section 145 is a summary proceeding about the possession of parties, sub-section (9) makes it discretionary to summon or not to summon witnesses.

Even if there were any doubt on this question of law, there would be no ground for interference in revision where the order of the court under section 145, which had been passed

*Criminal Revision No. 1043 of 1935, from an order of K. K. K. Nayar, Sessions Judge of Muttra, dated the 13th of November, 1935.