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COURTNEY TERRELL, C.J.

decision on the enquiry into the accounts could have no bearing upon the conduct of the trial upon its merits. In my opinion the objection to valuation was not taken at the earliest possible moment as prescribed by section 11 and it should fail in any case.

The suit should now go back to the trial court with a direction to the Munsif to enquire into the accounts to be rendered by the widow defendant on the principles enunciated in the earlier part of this judgment. She should make a proper affidavit of all documents in her possession or power and the commissioner should arrive at his estimate of the amount due to the plaintiff from an examination of the materials so disclosed together with such assistance as he can obtain from the parties, but the widow defendant cannot be compelled to furnish an account in the way such an account could have been ordered from her deceased husband, had he been alive, the obligation to render the account being of a personal nature only. The appeal must be allowed with costs throughout. The costs of taking the account will be determined by the Munsif in accordance with the ordinary principles in such cases.

KULWANT SAHAY, J.—I agree.

JAMES, J.—I agree.

Appeal allowed.
Case remanded.

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December, 21, 22.

APPELLATE CIVIL.

Before James and Agarwala, JJ.

BIRENDRA KESHRI PRASAD NARAIN SAHEE

v.

BAHURIA SARASWATI KUER.*

Transfer of Property Act, 1882 (*Act IV of* 1882), *sections* 95 *and* 123—*co-mortgagor paying up whole mortgage debt—charge, whether created—right to enforce the charge, when*

* Appeal from Original Decree no. 26 of 1930, from a decision of Babu Jatindranath Ghosh, Subordinate Judge of Muzaffarpur, dated the 25th July, 1929.

arises—limitation—limited right of subrogation created by section 95, nature of—co-mortgagor, whether entitled to interest at bond rate—court, discretion of—oral dedication, when effective—mere unexpressed intention to dedicate, whether has the effect of formal dedication.

Where G mortgaged his property, part of which he subsequently dedicated for religious and charitable purposes and part of which he settled on his wife for life with certain charges, and the whole mortgage was redeemed by the tenant for life of the settled estate, *held*, that by virtue of the provisions of section 95 of the Transfer of Property Act (as it stood before the amendment of 1929) a charge was created on the mortgaged property in possession of the trustees of the endowments for their proportionate share of the mortgage debt.

Malik Ahmed Wali Khan v. *Musammat Shamsi Jahan Begum*(1), followed.

The right to enforce such a charge created by the redemption of the mortgage by the holder of a portion of the mortgaged property does not accrue until the whole mortgage debt has been paid off. Therefore, a suit to enforce the charge can be brought at any time within 12 years from the date of the payment of the entire mortgage debt.

The limited right of subrogation created by section 95 must not be treated as if in fact it entitles the co-mortgagor to enforce the terms of the mortgage bond. Therefore, a co-mortgagor paying up the whole mortgage debt is not entitled to claim, as a matter of right, that interest should be calculated at the rate specified in the bond; the question of what interest should be payable to the co-mortgagor, on what amount, and from what date is one at the discretion of the court.

Digamber Das v. *Harendra Narayan Pande*(2), followed.

A mere unexpressed intention to dedicate certain property cannot have the effect of a formal dedication, so as to invalidate the transfer of that property to a third person made after the idea had been formed in the mind of the transferor.

Although, in spite of the provisions of section 123 of the Transfer of Property Act, a verbal dedication may be effective without an instrument in writing, there must be a real

(1) (1906) 10 Cal. W. N. 626, P. C.
(2) (1910) 14 Cal. W. N. 617.

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dedication, whereby the property is completely given away and the owner completely divests himself of his ownership.

Harihar Prasad v. *Sri Gurugranth Sahib*(1), followed.

Appeal by the defendant.

The facts of the case material to this report are set out in the judgment of James, J.

S. N. Ray (with him *B. N. Ray* and *G. P. Sahi*), for the appellants.

Government Pleader, for the respondents.

JAMES, J.—On the 1st of June, 1913, Babu Ganesh Prasad Narain Sahi borrowed Rs. 30,000 on a mortgage of certain property. On the 16th of July, 1914, he made a settlement of the whole of his property, including that which had been mortgaged in the previous year. Certain property was dedicated to the deities of a temple at his own home, and certain other property was dedicated to a temple at Benares, the settlor constituting himself the shebait of both of these endowments, and making provision that this office should descend to any sons who might be born to him. The rest of the property of which he was then in possession was settled on his second wife Musammat Saraswati Kuer for life, with remainder to his expected male issue, in default of male issue, to the religious endowment in his own village which was already endowed by the settlement. The estate thus settled on Musammat Saraswati Kuer was made subject to certain charges which provided for allowances to the settlor himself, to his mother, to his first wife, and to his daughter, providing also for an annual subscription to a school. Certain property was also definitely charged for the payment of Government revenue, and for the costs of repairs to the family house. At some time after executing this document, Ganesh Prasad Narain Sahi married a third wife, by whom he had a son who is

(1) (1930) 11 Pat. L. T. 658.

now the shebait of the endowments which have been mentioned above. After the death of Ganesh Prasad the Court of Wards took charge of the property of Musammat Saraswati; and in due course the mortgage of 1913 was redeemed by the Court. The suit with which we are concerned was then instituted in order to enforce the charge on the endowed property, which had been created by the operation of section 95 of the Transfer of Property Act, (as the section stood before the recent amendment), when the mortgage was redeemed by Saraswati Kuer. It was alleged by the defendant that the dedicated property was not liable, on the ground that the dedication had been actually made before the execution of the mortgage; but on this point the decision of the Subordinate Judge was in favour of the plaintiff. It was also suggested that Musammat Saraswati Kuer stood in some way or other in the shoes of the mortgagor, so that the redemption of the mortgage on her behalf was equivalent to redemption by the mortgagor himself which would create no charge on any property not then in his possession. It was also suggested that the suit was barred by limitation. The Subordinate Judge ascertained the value of the dedicated property from the road cess returns, from which it appears that the value is something less than that stated in the plaint. But on the valuation as he found, he decreed the plaintiff's suit, allowing interest at six per cent. on the amount paid for redemption, treating the plaintiff as entitled to interest on the instalments paid from the date of the first instalment. The defendant appeals from that decision.

Mr. S. N. Ray on behalf of the appellant suggests in the first place that the deed of the 16th of July, 1914, constituted Musammat Saraswati Kuer a trustee of the mortgagor, so that the redemption on her behalf should be regarded as payment by the mortgagor of a personal debt which he had undertaken to pay. He argues in the second place that the

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dedicated property had been dedicated before the execution of the mortgage, so that it could not be properly hypothecated by Ganesh Prasad Narain Sahi, and no charge on it could be created when the mortgage was redeemed by the holder of another portion of the mortgaged property. He argues also that the suit should be regarded as barred by limitation; and that in any event interest ought not to have been awarded on the amount decreed for any period antecedent to the date of the institution of the suit. On behalf of the plaintiff a cross-objection has been preferred, claiming interest from the date of the payment of the first instalment at the rate specified in the mortgage bond.

The deed of gift, or settlement, of the 16th of July, 1914, conveyed a portion of the mortgaged property to Srimati Saraswati Kuer for life with remainder to any sons which might be born to the settlor. The deed recites that the property has been given to Saraswati Kuer who is placed in possession and occupation thereof instead of Ganesh Prasad Narain Sahi; she is to remove his name from the Government registers and substitute her name: but Mr. S. N. Ray suggests that the directions that the property shall be charged for certain purposes amount to such directions regarding the expenditure of the income as to take Saraswati Kuer out of the category of a life tenant and to make her merely a trustee or managing agent for Ganesh Prasad Narain Sahi. No such inference can be drawn from the charges created for the maintenance of other members of the family, or for payment of Government demands. For the rest the deed directs that

> "the pay of the servants shall be disbursed out of the balance of the income of the said properties left after payment of the aforesaid annual and monthly amounts and Government demands; and the balance then left shall be spent by her in meeting her personal and diet expenses and in performing necessary ceremonies in connection with my family, which should not also be extravagant and improper".

Mr. S. N. Ray suggests that by these provisions Ganesh Prasad Narain Sahi assumes complete

control of the income of the property of which he makes a settlement, and that in consequence Saraswati Kuer should be regarded as in some way or other standing in his shoes. But this deed can in my judgment be read as nothing more than a deed creating a tenancy for life, subject to certain charges which are specified. The direction that the lady's living expenses, and expenses to be incurred on account of ceremonies to be performed in connection with the family should not be extravagant or improper is from the legal point of view mere surplusage; and expression of the desire of the donor which could not be enforced, which does not in any way limit the powers of Saraswati Kuer in dealing with the income. No right of alienation is given by the deed; but Saraswati Kuer is made a tenant for life; and subject to the charges created, she has complete discretion as to how she will deal with the income. Indeed where the donor has entered into such details in the expression of his intentions regarding the expenditure of the income of the property, the omission of any mention of the mortgage deed would imply that he did not intend that this portion of the property should be charged with the whole of that debt. However, that may be, the property is not so charged by the deed, and it cannot be said that by this deed Saraswati Kuer is made in any sense the trustee of the donor.

On the question of fact some attempt was made to prove at the trial that there had been a formal dedication before the date of the mortgage, by the evidence of two witnesses on behalf of the defendant; but it was proved by the evidence of Lachmi Tewari on behalf of the plaintiff that this oral dedication had been made in October, 1913, after the date of the mortgage. The learned Subordinate Judge has believed the evidence of Lachmi Tewari in preference to that of the evidence given on behalf of the defendant; and his view of the effect of this evidence must be accepted. In the deed of gift there is vague

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mention of the fact that the donor had already dedicated mentally the property which he formally dedicates by the deed; but although the provisions of section 123 of the Transfer of Property Act may have been somewhat modified by judicial decisions, (whittling them down, in our opinion, in a manner not contemplated when the Act was made law), it has never been suggested that a mere unexpressed intention to dedicate certain property would have the effect of a formal dedication, so as to invalidate the transfer of that property to a third person made after the idea had been formed in the mind of the transferor. Indeed, although it may be true that in spite of the provisions of section 123 of the Transfer of Property Act such a dedication may be effective without an instrument in writing, there must be a real dedication, whereby the property is completely given away and the owner completely divests himself of his ownership—*Harihar Prasad* v. *Sri Gurugranth Sahib*(1).

The position thus is, that Ganesh Prasad Narain Sahi mortgaged this property, part of which he subsequently dedicated for the two endowments, and part of which he subsequently settled on his family. The whole mortgage has been redeemed by the tenant for life of the settled estate; and by the provisions of section 95 of the Transfer of Property Act, (as it stood before the amendment made in 1929), a charge has been created on the mortgaged property in possession of the trustees of the endowments for their proportionate share of the mortgage debt. Mr. S. N. Ray has drawn attention to the fact that there was formerly some difference of opinion as to the effect of section 95 of the Transfer of Property Act; but I need here refer only to the decision in *Malik Ahmed Wali Khan* v. *Musammat Shamsi Jahan Begum*(2), decided by the Judicial Committee of the Privy Council on the 21st of March, 1906.

(1) (1930) 11 Pat. L. T. 658.
(2) (1906) 10 Cal. W. N. 626, P. C.

The mortgage debt was satisfied by two payments, the first on the 8th January, 1921, and the second on the 1st of April, 1926. The payment on the 8th of January, 1921, may have given cause of action for a claim to contribution from the trustees of the endowment. Mr. S. N. Ray suggests that as no suit was instituted within three years from the recovery of this sum, the claim should be regarded as barred by limitation. But the suit with which we are here concerned, is definitely a suit to enforce the charge created by the redemption of the mortgage by the holder of a portion of the mortgaged property; and the right to enforce such a charge did not accrue until the whole mortgage debt had been paid off. It certainly cannot be held that limitation, affecting the right to enforce the charge, began to run before the right had accrued; and the plaintiff was entitled to institute the suit at any time within twelve years after the 1st of April, 1926.

In preparing his decree the Subordinate Judge has allowed interest on the amount which the defendant would have paid in 1921 when the first instalment was paid if he had then borne his proportionate share. Mr. S. N. Ray argues that no liability to pay interest on the amount paid by the co-mortgagor should be held to accrue until the whole amount of the mortgage debt is paid off, pointing out that the payment of the first instalment was in effect only payment of a portion of the plaintiff's own share of the mortgage debt. The learned Government Pleader on behalf of the plaintiff-respondent asks for interest at the rate specified in the bond from the date of the first instalment. It appears to be clear that the effect of the old section 95 of the Transfer of Property Act was not to place the person claiming to enforce the charge completely in the position of the mortgagee in such a manner that he could enforce the terms of the mortgage deed against those mortgagors who had not borne their share in the redemption. He obtained a charge on the property; but the

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question of what interest should be payable to the co-mortgagor paying the debts, on what amount, and from what date, is one at the discretion of the Court; and the plaintiff is not entitled to claim as a matter of right that interest should be calculated at the rate specified in the bond—*Digamber Das* v. *Harendra Narayan Pande*(1). The limited right of subrogation created by section 95 of the Transfer of Property Act must not be treated as if in fact it entitled the co-mortgagor to enforce the terms of the mortgage bond; and in the present case I consider that interest should be allowed at the rate of six per cent. per annum only from the date at which the plaintiff became entitled to the charge which is now to be enforced.

I would accordingly amend the decree of the Subordinate Judge by disallowing interest for the period from the 28th of January, 1921, to the 1st of April, 1926. In other respects I would affirm the decision of the lower court and dismiss this appeal with costs. Hearing fee in this Court may be assessed at Rs. 250.

The cross-objection is dismissed.

AGARWALA, J.—I agree.

Appeal and cross-objection dismissed.

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January, 2.

APPELLATE CIVIL.

Before Khaja Mohamad Noor and Agarwala, JJ.

BHEKDHARI MAHTON

v.

SRIMATI RADHIKA KOER.*

Mortgage—certificate for arrears of cess—service of notice on certificate-debtor—charge, whether created in favour of Secretary of State—purchaser at the certificate sale, position

* Appeal from Appellate Decree no. 1160 of 1930, from a decision of F. G. Rowland, Esq., I.C.S., District Judge of Patna, dated the 21st of February, 1930, upholding a decision of Babu Jugal Kishore Narayan, Munsif of Patna, dated the 18th of March, 1929.

(1) (1910) 14 Cal. W. N. 617.