

nothing to register except a signature, and that Section 138 which requires a copy of the instrument to be made in a book could not be carried out, but if the signature at the back of the bill or note sufficiently expresses the legal engagement of the endorser, then the endorsement would be effectually registered by copying into the book the bill or note together with the endorsement.

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In the present case it is certain that no registration of the endorsement has taken place, and I do not see how the registration of the instrument prior to endorsement can affect the case.

I must conclude therefore that the period of limitation is three years and the suit barred. The suit must be dismissed but I think without costs.

Appellate Jurisdiction (a)

Special Appeal No. 52 of 1869.

SOMASUNDARA TAMBIRAN....*Special Appellant (Plaintiff)*

SAKKARAI PATTAN....*Special Respondent (2nd Defendant.)*

The mere possession of the title-deeds by a second mortgagee, though a purchaser for value without notice, will not give him priority. There must be some act or default of the first mortgagee to have this effect.

THIS was a Special Appeal against the decision of V. Sundra Naidu, the Principal Sadr Amin of Tranquebar, in Regular Appeal No. 215 of 1867, modifying the decree of the Court of the District Munsif of Sheally in Original Suit No. 98 of 1867.

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The plaintiff, trustee of the Velur Covil, brought this suit to recover rupees 326, being the balance of principal and interest due on a mortgage bond executed to Arumuga Pandaram, the late trustee of the Covil, by the 1st defendant, on the 2nd December 1858.

(a) Present: Bittleston and Carmichael, J. J.

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The second defendant was included as having caused the house mortgaged to plaintiff to be attached in execution of the decree alleged to have been fraudulently obtained by him in Original Suit No. 179 of 1866 on the file of the Court.

The first defendant admitted the plaintiff's claim.

The second defendant stated that the house referred to had been attached by order of the Court in execution of the decree passed in his favor in No. 179 which holds the house in question liable for its satisfaction.

The plaintiff filed the bond, but adduced no evidence to prove that the decree referred to was obtained by fraud.

The Acting District Munsif adjudged to plaintiff the amount sued for with costs the mortgaged house being liable for the satisfaction of the decree.

The second defendant appealed. The following was the Judgment of the Principal Sadr Amin:—

The plaintiff-bond has been admitted by the first defendant as having been executed by him, and it is clear from the second defendant's written statement that he did not impugn the genuineness of the same, but simply denied the knowledge of its execution. Therefore, the Appellate Court sees no reason to question the authenticity of the bond, though, in its opinion, the hypothecated property cannot legally be held responsible to the claim for the following reasons.

It appears that the decree obtained by the second defendant was passed on the 15th October 1866, and it was based upon a razinamah entered into between the first and second defendants in Suit No. 595 of 1863 on the file of the Tranquebar Munsif. In execution of that decree, the hypothecated house was attached, and, just at the time it was to be sold at auction, the plaintiff objected to it on the ground of his having a lien upon it, and requested that the sale should be suspended; but his prayer was not granted; and he therefore brought this suit.

It is clearly laid down in Section 270, Act VIII of 1859, that attaching creditors should be first paid out of proceeds of property sold. That the second defendant was

the attaching creditor is not disputed, and the property appears to have been since sold, and the proceeds of the sale are barely sufficient to cover the amount due to the second defendant.

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Under these circumstances, the Appellate Court, in modification of the Lower Court's decree, exempts the hypothecated property as well as the second defendant from the claim, and adjudges that the plaintiff do recover the amount decreed to him, together with the appeal costs, from the first defendant, the costs incurred by the second defendant being borne by the first defendant.

The plaintiff presented a special appeal against the decree of the Principal Sadr Amin.

Savundaranayagam Pillai, for the special appellant, the plaintiff.

Sloan, for the special respondent, the second defendant.

The Court delivered the following

JUDGMENT:—This suit was brought to enforce a mortgage instrument executed by first defendant and bearing date 2nd December 1858. The second defendant had attached and sold the mortgaged property in execution of a decree obtained by him in a suit brought against the first defendant upon a mortgage of the same property executed in 1859.

The District Munsif decreed in favor of the plaintiff for payment of the amount sued for, and that the mortgaged property “do stand liable to the amount of the decree until satisfied.”

The Principal Sadr Amin modified this decree by declaring the mortgaged property not liable for the debt, on the ground that by Section 270 of the Civil Procedure Code, it is provided that the attaching creditor should be first paid out of the sale proceeds of the property attached. But in the present suit there is no question how the sale proceeds of the property should be dealt with; that question can only arise in the suit in which the sale took place; and those sale proceeds represent only the value of the right, title, and interest of the defendant in that suit (the first defendant in this,) which interest was at most an equity of redemption only, if the mortgage now sued

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upon by the plaintiff be valid. The attachment and sale of the property in that suit, to which plaintiff was no party, cannot affect the plaintiff's rights as a mortgagee under an instrument of mortgage of anterior date. The second defendant, however, has an interest in the mortgaged property which entitles him to require due proof of the plaintiff's mortgage. Both the Lower Courts appear to have erred in procedure in this respect. No evidence has been taken as to the genuineness of the plaintiff's mortgage, because it was admitted by the first defendant and because the second defendant simply denied knowledge of it. The second defendant could not be supposed to know anything about a mortgage transaction between the plaintiff and first defendant, and his denial of knowledge was sufficient to put the plaintiff on proof of it; but we do not find that any evidence was adduced by the plaintiff.

The case must therefore be sent back for the determination of the issue raised whether the plaintiff's alleged mortgage of 2nd December 1858 is genuine. In this issue is of course involved not only the question whether it was executed by the defendant but whether it was executed for a *bona fide* consideration and at the time when it purports to have been executed. But assuming that the plaintiff's mortgage is found to be genuine, the second defendant claims priority for his mortgage dated in 1859, on the ground that with his mortgage he obtained possession of the title-deeds; and for this position he relies on decisions of the English Courts as well as of the late Sadr Court. An inaccurate reference is given in the fifth ground of appeal presented to the Lower Appellate Court, but we believe that the principal Sadr Court decisions on the subject are the following:—Special Appeal 2 of 1825 in the Volume of *Decisions of the Sudder Udawlut* 1805-47, p. 500, 508; Special Appeal 67 of 1858 at p. 123 of the decisions of that year, and Special Appeal 442 of 1861 at p. 97 of the decisions of 1862. The latest English cases are *Layard v. Mand*, 36 L. J. Ch: 669, and *Thorpe v. Holdsworth*, 38 L. J. Ch: 194, and from these, as from many other previous cases, we think it may safely be deduced that the true ground on which the possession of the title-deeds by a subsequent mortgagee can in any case

be held to give him precedence of one whose security is earlier in date is negligence on the part of the first mortgagee. In the latest case Gifford v. C. referring to *Layard v. Mand* says that "in that case there was conduct amounting to acquiescence in what was done on the part of the first mortgagee, and the decision was founded on *Robert v. Croft* (2 *De Gex and Jones* 1; 27 *L. J. Ch.*: 220,) which is one among the several authorities for the proposition that the mere possession of the title-deeds by a second mortgagee, though a purchaser for value without notice, will not give him priority. There must be some act or default on the part of the first mortgagee to have this effect." We consider this to be a just and reasonable rule to be applied in this country. The non-possession of the title-deeds by the first mortgagee is a circumstance which certainly calls for explanation on his part, but it may be explained; and if he can satisfy the Court that the absence of the title-deeds was reasonably accounted for to him at the time when he obtained his mortgage, or that he was subsequently induced to part with them upon such grounds and under such circumstances as to exonerate him from any serious imputation of negligence, he ought not to lose his priority because the mortgagor may afterwards have dishonestly handed over the title-deeds to a second mortgagee.

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The genuineness of the plaintiff's mortgage is the first question to be considered in this case, but, if that be established, the Principal Sadr Amin must then decide whether the mortgage of the second defendant is genuine, and whether under the circumstances he is entitled to priority. The decree in Original Suit No. 179 of 1866 is not binding upon the plaintiff; and as against him the second defendant's title under the second mortgage must of course be established by independent evidence.

We reverse therefore the decree of the Principal Sadr Amin and remand the suit to be disposed of on the merits with reference to the above remarks.

The special appellant is entitled to his costs of this appeal from the special respondent; and all other costs will be disposed of by the Lower Appellate Court.