and we think that the Judge ought to have found on that part of the case, namely, whether the defendant No. 1 had established the custom set up by her in her defence. We, therefore, remand the case to the Judge to come to a finding on that point, taking evidence if necessary. Costs to follow the result.

1877

KUDOMEE DOSSEE v. JOTEERAM KOLITA.

Appeal allowed.

Before Mr. Justice Jackson and Mr. Justice White.

GOLUKNATH MISSER (PLAINTIFF) *v.* LALLA PREM LAL AND OTHERS (DEFENDANTS).*

1877 *Sept.* 14.

Mortgage, Effect of subsequent Mortgage—Extinguishment—Merger.

A creditor holding a mortgage on the lands of his debtor does not necessarily surrender that mortgage, or lower its priority, by taking a subsequent mortgage, including the same lands with other lands, for the same debt. Whether the earlier mortgage becomes merged and extinguished or not is a question of intention.

Baboo *Mohini Mohun Roy*, Baboo *Tarucknath Dutt*, and Baboo *Juggudoollabh Basack* for the appellant.

Mr. *R. E. Twidale* and Baboo *Tarucknath Palit* for the respondents.

THE facts of this case are sufficiently stated in the judgment of the Court.

WHITE, J. (JACKSON, J., concurring).—It appears that in this case the defendants (who are grouped together as No. 1) borrowed from the special appellant (who is the plaintiff in the suit) on the 13th of Srawun 1271 F. S., Rs. 295 at 2 per cent. per mensem, and by a mortgage bond of that date, in order to secure the payment of that sum with interest, mortgaged to the plaintiff certain land which is described in the mortgage bond

* Special Appeal, No. 2054 of 1876, against the decree of E. S. Mosely, Esq., Officiating Judge of Zilla Bhagalpore, dated the 6th of July 1876, affirming the decree of Baboo Gopinath Matey, Sudder Munsif of that District, dated the 4th of December 1875.

1877

GOLUKNATH MISSER v. LALLA PREM LAL.

as "20 bigas of '*Inglis*' land belonging to us exclusively" (meaning defendants No. 1),—"that is to say, 10 bigas out of 50 bigas in Mouzah Kuchia, and 10 bigas in Mouzah Dowlutpore." Certain payments on account of the interest were made as appears by the endorsement on the bond; but in 1278 F. S. the whole of the principal sum and a large arrear of interest still remaining unpaid, the parties came to an adjustment of account, when Rs. 500 was found to be due for principal and interest upon the foot of the bond, and thereupon the defendants No. 2 executed to the plaintiff another mortgage bond to secure payment of the Rs. 500 with interest on that sum at the reduced rate of 1 per cent. per mensem. This second bond is dated the 21st of Bysack, 1278 F. S. It mentions the previous mortgage bond, and the properties mortgaged by it are the same as those in the previous mortgage bond, with the addition of another 10 bigas out of the 50 bigas in Mouzah Kuchia. The schedule annexed to the bond states in effect the mortgaged properties to be 30 bigas of land composed of 20 bigas out of 50 bigas in Mouzah Kuchia and 10 bigas in Dowlutpore.

Shortly before this second mortgage bond was executed to the plaintiff, namely, on the 9th of Assin 1277, the defendants No. 1 mortgaged the whole 60 bigas of land to the special respondent (who is defendant No. 2) for Rs. 1,550 with interest at Rs. 1-4 per cent. per mensem. The mortgage was in the form of conditional sale, and provided that, on failure to pay that sum together with the interest within four years, defendant No. 2 was to be at liberty to foreclose the mortgage and take possession of the property sold. The property in the respondents' conditional sale is described as 50 bigas in Mouzah Kuchia and 10 bigas in Mouzah Jamulpore, which is another name for Dowlutpore.

On default being made, the defendant No. 2, in December 1873, took proceedings to foreclose the mortgage, which resulted in his getting into possession of the whole 60 bigas.

The plaintiff brings this suit to establish a lien or charge in his favour upon 30 bigas of the land in the possession of defendant No. 2, and he claims Rs. 7,268 as the amount due upon the footing of his second mortgage bond: at the same time

he insists in his plaint that his previous mortgage of 1271 continues in force.

As the doctrine of tacking does not prevail in the mofussil of this Presidency, the plaintiff cannot avail himself of his second mortgage, which was subsequent to the conditional sale to the defendant No. 2; but the question remains whether, by reason of the plaintiff having taken the second mortgage of 1278, he has lost the priority which at the time when the conditional sale was made he unquestionably had under his previous mortgage of 1271; in other words, whether his previous mortgage has become merged or extinguished by his subsequent mortgage.

Both the lower Courts have held that s. 62 of the Indian Contract Act, 1872, applies, and that the prior mortgage has become extinguished, and the plaintiff's suit has accordingly been dismissed.

I am unable to agree in the conclusion which they have arrived at. It depends upon the intention of the parties whether or not the earlier security has become merged or extinguished in the later one, and I think that the nature of the transaction and the acts of the parties, as well as the documents themselves, show that, in the present case, there is no such intention. There is nothing in the mortgage bond of 1278 which indicates that the plaintiff meant to forego the benefit of the security created by the mortgage bond of 1271. On the other hand, it refers to that previous mortgage as a then subsisting security. The bond of 1271 was not cancelled or returned to defendants No. 1, but has continued all along in the possession of the plaintiff, and has in point of fact been filed by him with his plaint. It is very improbable that the plaintiff, when adjusting the account of what was due upon the foot of the mortgage in 1278, and finding a large sum to be due for arrears of interest, and taking in consequence another mortgage of the same lands together with others, should relinquish, or intend to relinquish, his original and earlier security.

It is argued, however, that the property mortgaged is not the same, and therefore that a substitution of securities must have been intended, and a consequent extinguishment of the prior mortgage has taken place.

1877

GOLUKNATH MISSER v. LALLA PREM LAL.

I think this argument is founded upon a misapprehension of the real nature of the transaction.

The mortgage bond of 1271 gives the plaintiff the security of 20 bigas of land, namely, 10 out of 50 bigas in one village (which is a native expression for one-fifth of the land in that village) and 10 bigas situated in another village. The mortgage bond of 1278, which is made when the debt had become increased by large arrears of interest, extends the plaintiff's security to 30 bigas of land,—namely, 20 out of 50 bigas in the first village (which is equivalent to two-fifths of the lands in that village) and the same 10 bigas out of the second village. That the 10 bigas in Dowlutpore, the second village, are the same lands already mortgaged by the first bond there can be no doubt, and as to the two-fifths of the land in Kuchia, the first village, that must be taken to mean, in the absence of all evidence to the contrary, the one-fifth already mortgaged by the first bond and an additional one-fifth of the land in the village; this latter one-fifth being mortgaged to the plaintiff for the first time by the bond of 1278.

The transaction which took place between the plaintiff and the defendants No. 1 in 1278 was not intended to be, nor in point of fact was, a substitution of the later mortgage for the earlier one, but a giving of further security in consequence of the original debt having become increased by large arrears of unpaid interest, and therefore no merger or extinguishment of the previous mortgage in the later one has occurred. The circumstance that the original debt was in the mortgage bond of 1278, augmented by the addition to it of the arrears of interest, and that the interest upon the aggregate debt was reduced, appears to me to make no difference on this question, which is one of merger of securities.

In *Tenison* v. *Sweeny* (1), where the same question arose, Sir Edward Sugden, afterwards Lord St. Leonards, made the following remarks:—"Then another point was started that, as the successive mortgages were for the sums secured by the former mortgages and for the sums subsequently advanced, the old securities were merged in the new, and that the judgment-

(1) 1 Jo. and Lat., 717.

creditor had a right to come in before the last mortgage. That is a very novel view of the operation of the deeds. I have had considerable experience in this particular department of the law, and I never before heard of such a doctrine. It is clear that the former mortgages continued untouched and operative, notwithstanding the new mortgages, and the new mortgages were for the purpose of letting in the further advances upon the property. Nothing could be more alarming to creditors than that a doubt should be thrown out whether, by taking a new security for their old debt and for further advances, they do not prejudice their original securities." See also *Miln* v. *Walter* (1).

As the original mortgage is, in my opinion, not extinguished, and the defendant acquired the 60 bigas of land subject to that mortgage, the appeal should be allowed with costs, and the following decree substituted for the one made by the first Court, that is to say, declare 10 bigas out of 50 bigas, or one-fifth of the lands in Mouzah Kuchía, in the possession of the defendant No. 2, and 10 bigas of the lands of Mouzah Dowlutpore, also in the possession of defendant No. 2, are well charged with the payment to the plaintiff of the amount due upon the mortgage bond of 13th Srawun 1271 F. S., and also with the costs of this suit.

Let the amount due upon that mortgage bond for principal and interest down to three months from this date, after deducting any payments on account of interest made thereon, be ascertained.

On payment by defendant No. 2 to plaintiff of such amount and costs, let the above lands be held by defendant No. 2 discharged from plaintiff's mortgage of 1271.

On failure by defendant No. 2 to pay to plaintiff the amount so found due within three months from the date, let the lands hereby declared to be charged, be sold and the net proceeds of sale applied in and towards satisfaction of the amount so found due to the plaintiff, together with the costs of the suit; and if any balance remains due to the plaintiff after the net proceeds of sale shall have been so applied, let the same be paid to plaintiff by defendants No. 1, who are the plaintiff's mortgagors.

Appeal allowed.

(1) 2 Y. and C. Ch., 354 and 361, before Vice-Chancellor Knight Bruce.