of section 13 (2) of the Negotiable Instruments Act. Section 45 of the Contract Act by its terms indicates that joint promisees are tenants-in-common, and not joint tenants, of the debt.

I agree that the first question propounded should be answered in the negative and that therefore the second question does not arise.

ROBERTS, C.J.—In this case I have read the two judgments of my learned brothers and I concur in them and have nothing to add. The costs of the reference will be costs in the appeal, advocate's fee 15 gold mohurs.

LETTERS PATENT APPEAL.

Before Sir Ernest H. Goodman Roberts, Kt., Chief Justice, and Mr. Justice Leach.

S.N.V.R. CHETTYAR FIRM
v.
K.Y.A. CHETTYAR FIRM.*

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Jan. 7.

Mortgage—Mortgaged lots—Sale of some lots subject to mortgage—Oral release of some lots from mortgage—Sale of released plots to satisfy mortgagee's other debts—Second mortgage of two lots of mortgaged land—Suit by mortgagee against mortgagor and puisne mortgagee—Claim against puisne mortgagee for proportionate share of mortgage debt—No evidence of valuation of respective lots—Puisne mortgagee's claim to bring sale proceeds of released lots into account—Marshalling—Wrong basis of suit—Necessary parties—Remand of case for addition of parties and fresh evidence—Evidence Act (I of 1872), s. 92—Transfer of Property Act (IV of 1882 and XX of 1929), s. 81—Civil Procedure Code (Act V of 1908), O. 1, r. 10 ; O. 34, r. 1.

In 1919 H mortgaged her 18 lots of paddy land measuring 381·88 acres to the respondent by a registered instrument. In 1925 H sold 24·91 acres of the mortgaged land to T and his wife subject to the mortgage. In 1926 the respondent orally released from the mortgage 89 acres which H sold to various persons and the purchase price of Rs. 8,500 was applied in the reduction of sundry debts due by H to the respondent. In 1927 H executed in favour of the

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* Letters Patent Appeal No. 8 of 1936 from the judgment of this Court in Civil Second Appeal No. 190 of 1936 arising out of Civil Appeal No. 2 of 1936 of the District Court of Pegu.

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appellant a second mortgage of two lots measuring 17·68 acres which formed part of the mortgaged land. In 1932 the appellant attached and bought at the Court sale the right to redeem this second mortgage. In 1934 the respondent attached the equity of redemption of eight lots of land and purchased the mortgagor's interest therein at Court sales. In 1935 he sued H (who did not defend) and the appellant for Rs. 1,299 claiming the sum as a proportionate share of his whole mortgage debt which he asserted to be Rs. 21,520 on the lands measuring 17·68 acres which were subject to the appellant's second mortgage. The respondent had omitted to sue the purchasers of 24·91 acres and he had made no real attempt at valuation of the respective lots of property.

The appellant contended that (1) the sale proceeds of the 89 acres ought to be brought into account and applied in the reduction of the respondent's mortgage debt as by virtue of s. 92 of the Evidence Act no oral evidence could be given to show that this acreage had been released from the mortgage ; (2) the respondent must account for the profits made by him by the purchase of the eight lots at Court sales ; (3) after giving credit for those amounts, if a balance was still due to the respondent, the 24·91 acres sold to T and his wife should be brought to sale before his 17·68 acres ; (4) as the respondent had not made T and his wife parties and had proceeded with his suit on a wrong basis, the suit should be dismissed.

In the course of the bearing of this appeal the respondent applied that the case be sent back to the trial Court with liberty to add T and his wife as parties and to take accounts on a proper basis.

Held, that a valid release of a mortgage by word of mouth was permissible. S. 92 of the Evidence Act did not apply as the appellant was not a representative in interest of either party to the first mortgage. His incumbrance was subsequent to the release and sale of the 89 acres, and, therefore, these could not be taken into account. The appellant was entitled to have all the other securities marshalled and as the respondent had failed to make T and his wife parties and had proceeded throughout with his suit on a wrong basis, leaving it impossible for the Court to ascertain the true position, it was too late to allow him to add new parties and to adduce a considerable amount of fresh evidence in order that he might make out a fresh case.

Faquir Chand v. *Aziz Ahmad*, 59 I.A. 106, followed.

Clark (with him *Chakravarti*) for the appellant.

Hay for the respondent.

LEACH, J.—This appeal arises out of a mortgage suit filed by the respondent in the Subdivisional Court of Nyaunglebin. There were two defendants, the appellant and one Ma Saw Hmon. By a registered deed of mortgage, dated the 16th December, 1919, Ma Saw Hmon mortgaged to the respondent 18 lots of paddy land, measuring in all 381·88 acres. On the 28th May, 1925, Ma Saw Hmon sold 24·91 acres to one Ko Tha

Lu and his wife Ma Moe Nyun. This sale was, it is said, effected without the consent and knowledge of the respondent, but admittedly it was subject to respondent's mortgage. On the 15th January, 1926, the respondent, by an oral agreement, released from his mortgage seven lots, Nos. 1 to 7, measuring 89 acres, and these lands were then sold free of encumbrance to third parties. On the 27th June, 1927, the appellant acquired a second mortgage of two lots, Nos. 17 and 18, which measured 17·68 acres. In Civil Execution proceedings No. 28 of 1934 of the Subdivisional Court of Pegu, the respondent attached the equity of redemption of the lands comprised in lots Nos. 12, 13 and 14 and purchased the mortgagor's interest therein at the Court sale. In Civil Execution No. 14 of 1934 of the same Court, the K.Y.P.A. Chettyar Firm attached and bought at the Court sale the mortgagor's interest in lots Nos. 8, 9, 10, 15 and 16. It is said that the K.Y.P.A. Chettyar Firm is the respondent carrying on business under another name and that as the result of these two sales by the Court the respondent became the absolute owner of all the lands included in the sales.

In the suit with which this appeal is concerned the respondent claimed a mortgage decree for Rs. 1,299 in respect of the lands subject to the appellant's second mortgage. The total amount due on the mortgage was said to be Rs. 21,520. After the release of the 89 acres on the 15th January, 1926, there remained 292·88 acres, including the 17·68 acres, which were subject to the appellant's second mortgage. The sum of Rs. 1,299 was arrived at by charging in respect of the 17·68 acres a proportionate share of the sum of Rs. 21,520. I should mention that in 1932 the appellant attached and bought at another Court sale the mortgagor's interest in the 17·68 acres.

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The suit was not defended by Ma Saw Hmon, and a decree was passed against her for the amount claimed. The claim, however, was strenuously resisted by the appellant, who pleaded that :—(1) As the result of the gross negligence of the respondent, the appellant had been induced to advance money on mortgage to Ma Saw Hmon, and that the respondent had been guilty of fraud in not disclosing the position with regard to the first mortgage when the appellant attached in execution proceedings the interests of the mortgagor in the lands subject to his second mortgage. (2) On the taking of proper accounts it would be found that there was nothing due to the respondent. (3) The respondent was in law bound to marshall his securities, and in the first instance proceed against Ko Tha Lu and Ma Moe Nyun in respect of the lands conveyed to them. (4) The claim was barred by the law of limitation. The Subdivisional Court held that the charges of negligence and fraud had been established and that in consequence the respondent was postponed to the appellant. The suit was accordingly dismissed.

The respondent appealed to the District Court of Pegu against the decree of the Subdivisional Court in so far as it concerned the appellant. The District Court agreed with the Subdivisional Court on the questions of negligence and fraud. It also held that oral evidence could not be given to show that the respondent had released the 89 acres, and that as these lands had been sold for Rs. 8,500 and the purchase money paid in reduction of the debt due to the respondent, the respondent was bound to give credit for the Rs. 8,500 in the account against the appellant. Taking into consideration this amount and the purchases of mortgaged lands by the respondent at Court sales, and marshalling the 24·91 acres sold to Maung Tha Lu and Ma Moe Nyun the District Court

considered the mortgage debt had been more than discharged at the date of suit. The appeal was accordingly dismissed.

The respondent then appealed to this Court. The case came before Mr. Justice Spargo who held that :— (1) A valid release may be made by word of mouth, and as the appellant had not been granted a second mortgage at the time of the release his interests were not affected by that transaction and the respondent was, therefore, entitled to regard the remaining lands as security for his debt. (2) There was no substance in the charges of negligence and fraud and the respondent was not postponed to the appellant. (3) Section 60 of the Transfer of Property Act applied and the respondent was entitled to recover on the basis of the section, which gave the respondent what he claimed in the plaint. (4) The suit was not barred by the law of limitation. The learned Judge, however, granted to the appellant a certificate under section 13 of the Letters Patent, and we have now to decide whether the respondent is entitled to retain the decree which he has obtained.

The learned advocate for the appellant contended before us that the District Court was right in holding that oral evidence could not be given of the release of the 89 acres and that the money which was realized by the sale of these lands should be applied in reduction of the mortgage debt. He has also contended that before the appellant could be held liable the respondent must account for the profits made by the purchases of lots Nos. 8, 9, 10, 12, 13, 14, 15 and 16 at the Court sales. If these profits, together with the purchase price of the 89 acres, were not sufficient to discharge the mortgage debt the appellant was entitled to have the 24·91 acres of land sold to Ko Tha Lu and Ma Moe Nyun brought to sale before

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his 17·68 acres were attached. It was then said that as Ko Tha Lu and Ma Moe Nyun had not been made parties, and as the case had proceeded throughout on a wrong basis the suit should be dismissed. The plea of limitation was also relied on, but nothing turned on the question of negligence and fraud.

I do not consider that there is any substance in the plea with regard to the 89 acres, or in the plea that the suit was barred by the law of limitation. The learned advocate for the appellant conceded that in this country, a valid release can be granted by word of mouth, but in his argument with regard to the 89 acres he relied on the provisions of section 92 of the Indian Evidence Act which he said precluded any evidence being led to show that an oral release had in fact been granted. I am unable to see anything in section 92 which precludes the respondent from showing what was the real situation before the appellant came on the scene. The respondent had granted permission to the mortgagor to sell the 89 acres free from the encumbrance then existing, namely his own mortgage, and the sale of the 89 acres was a valid sale. Moreover, section 92 relates to the parties to the instrument relied on or their representatives in interest. The contest here is not between the parties to the instrument or their representatives in interest, but between one party, the respondent, and a third party, the appellant. The appellant cannot be regarded as the representative in interest of the mortgagor as far as the 89 acres are concerned. The representatives in interest are the purchasers of the 89 acres. With regard to the question of limitation, time began to run from the date of the demand for payment, not from the date of the deed, this being provided for in the deed. The learned advocate for the appellant contended that there was no evidence to show when the demand

was made. This contention, however, overlooks the fact that a decree based on the deed of mortgage was passed against the mortgagor and that the validity of this decree was not challenged in the District Court or before Mr. Justice Spargo. It is, therefore, too late for the appellant to raise the plea now.

The appellant's advocate is, however, on firmer ground when he contends that the provisions of section 60 of the Transfer of Property Act have no application here and that the learned Judge ignored the provisions of law with regard to marshalling and proceeded on a wrong basis when apportioning the amount due in respect of the lands comprised in the second mortgage. He is also on firmer ground when he contends that the case should not be sent back to the trial Court for the adding of new parties and the recording of further evidence.

Section 60 relates to the right of a mortgagor to redeem, and concludes with the following provisions :

> " Nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except *only* where a mortgagee, or if there are more than one mortgagee, all mortgagees, has or have acquired, in whole or in part, the share of the mortgagor."

In other words, when a person having a second mortgage on part of the property covered by the first mortgage acquires the mortgagor's right in that part, he may redeem that part from the first mortgagee on payment of a proportionate part of the amount due to the first mortgagee. The section does not affect the rights of a second mortgagee so far as the marshalling of securities is concerned and does not say on what basis the account between the appellant and the respondent is to be taken.

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Section 81 is the section which deals with the marshalling of securities. That section reads as follows :

"If the owner of two or more properties mortgages them to one person and then mortgages one or more of the properties to another person, the subsequent mortgagee is, in the absence of a contract to the contrary, entitled to have the prior mortgage debt satisfied out of the property or properties not mortgaged to him, so far as the same will extend, but not so as to prejudice the rights of the prior mortgagee or of any other person who has for consideration acquired an interest in any of the properties."

To bring to sale the lands transferred to Ko Tha Lu and Ma Moe Nyun before the lands subject to the appellant's second mortgage would not prejudice the respondent and the appellant is entitled to have this course adopted so far as the respondent is concerned.

The learned advocate for the respondent conceded that the amount due on the lands now held by the appellant could not be arrived at by the method adopted in the plaint and accepted by this Court in second appeal. He denied, however, that the respondent could be required to account for any profits made by him as the result of having purchased the equity of redemption of certain of the lots and contended that the proper method of taking the account was that indicated in the case of *Bisheshur Dial and another* v. *Ram Sarup* (1), where it was held that when a mortgagee buys at auction the equity of redemption in a part of the mortgaged property, such purchase has, in the absence of fraud, the effect of discharging and extinguishing so much of the mortgage debt as is chargeable on

(1) (1900) I.L.R. 22 All. 284.

the property purchased by him, that is, discharging and extinguishing that portion of the debt which bears the same ratio to the whole amount of the debt as the value of the property purchased bears to the value of the whole of the property comprised in the mortgage. I will assume for the purposes of this case that this is the right basis on which the account should be taken. It is, however, quite clear that the evidence at present on the record is not sufficient for the purpose. There has been no real attempt at valuation of the respective lots of property and before the account could be taken much new evidence would have to be recorded.

Order 34, rule 1 of the Code of Civil Procedure requires all persons having an interest either in the mortgage security or in the right of redemption to be joined as parties to a suit relating to a mortgage. In contravention of this rule Ko Tha Lu and Ma Moe Nyun were not made parties to the suit. Realizing this and the difficulty he was in with regard to the account the learned advocate for the respondent asked that he be allowed to withdraw the present suit with leave to file a fresh suit, under the provisions of Order 23, rule 1 of the Code of Civil Procedure, but when it was pointed out that a decree had been passed against the mortgagor, the second defendant in the suit, and that this decree must stand, he withdrew this application and urged the Court to send the case back to the trial Court with leave to add Ko Tha Lu and Ma Moe Nyun as parties and with a direction that the account between the appellant and the respondent should be taken on a proper basis. This application was strenuously opposed by the learned advocate for the appellant who pointed out that at no stage had any attempt been made before to add these persons as parties,

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although it was obvious that they were necessary parties. He also contended that it would not be right to allow further evidence to be given, as this would mean trying a new case which should not be allowed on a Letters Patent appeal. I am of opinion that these arguments should prevail. They are based on the decision of the Privy Council in the case of *Faquir Chand and others* v. *Aziz Ahmad and others* (1). That appeal arose out of a mortgage suit, in which the trial Court held that the plaintiffs had failed to bring all the parties concerned on the record and had also failed to bring before the Court materials sufficient to enable the Court to work out the account. The suit was accordingly dismissed. On appeal to the Allahabad High Court this decision was reversed and the suit remanded to the trial Court for disposal on the lines indicated in the judgment of the High Court. Their Lordships of the Privy Council held that the suit had been rightly dismissed, on the ground that there were not sufficient materials before the Court to work out the account. If this case were sent back it would mean a complete rehearing, involving the leading of a considerable amount of new evidence. The respondent chose to proceed with the suit on a wrong basis and must suffer the consequences. No attempt was made when the case was in the District Court or before Mr. Justice Spargo to have the case put on a proper basis and it is now too late to send the case back for retrial.

For the reasons indicated I would allow the appeal with costs against the respondent in all Courts.

ROBERTS, C.J.—In this appeal one Ma Saw Hmon mortgaged a series of lots of landed property

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(1) (1931) 59 I.A. 106.

amounting to 381·88 acres to the respondent in 1919, and in 1926 the respondent granted to her a valid oral release of 89 acres of the mortgaged property, the lands being sold and the purchase price thereof Rs. 8,500 being applied in a reduction of sundry other debts due to the respondent by Ma Saw Hmon.

After the sale the mortgage debt was secured by the rest of the land, 292·88 acres, and in the following year (1927) Ma Saw Hmon executed a second mortgage, this time to the appellant, of two lots out of the 292·88 acres amounting to 17·68 acres. The appellant attached and bought the right to redeem this second mortgage in 1932.

Now, the respondent obtained by purchase a number of other lots, but having done so he said there was still this mortgaged property of 17·68 acres, and he claimed from the appellant a proportionate share of the whole debt. The total amount said to be due on the original mortgage being Rs. 21,520 the respondent claimed (to omit decimals) seventeen two hundred and ninety seconds of this sum and filed a suit for this amount.

The appellant set up two main defences. First he said that the release and sale of the 89 acres in 1926 (before he took his second mortgage) ought to be brought into account. He said that the mortgage deed showed that the total amount was over 381 acres, that no evidence could be given to vary this sum and that if any proportionate figure was to be taken it must be based on the total security covering 381 acres and not 292. In this connection he tried to rely on section 92 of the Indian Evidence Act, but that section excludes oral evidence of the contents of a written contract between the parties or their representatives in interest only. I do not find that

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the appellant was a representative in interest of either of the parties to the first mortgage and at the time of the release and sale he had not appeared upon the scene. The only representatives in interest of either of the parties were the purchasers of the lots sold. I agree with Spargo J. who tried the case on appeal that as a valid release can be made orally, the position so far as the 89 acres is concerned is that it never comes into the picture, so to speak, and the other lots were security for the total amount of the mortgage debt. I see no reason to suggest that because the respondent allowed part of the land to be sold for his own purposes and was willing to retain the rest as security he should account for the purchase price to a puisne incumbrancer whose mortgage was executed subsequent to the purchase in question.

But the second part of the appellant's defence was more substantial. It was proved that as far back as 1919 there was a sale of 24·91 acres by the mortgagor to Ko Tha Lu and his wife and the sale was subject to the mortgage: in other words the purchasers bought the right to redeem. And the appellant says that if he is to be proceeded against for a proportionate share of the debt due on the total of the mortgaged property then by Order 34, rule 1, the respondent must join as a party to the suit all persons having an interest in the mortgage security or in the right to redemption, which he has not done. The appellant also says that he is entitled to a marshalling of the securities by virtue of section 81 of the Transfer of Property Act 1882 as amended by Act XX of 1929.

Both of these contentions I hold to be correct. The respondent having acquired by purchase a number of other lots it was submitted that the

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integrity of the mortgage was broken, and that what remained was the mortgage secured by the residue. But the respondent has never done anything in the way of having a valuation prepared to ascertain what that amounts to, and in my opinion it is too late to do that now. It is true that mere non-joinder of parties may be saved by the application of Order 1, rule 9, but this is not a mere non-joinder. The suit ought to have been one in which the proportionate amount of the mortgage debt due from the appellant (if any) could be ascertained from an account based upon the value of the properties in respect of which the mortgage has been discharged and those in respect of which it still subsists including the lot of 24·91 acres purchased by Ko Tha Lu and his wife. It does not, however, appear that it was ever filed upon such a footing, nor were any steps taken to cure the defect which continued throughout the successive hearings in the Courts below.

The appellant also set up a plea of limitation which I think it unnecessary to decide. The respondent's suit in my view has been misconceived throughout, or rather it has been presented in a manner so incomplete both as regards non-joinder and valuation of properties that it cannot form the basis of a decree against the appellant.—See *Faquir Chand and others* v. *Aziz Ahmad and others* (1). The defects are not cured by leave to file a fresh suit instead of the present one because a decree has been passed herein against one of the two defendants, namely, the original mortgagor, and this decree must stand.

It follows that the appeal must be allowed with costs here and in each of the Courts below.

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(1) (1931) 59 I.A. 106.