

all instruments of gaming found upon such search." This is the only power of searching the person, and it is clear there is no power to seize money found on the person in such search.

The Magistrate's order as to the moneys found on the person is, therefore, illegal, and must be set aside, and the money must be restored to those from whom it has been taken.

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*Before Mr. Justice Starling.*

PANDURANG KRISHNAJI AND ANOTHER, (PLAINTIFF), v. DADABHOY NOWROJI AND OTHERS (DEFENDANTS).\*

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 June 24.
 

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*Mortgage—Redemption—Death of mortgagor—Notice by executors of mortgagor to mortgagor to redeem within three months—Sale of mortgaged property by mortgagor in order to pay off mortgage debt—No probate obtained by executors and sale, therefore, not completed—Mortgage debt not paid within period of notice—Negligence of executors—Interest on mortgage ceased to run on expiration of notice to redeem.*

In 1898 the plaintiff mortgaged certain property to one Shapurji Sukhia for Rs. 30,000 with interest at  $7\frac{1}{2}$  per cent. per annum, the debt to be repayable in one year. Shapurji died in 1901 and the defendants were the executors of his will, which had been lodged for safe custody with the Registrar of Assurances. On 8th January, 1902, the defendants requested the Registrar to lodge the will in the High Court in order that they might obtain probate of it. It was duly lodged on the 24th January, 1902, and was sent to the Translator's Office for translation. On the 3rd February, 1902, the defendants gave notice to plaintiff to pay them the debt due on the mortgage, intimating at the same time that they had taken steps to obtain probate. The plaintiff, in order to pay off the debt, immediately (12th February, 1902) agreed to sell the property to Haji Osman & Co. for Rs. 35,000, the sale to be completed by the 14th April, 1902. The plaintiff informed the defendants of the sale and requested inspection of the deeds relating to the property. The sale, however, was not completed by the 14th April, 1902, in consequence (as the plaintiff alleged) of defendants not having obtained probate, and the purchasers (Haji Osman & Co.) gave notice to the plaintiff that the purchase-money was lying idle and that they would charge interest thereon. The plaintiff informed the defendant of this on the 23rd April, 1902. It appeared that the will was obtained from the Translator's Office on the 9th April, 1902. The plaintiff filed this suit for redemption on

\* Suit No. 294 of 1902.

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the 4th June, 1902. The defendants applied for probate of the will on the 17th June, 1902.

*Held*, that the plaintiff (mortgagor) was not liable to pay interest on the mortgage after the 3rd May, 1902, *i.e.*, after the expiration of the three months mentioned in the defendant's notice of 3rd February, 1902. After the receipt of that notice the plaintiffs were at liberty to pay the amount demanded to the legal representatives of the mortgagee, and the legal representatives were bound to be ready and able to execute a good and valid reconveyance to the plaintiff of the mortgaged property. If the defendants had used due diligence after obtaining the translation of the will on the 9th April, they could have obtained probate and been in a position to reconvey.

In Chambers.

On the 8th November, 1898, the plaintiffs mortgaged certain property in Bombay to one Shapurji Rustomji Sukhia for Rs. 30,000, with interest thereon at the rate of Rs. 7-8-0 per cent. per annum. The money was to be repaid on the 8th November, 1899.

In September, 1900, the plaintiffs paid the mortgagee Rs. 12,000 in part payment of the mortgage-debt.

Shapurji Rustomji Sukhia (the mortgagee) died on the 23rd November, 1901, leaving a will whereby he appointed the defendants his executors. The will had been lodged for safe custody in the office of the Registrar of Assurances.

On the 8th January, 1902, the defendants applied to the Registrar of Assurances to lodge the will in the High Court in order that probate might be obtained. In accordance with this request it was lodged in the High Court on the 24th January, 1902, and was sent to the Translator's office for translation.

On 3rd February, 1902, the defendants (the executors of the mortgagee) gave notice to the plaintiffs to pay the amount due on the mortgage, or that in default of payment thereof within three months they would sell the property. They at the same time intimated that they had taken steps to obtain probate.

On the 12th February, 1902, the plaintiffs (in order to pay off the mortgage debt) contracted to sell the property to one Haji Oosman Haji Hassan and Company for Rs. 35,750. The contract was to be completed by the 14th April, 1902. On the same day the plaintiffs' Solicitors by letter informed the defendants' Solicitors of the sale, and requested them to obtain both the

deeds of the property from the defendants and to give inspection of them.

The plaintiffs alleged that in consequence of the defendants not having obtained probate the purchase could not be completed on the 14th April, 1902, and the purchasers gave them notice that the purchase money was lying idle and that they would charge the plaintiffs interest thereon.

The plaintiffs informed the defendants of this on the 23rd April, 1902.

On the 4th June, 1902, the plaintiffs filed this suit, and under Rule 249 of the Rules of Court, 1901, took out an originating summons praying as follows :

(a) That it may be declared that the plaintiffs are entitled to redeem the said mortgage.

(b) That upon the plaintiffs paying the said sum of Rs. 20,946-8-0 in the plaint mentioned, or such other sum as the Court may find to be due under the said mortgage, into Court, all interest may cease on the amount due under the mortgage.

(c) That on such payment into Court by the plaintiffs the defendants may be ordered to execute a good and valid re-conveyance of the mortgaged property to the plaintiffs or as they may direct.

(d) That this suit having been necessitated by the defendants not having put themselves in a position to re-convey the property on payment of the amount due, they may be ordered to pay the costs of this suit.

From the affidavits it appeared that the will with its translation was returned to the High Court from the Translator's office on the 9th April, 1902, and that on the 17th June, 1902, the defendants applied for probate.

The amount due on the mortgage at date of suit was Rs. 21,500.

The two points mainly discussed at the hearing of the summons were :

(1) Whether interest payable by the plaintiffs on the mortgage should not cease from the 3rd May, 1902, *i.e.*, three months from the above notice given by the defendants on 3rd February, 1902.

(2) Whether this suit was not rendered necessary by the defendants' neglect to obtain probate.

At the hearing of the summons the Judge required the plaintiffs to file an affidavit showing that they were ready with

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the money due on the mortgage on the 3rd May, 1902, and he allowed the deponents to be orally cross-examined.

*F. R. Vicaji* for defendant 4 (the other defendants did not appear):—The originating summons is taken out under Rule of Court No. 249, which corresponds with Order 55, Rule 5A of the English rules and orders, and provides a summary remedy in the place of an ordinary suit. In order to stop interest on the mortgage debt the plaintiffs were bound to tender to the defendants payment of the mortgage-debt or to pay the money into Court under sections 55, 83 and 84 of the Transfer of Property Act, 1882. The mere statement by them in a letter that the money was ready was not enough: *Austen v. The Executors of Dodwell*<sup>(1)</sup>; *Sharpnell v. Blake*<sup>(2)</sup>; *Kamaya v. Devapa*<sup>(3)</sup>; *Haji Abdul Rahman v. Haji Noor Mahomed*<sup>(4)</sup>; Williams on Executors, Vol. I, page 251.

*Gazdar* for the plaintiffs *contra*.

STARLING, J.:—In my opinion none of the cases cited by Mr. Vicaji apply, because the facts here are entirely different from those upon which they are based. I doubt whether a case like this could have arisen in England.

To decide this case I must rely upon elementary rules of law. A man is bound to be ready and willing to carry out his contract from the very earliest moment at which fulfilment of it can be demanded, and if a man calls upon another to do an act, the doing of which puts the demandant under an obligation to do another act, then the demandant must be ready and willing to do that act at any time the other party does the act which lays the demandant under that obligation.

In this case the defendants, on the 3rd February, 1902, called upon the plaintiffs within three months to pay the amount due upon the mortgage for principal and interest. Under that demand the plaintiffs were at liberty at any time after its receipt to pay the amount demanded to the legal representatives of the mortgagee, and on such payment the legal representatives were bound to be ready and able to execute a good and valid re-conveyance to the plaintiffs of the mortgaged property.

(1) (1729) 1 Eq. Ca. abridged 318.

(3) (1896) 22 Bom. 440.

(2) (1787) 2 Eq. Ca. abridged 603.

(4) (1891) 16 Bom. 141.

Now, in what position were the defendants? The testator (the mortgagee) died on the 23rd November, 1901. What was alleged to be his will had been deposited with the Registrar of Assurances, and on the 2nd December it was opened. On the 8th January, 1902, the defendants, being the persons named as executors therein, obtained a summons from this Court calling upon the Registrar to deposit the alleged will in Court, which was done on the 24th January, 1902, when the document was sent for translation and returned translated on the 2nd April.

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The defendants, having given the notice to the plaintiff on the 3rd February, were, in my opinion, bound to have expedited the translation, which certainly does not seem to have been done, because they knew on the 12th February that the plaintiff had sold the property in order to pay off the mortgage-debt and that they might at any time be called upon to execute a re-conveyance.

The plaintiffs were diligent. They called upon the defendants several times in March and April to state whether they had filed a petition for probate, but could get no answer to their letters. This dilatoriness of the defendants would not, however, have done any harm, if, on the 9th April, when they did get the translation of the will, they had applied for probate; but they did not do this till the 17th June, ten days at least after they had been served with the summons in this suit and only two days before it was heard, in spite of reminders from the plaintiffs and of notice that the money was ready and waiting to be paid to them, and of an offer to deposit the amount due in the names of the two Solicitors and of many other facts which appear in the correspondence of the plaintiffs.

In my opinion, the money necessary to pay off the mortgage was and has been actually available in the hands of the purchaser from the 12th April up to the present time, and he was ready and willing to pay off the mortgage, while the money necessary to complete the purchase was available from the 12th April to 17th May, on which day the purchaser deposited a sum of Rs. 30,000 at call.

It is argued that nothing but actual tender will stop interest, but in the cases where that has been ruled there has been some one to whom interest could be tendered either as the mortgagee

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himself or one who had established his right to be the representative of a deceased person. Here, however, the will, even at the time of hearing, had not been proved. There was, therefore, no legal evidence that it was a genuine will and that the defendants had any right to deal with the property, and there was no security that they were going to prove the will. They might all have renounced. Such things have happened. Until the 17th June there was no evidence on the defendants' part of their intention to prove the will. It being necessary to prove the will, no one would have accepted a re-conveyance from them until they had proved it, because their right to re-convey could not be established except by production of the probate.

Applying the principles I stated at the beginning of my judgment, I am of opinion that I shall be justified in stopping interest on and from the 3rd May, 1902, the time when the defendants' notice expired, and a time when, if they had used due diligence after the 9th April, they could have obtained probate and been in a position to re-convey. The amount due under the mortgage up to that day must forthwith be brought into Court and each party must bear their own costs.

Declare plaintiff entitled to redeem on plaintiff forthwith paying Rs. 20,946-8-0, the amount due up to 3rd May, 1902, for principal, interest and premium into Court. Declare all further interest to cease, defendants submitting that they have on the 17th June presented a petition for probate. Order that they do with all due diligence proceed to obtain probate and forthwith thereafter do execute a proper re-conveyance at the cost of the plaintiffs.

Each party to bear his and their own costs. Liberty to apply.

Attorneys for plaintiffs—*Messrs. Mirza and Mirza*,

Attorneys for the fourth defendant—*Messrs. Nann and Hormusji*.