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PRIVY COUNCIL.

PRESENT :

*Lord Macnaghten, Lord Robertson, and Lord Lindley.*

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DINOBUHDHU SHAW CHOWDHRY v. JOGMAYA DASI AND OTHERS.  
[12th and 30th November, 1901.]

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*[On appeal from the High Court at Fort William in Bengal.]*

*Mortgage—Sale of mortgaged property — Prior mortgage, extinguishment of— Parties, intention of—Effect of payment of prior mortgage by subsequent mortgagee—Civil Procedure Code (Act XIV of 1882), s. 276—Mortgage pending attachment.*

The respondent was mortgagee of property which the appellant purchased at an execution sale. The respondent sued to enforce his lien under the mortgage and the appellant's purchase was subject to his prior lien. The attachment under which the sale to the appellant took place was made on 5th October 1891, at which time the property was subject to two mortgages, one dated 22nd June 1888 for Rs. 25,000, and the other dated 19th August 1890 for Rs. 3,000. At the time of attachment the mortgagor was arranging with the respondent for an advance of Rs. 40,000 to enable him to pay off these two mortgages, and in accordance with the arrangement made he executed, on 7th October 1891, in the respondent's favour, a mortgage bond, which, after reciting the two earlier mortgages and that the loan of Rs. 40,000 was taken in order to pay them off, and charging the property with the amount and interest at 12 per cent., contained the following clause: "I promise that after repaying the money due on the aforesaid two [155] mortgages I shall cause a reconveyance of those properties to be executed and registered and shall make over to you the mortgage-deeds, which I shall get back.

On 8th October 1891 Rs. 40,000 was advanced, the two mortgages were paid off, and the property reconveyed to the mortgagor who handed over the reconveyances to the respondent. The sale at which the appellant purchased the property took place in July 1892, and it was held on the evidence that he re-purchased with notice of the respondent's lien.

*Held*, the intention of the parties was that the earlier mortgages should not be extinguished on being paid off, but were to be kept alive for the benefit of the respondent, the object being to give him the only charge on the property.

*Gokaldas Gopaldas v. Puranmal Preamsukhdas* (1) and *Mohes Lal v. Bawan Das* (2) followed in principle. The appellant further contended that the effect of s. 276 of the Civil Procedure Code was to make void, as against him, the respondent's mortgage, it having been made pending the attachment of 5th October.

*Held*, that so to construe the section would be putting on it a construction contrary to its plain meaning and intention, which were to make void only transactions prejudicing the execution-creditor. So far as they prejudice him, the section could not be construed as conferring a benefit on him contrary to the intention of the parties. The attachment only affected the equity of redemption in the property and the appellant purchased, subject to the respondent's lien.

APPEAL from a decree (3rd June 1898) of the High Court at Calcutta which substantially affirmed a decree (16th September 1896) of the Subordinate Judge of the 24-Pergunnahs in favour of the plaintiff Nistarini Dasi.

The defendant No. 2, Dinobundhu Shaw Chawdhry, appealed to His Majesty in Council. The respondents Joymaya Dasi and others (daughters) represented the deceased plaintiff Nistarini Dasi, who died on 29th November 1895.

(1) (1884) I. L. R. 10 Cal. 1035; L. R. 11 I. A. 126.

(2) (1883) I. L. R. 9 Cal. 961; L. R. 10 I. A. 62.

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The plaint in the suit (filed on 9th September 1895) stated that on 22nd June 1888 one Prashid Mohun Roy Chowdhry mortgaged, in the English form, the house and premises 95 and 96, Shovabazar Street in Calcutta (the property in dispute in this litigation) together with other properties, to one Lokenath Mullick for Rs. 25,000 at 15 per cent. interest; and that after [156] wards on 9th August 1890 he executed a second mortgage of the same property to one Sarat Chundra Ghose for Rs. 3,000 at 24 per cent. interest; that Lokenath Mullick died on 2nd December 1888 leaving a will by which he appointed his son, Sham Lal Mullick, his executor, who duly proved the will; and on 24th April 1890 brought a suit in the High Court at Calcutta (1) against Prashid Mohun on the mortgage of 22nd June 1888 in which on 21st July 1890 the usual mortgage decree was made of taking the necessary accounts; that on taking the accounts it was found that there was due for principal and interest on the mortgage for a sum of Rs. 39,696 and the 16th August 1891 was appointed for payment of that amount by the mortgagor; that default having been made in such payment the High Court on 27th August 1891 made an order that the mortgaged properties should be sold and the proceeds of sale applied in due course to the satisfaction of the mortgage debt; that in order to prevent such sale and discharge the balance due on the mortgage-decree, and also the sum due on the mortgage of 9th August 1890 to Sarat Chunder Ghose, Prashid Mohun arranged with one Radhajibun, Mustafi, the husband of the plaintiff Nistarini, that he should advance to Prashid Mohun the sum of Rs. 40,000 on a mortgage of the properties then under mortgage to Lokenath Mullick and Sarat Chunder Ghose; that accordingly on 7th October 1891 Prashid Mohun executed in favour of Radhajibun Mustafi a mortgage of the said properties for Rs. 40,000 with interest at 12 per cent. reciting in the mortgage that it was executed in order to raise money to pay off the two earlier mortgages and so save the mortgaged property from sale under the mortgage-decree, and reciting also as follows: "I promise that, after repaying the money due on the aforesaid two mortgages. I shall cause a re-conveyance of those properties to be executed and registered, and I shall make over to you the mortgage-deeds, which I shall, get back"; that the money advanced on the mortgage was paid to Prashid Mohun on 7th October 1891, and on 8th October the amount due to the estate of Lokenath Mullick in respect of his mortgage was paid to his son Sham Lal Mullick, who on the same day executed a re-con [157] veyance of the mortgaged property to Prashid Mohun and on the same day the amount due on the mortgage to Sarat Chunder Ghose was paid to him, and he also executed a re-conveyance in favour of Prashid Mohun of the mortgaged property, and both re-conveyances were at once handed over to Radhajibun Mustafi; that on 5th October 1891, two days before the mortgage to Radhajibun, the property in dispute was attached by the Sheriff of Calcutta at the instance of one Preonath Shastri, the assignee of a consent decree, made in the High Court in suit 254 of 1888 instituted by certain persons against Prashid Mohun; that Radhajibun Mustafi died on 17th April 1892 leaving as his sole widow and heiress the plaintiff Nistarini Dasi to whom the High Court granted letters of administration to his estate on 4th July 1892; that the sale by the sheriff

(1) Suit No. 161 of 1890.

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under the attachment took place on 28th July 1892, and, before the sale, notice of the plaintiff's claim as representing her husband Radhajibun was served upon the sheriff and a copy of such notice was read out at the sale by the plaintiff's solicitors; and that Dinobundhu Shaw Chowdhry, who became the purchaser of the property, bid for and purchased it with full notice of her claim.

The plaint prayed for a declaration (a) that the plaintiff had a prior claim to the mortgaged property in preference to that of Dinobundu Shaw Chowdhry; (b) that Dinobundu Shaw Chowdhry had purchased only the equity of redemption in the mortgaged property subject to the plaintiff's claim and with notice thereof and also for an account and payment of what might be found to be due on the mortgage and in default of payment for sale and for further and other relief.

The defendants in the suit were Prashid Mohun Ray Chowdhry and Dinobundhu Shaw Chowdhry (the present appellant). Of these the latter alone put in a written statement in which he stated that the property was attached on 5th October 1891, at which time he believed it was free from all charges except such attachment; that it was purchased by him on 28th July 1892 at the sale under the attachment; that the sale was confirmed by the High Court on 5th September 1892 and that he had obtained a sale certificate, and possession of the property he had purchased; and he denied that the mortgage to Radhajibun [158] Mustafi had any force or that the plaintiff had any rights in or over the said property.

On 16th September 1896 the Subordinate Judge of the 24-Pergunnahs decided the case in favour of the plaintiff. He held that, at the time of the attachment all the interest remaining in Prashid Mohun, the mortgagor, was the equity of redemption; that therefore the attachment could not effect the legal right then vested in the mortgagees of the earlier mortgages; and that upon the re-conveyances by those earlier mortgagees to Prashid Mohun on their mortgages being paid off out of the money advanced by Radhajibun Mustafi, Radhajibun acquired a valid right to the property under his mortgage of 7th October 1891. As to the intention to keep alive the prior mortgages he held that "in the absence of anything shown to the contrary there is no ground to suppose that Radhajibun intended to forego the benefit of the prior security. At any rate he never exhibited any such intention. That he intended to keep the prior charges alive may be presumed, since it is clearly for his benefit to do so.

He held, therefore, that the plaintiff's right prevailed over the title, by his purchase at the sheriff's sale, of Dinobundhu Shaw Chowdhry, and he directed that there should be the usual mortgage decree in the plaintiff's favour according to s. 83 of the Transfer of Property Act (IV of 1882). Dinobundhu Shaw Chowdhry appealed from that decision to the High Court.

The Division Bench of that Court (AMEER ALI and PRATT, JJ.) on 3rd June 1893 affirmed, with a slight modification, the decree of the Subordinate Judge as follows:—

"It has been contended in the first place, that, inasmuch as it was the mortgagor who actually paid the money to Sham Lal Mullick and Sarat Chunder Ghose, and, inasmuch as the re-conveyances were executed not in favour of Radhajibun but in favour of the mortgagor, we must not presume that the new mortgagee, viz., Radhajibun Mustafi, intended to keep alive, or to have the benefit of, the old securities in his favour. It was also contended that the cases upon which the Subordinate

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Judge has relied, deal with payments made by a person having an interest in the property, and consequently as Radhajibun had no interest in the property at the time the debts to Sham Lal Mullick and Sarat Chunder Ghose were paid off, the payments, assuming that they were made by him, cannot enure to his benefit. It was [159] also urged that, although on the 5th October the old mortgages were subsisting, yet on the 8th October they were discharged, and that therefore the prior attachment took effect against the entire property and not merely as against the equity of redemption, and hence the defendant Dinobundhu Shaw Chowdhry acquired the premises Nos. 95 and 96, Sobhabazar Street, free of all incumbrances. And, lastly, it was argued that, in any event, the plaintiff was not entitled to an account as against Dinobundhu Shaw Chowdhury, except as regards the money actually paid to Lokenath Mullick and Sarat Chunder Ghose, which amounts to Rs. 80,838.

"As regards the first contention, it seems to us that the intention of all the parties concerned in the transaction was that Radhajibun Mustafi should have the benefit of the prior securities. In the case of *Gokaldas Gopaldas v. Purnamal Premeekhdas* (1) their Lordships of the Judicial Committee of the Privy Council expressly lay down the principle governing this class of cases; and they say, in express terms, that it is a matter of intention to be gathered from the circumstances appearing in the case. The mere fact that the mortgagor pays the money to the prior incumbrancer for his own benefit, namely, with the object of getting a reduction in the amount of the debt (as actually happened in this case), cannot be taken as an indication of an intention on the part of the subsequent mortgagee not to keep alive the prior security for his benefit. The mortgagor in such instances is merely the agent of the mortgagee, and undoubtedly he is allowed to pay the money to the first mortgagee in order to give him an opportunity of getting himself released of some portion of the debt.

"There were three parties concerned in the transaction which is the foundation of the present suit. Radhajibun Mustafi was one, the first defendant was the other, and the prior mortgages were the third. A mere reference to the documents executed on the 7th and 8th October will show that it was distinctly covenanted between the mortgagor and Radhajibun that the former would pay off the existing mortgages, take a reconveyance of the properties, and make over the mortgage deeds to Radhajibun. There could have been no possible reason for that condition, unless Radhajibun intended to keep alive these former securities for his benefit. We agree with the Subordinate Judge that all the circumstances in this case lead to that conclusion. Upendra Nath Pal, the brother of the plaintiff, was not only present at the execution of the mortgage in favour of Radhajibun, but appears to have accompanied the mortgagor at the time of the payment by him of the mortgage debts due to Sham Lal Mullick and Sarat Chunder Ghose. He was present also at the execution of the reconveyances, and his presence can only be explained by the fact that Radhajibun Mustafi was anxious that the mortgagor should pay off the old mortgages and obtain for him the reconveyances, which he had covenanted to do. There is absolutely no evidence to the contrary, and we are of opinion that it is abundantly [160] clear in this case that the intention of the parties was to keep alive the former securities for the benefit of the plaintiff respondent.

"As regards the question whether Radhajibun Mustafi had any interest in the property, which would entitle him to have the benefit of the payments made by him, we think the expressions used by the learned Judges in the cases referred to must be read along with all the facts, nor is there any thing to show that the principle is of that limited character contended for by the learned pleader for the appellant. In this case the mortgage to Radhajibun Mustafi was executed on the 7th October 1891, and at that time he acquired an interest in those properties, and on the 8th October with the money advanced by him the former debts were paid off. We think that the Subordinate Judge was right in holding that Radhajibun had an interest which entitled him to make these payments and to obtain the benefit of these payments.

"Proceeding now to the attachment, we find that on the 5th October 1891, what was in fact attached and could be attached was merely the equity of redemption belonging to the mortgagor. In our opinion, the discharge of the prior mortgages on the 8th of October did not enlarge the subject of the attachment made on the 5th October. This is clear upon the provisions of s. 276 of the Code of Civil Procedure, which runs thus:—'When an attachment has been made by actual seizure or by

(1) (1884) I. L. R. 10 Cal. 1035; L. R. 11 L. A. 126.

written order duly intimated and made known in the manner aforesaid, any private alienation of the property attached, whether by sale, gift, mortgage or otherwise, and any payment of the debt or dividend, or a delivery of the share to the judgment-debtor during the continuance of the attachment, shall be void as against claims enforceable under the attachment.'

"The property attached in this case was the equity of redemption and consequently what was purchased by Dinobundhu Shaw Chowdhury was merely the equity of redemption. We are of opinion, therefore, that the premises, Nos. 95 and 96, Sobhabazar Street, are subject to the plaintiff's claim.

"As regards the question whether the plaintiff is entitled to an account as against Dinobundhu Shaw Chowdhury for anything more beyond the money actually applied to pay off the mortgages of Lokenath Mullick and Sarat Chunder Ghose, it has been conceded by the learned pleader for the respondent that she is not so entitled.

"We accordingly affirm the decree of the Subordinate Judge with this modification, that, so far as Dinobundhu Shaw Chowdhry is concerned, the mortgage account as against him must be taken on the admitted basis of the payments made to Lokenath Mullick and Sarat Chunder Ghose, which unquestionably amounts to Rs. 80,838.

*W. Rattigan, K.C.* and *C. W. Arathoon* for the appellant. The Courts below wrongly held that the intention of the [161] parties was that the mortgages to Lokenath Mullick and Sarat Chandra Ghose should be kept alive: the real intention to be inferred from the words of the mortgage to Radhajibun, from the circumstances of the case, and from the conduct of the parties was that the earlier mortgages should be extinguished on being paid off. The money due on those mortgages was paid by Prashid Mohun, the Mortgagor, and the reconveyances were executed in his favour; this showed an actual release of the mortgage debts, not an intention to keep them alive for Radhajibun's benefit. *Gokaldas Gopaldas v. Purnamal Premasukhdas* (1), *Mohesh Lal v. Bawan Das* (2), *Liquidation Estates Purchase Co. v. Willoughby* (3), *Thorne v. Cann* (4), and *Adams v. Angell* (5). All that the cases on this point really decide is that it does not follow from the mere fact of a mortgage being paid off that it is extinguished. Radhajibun had no interest in the property at the time when the payments in discharge of the earlier mortgages were made, and therefore, even assuming that they were made by him, he was not entitled to the benefit of them. The Courts below are also in error in holding that what was attached on 5th October 1891 was only the mortgagor's right of redemption; but even if that was so, on 8th October when the earlier mortgages were paid off, the attachment became effective against the absolute right in the property and not merely against the equity of redemption. S. 276 of the Civil Procedure Code has not been rightly applied in the Judgment of the High Court: under that section the mortgage to Radhajibun was void and of no effect as against the prior attachment of 5th October, under which the sheriff's sale took place. What was sold at that sale was the interest of the judgment debtor Prashid Mohun at the time of the sale, namely, a right to the property free from all incumbrances; that interest the appellant has purchased, *Umesh Chunder Sircar v. Zahur Fatima* (6). He purchased, moreover, without notice of the respondent's [162] claim. It is submitted therefore that the appellant's title must prevail over that of the respondent.

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(1) (1884) I. L. R. 10 Cal. 1035, 1044;

(4) (1895) L. R. A. C. 11, 19.

L. R. 11 I. A. 126, 132.

(5) (1877) L. R. 5 Ch. D. 634.

(2) (1883) I. L. R. 9 Cal. 961, 977;

(6) (1890) I. L. R. 18 Cal. 164; L. R.

L. R. 10 I. A. 62, 70.

17 I. A. 201.

(3) (1896) L. R. Ch. 1, 726.

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*J. H. A. Branson* for the respondent: Both the Courts below have rightly held that the question as to whether the earlier mortgages were extinguished or not is one of intention of the parties, and the intention to keep them alive was clearly shown on the face of the mortgage deed of 7th October 1891 as well as by the dealings between the parties. If the intention was to extinguish them, why should the reconveyances have been handed over to Radhajibun; there could be no reason, except that the parties so acting intended to keep the mortgages alive for the benefit of Radhajibun, who was advancing the money to pay them off. On 8th October 1891, the day on which the previous mortgages were discharged, Radhajibun had an interest in the property under the mortgage to him of 7th October, and that interest entitled him to make the payments he had made through the mortgagor and to claim the benefit of those payments. *Gokaldas Gopaldas v. Purnamal Preamsukhdas* (1) and *Mohesh Lal v. Bawan Das* (2). At the time of the attachment, therefore, the only interest remaining in the mortgagor that could be attached was the equity of redemption, and such an attachment could not, it is clear, have any such effect, as it was contended for the appellant it had, by virtue of s. 276 of the Civil Procedure Code. The evidence shows that the appellant had distinct notice of the respondent's lien on the property.

*W. Rattigan, K.C.*, in reply.

The judgment of their Lordships was delivered by

LORD LINDLEY.—The question in this appeal is whether a purchase of property by the appellant at a sheriff's sale is subject to or freed from a prior lien claimed by the respondents.

On the 5th October 1891 the property in question was attached by the Sheriff of Calcutta at the suit of a judgment creditor. At that time the property was subject to two mortgages created by the execution debtor, *viz.*, (1) a mortgage dated the 22nd June [163] 1888 for 25,000 rupees bearing interest at 15 per cent.; and (2) a mortgage dated 9th August 1890 for 3,000 rupees bearing interest at 24 per cent. The attachment in no way affected those mortgages. It affected the execution debtor's beneficial interest in the property attached; in other words the equity of redemption and nothing else.

At the time of the attachment the mortgagor was making arrangements with one Mustafi (the predecessor of the respondents in the present proceedings) for an advance of 40,000 rupees at 12 per cent. to enable him, *i.e.*, the mortgagor, to pay off the two above-mentioned mortgages and for other purposes. The mortgagor was to obtain the deeds from the mortgagees and to hand them over to Mustafi and give him a mortgage for his advance of Rs. 40,000 and interest at 12 per cent. It is obvious that, if this arrangement had been carried out in English fashion by a skilful conveyancer, the old mortgages would have been kept alive and transferred to Mustafi and provision would have been made for reducing the interest and for securing the excess of the 40,000 rupees advanced over the amount due on the mortgages paid off. If this had been done the position of the execution creditor would have been unaffected in any way. He would have gained nothing by the payment off of the old mortgages, and he would have lost nothing either by that payment or by the further advance which would not have affected him (*see* s. 276 of the Code of Civil Procedure).

(1) (1884) I. L. R. 10 Cal. 1085; L. R. 11 I. A. 126.

(2) (1888) I. L. R. 9 Cal. 961; L. R. 10 I. A. 62.

Transfers of mortgages are apparently not so common in India as in this country ; and what was done was that the mortgagor paid off the two old mortgages, took a re-conveyance to himself and then executed a fresh mortgage bond for 40,000 rupees to Mustafi. This mortgage bond is dated 7th October 1891 and is set out in the Record at page 31. The bond recited the two old mortgages and the loan of 40,000 rupees to pay them off and charged the property with that amount and interest at 12 per cent. The bond stated that the property was not subject to any attachment by the Court, and, if it should appear that there was any charge on the property, then the 40,000 rupees and all interest should become immediately payable. The bond also contained a clause as follows : " I promise that after repaying the money [165] due on the aforesaid two mortgages I shall cause a reconveyance of those properties to be executed and registered and shall make over to you the mortgage deeds which I shall get back."

This arrangement was carried out ; the 40,000 rupees were advanced ; the two old mortgages were paid off ; the property comprised in them was re-conveyed to the mortgagor ; he got the deeds and handed them to Mustafi. This was done on the 8th October 1891, the day after the mortgage bond was executed. Probably at this time the mortgagor was not aware of the attachment.

Pausing here for a moment, nothing can be clearer than that the intention of the parties to this transaction was to give to Mustafi a charge for 40,000 rupees on the property in question in priority to all other charges, if any. The property being represented as unincumbered the statement in the judgment of the High Court that it was intended to keep the two old mortgages alive is open to criticism. But it does not affect the substance of the case. The respondents were intended to have the first and only charge, and it is idle to contend that there was any intention to extinguish the old mortgages for the benefit of the execution creditor or any purchaser at the sheriff's sale.

Subsequently to this transaction, viz., in July 1892, part of the property mortgaged was sold under the execution to the appellant. As will be shown presently he was not a purchaser for value without notice of the respondents' security. He claimed, however, to be entitled to the property bought free from all incumbrances. Thereupon, Mustafi having died, this suit was instituted by his widow claiming a lien for the full amount of their mortgage bond. She died pending the suit which was continued by the respondents and they obtained a decree in their favour. On an appeal this decree was affirmed, but was modified without objection on the part of the respondents by limiting their lien to the amount actually applied in paying off the two old mortgages. From this decree the appellant had again appealed.

Counsel for the appellant contended that the appellant had no notice of the real facts when he bought ; and that the only [165] notice he had was that conveyed by the proclamation referred to in the official sale certificate of the Registrar set out in the Record at p. 69. According to this certificate notice was given of the old mortgage of the 22nd June 1888 and of its payment off and of the mortgage for 40,000 rupees on the 7th October 1891, two days after the attachment. Nothing is said about anything more. The certificate was apparently given pursuant to s. 316 of the Civil Procedure Code. It appears from the evidence that the appellant was distinctly informed of both mortgages and of their

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payment off out of the Rs. 40,000 advanced by Mustafi and of his widow's claim to a lien on the property. Both the Subordinate Judge and the High Court held that the appellant had full knowledge of the real facts of the case when he bought the property, and their Lordships are of the same opinion.

The next and main contention raised by counsel for the appellant was that the two old mortgages were extinguished by the mode in which they were dealt with. The answer given in both Courts to this contention was that so to hold would be to defeat the obvious intention of the parties to the transaction. Their Lordships have already stated that this is the conclusion at which they have themselves arrived.

The law upon this subject and its application to transactions in India will be found in *Mohesh Lal v. Bawan Das* (1) and *Gokaldas Gopaldas v. Puranmal Preamsukhdas* (2). The Subordinate Judge has summed it up accurately thus: "When the owner of an estate pays charges on the estate which he is not personally liable to pay, the question whether those charges are to be considered as extinguished or as kept alive for his benefit is simply a question of intention. The intention may be found in the circumstances attending the transaction or may be presumed from a consideration of the fact whether it is or is not for his benefit that the charge should be kept on foot." Here the mortgagor was paying off his own debts, but he was doing so for the benefit of Mustafi and in performance of the agreement with him.

[166] As already stated the intention of the parties in this case was to give Mustafi a first charge on property represented to be unincumbered and the appellant knew it.

The last point urged by the appellant's counsel was that, whatever the intentions of the parties may have been, s. 276 of the Civil Procedure Code rendered the mortgage for 40,000 rupees wholly void as against the appellant. So to construe this section would be quite wrong. So far as the mortgage for 40,000 rupees prejudiced the execution creditor, it is void as against him; but the section does not render void transactions which in no way prejudice him; and to hold the mortgage void so as to confer upon him a benefit, which no one ever intended he should have, is entirely to ignore the object of the section and to pervert its obvious meaning. It is impossible to hold that the effect of that section is to give an execution creditor an unincumbered fee simple instead of an equity of redemption against the intention of the parties.

Their Lordships will, therefore, humbly advise His Majesty to dismiss this appeal and the appellant must pay the costs of it.

*Appeal dismissed.*

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

Solicitors for respondents: *Barrow, Rogers and Nevill.*

(1) (1888) I. L. R. 9 Cal. 961; L. R. 10 I. A. 62.

(2) (1884) I. L. R. 10 Cal. 1036; L. R. 11 I. A. 126.