Privy Council Appeals Nos. 148 *and* 149 *of* 1920.

The Imperial Bank of India (substituted for the Bank of Bengal, Akyab) - - - - - - - - *Appellants*

v.

U Rai Gyaw Thu and Company, Limited - - - - *Respondents*

The Imperial Bank of India (substituted for the Bank of Bengal, Akyab) - - - - - - - - *Appellants*

v.

Aung Tha Hla and others - - - - - - *Respondents*

(*Consolidated Appeals.*)

FROM

THE CHIEF COURT OF LOWER BURMA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 10TH JULY, 1923.

Present at the Hearing:

VISCOUNT FINLAY.
LORD DUNEDIN.
LORD ATKINSON.
SIR JOHN EDGE.
MR. AMEER ALI.

[*Delivered by* LORD DUNEDIN.]

These are two consolidated appeals. The facts in appeal No. 148 of 1920 are as follows:—

One Abdul Hakim on the 28th December, 1911, handed to the Bank of Bengal (now represented by the appellants the Imperial Bank of India who took over their business) the following document:—

"AKYAB,
"28th *December*, 1911.

"To The Agent, Bank of Bengal, Akyab.

"DEAR SIR,

"I beg to hand you the title-deeds as at foot to be held as Collateral Security for the advances made by you or to be made by you to me hereafter.

" I further beg to submit you that all those title-deeds as at foot deposited with you are free from encumbrances.

" Yours faithfully,

" ABDUL HAKIM II."
(In Burmese).

" DETAILS OF PROPERTIES REFERRED TO ABOVE."

The schedule was not filled up. The Bank thereafter made advances on current account from time to time. On 1st June, 1914, Abdul Hakim was indebted to the Bank to the extent of Rs. 24,500. His liabilities to the Bank subsequently rose and fell ; the minimum amount due at any one time being Rs. 15,000 on the 8th July, 1914. The liabilities rose by further advances.

On the 1st June, 1914, Abdul Hakim, without the knowledge of the Bank, executed a deed of mortgage of seven parcels of land, of which the titles had been handed to the Bank, in favour of a firm who were the immediate predecessors in title of the respondents. This mortgage was registered. The mortgage was to secure Rs. 10,000. The respondents' manager did not ask for any title-deeds and believed the state ment of Abdul Hakim that the properties were free from encumbrances.

The facts in appeal No. 149 of 1920 are as follows :—

One Maung Tha Baw deposited the title-deeds of certain agricultural lands with the Bank at Akyab, as security for advances made to him by the Bank from time to time. His indebtedness to the Bank fluctuated from month to month. On the 29th April, 1914, he cleared his account with the Bank, but allowed his title-deeds to remain in possession of the Bank, and on the 23rd May, 1914, took a fresh advance of Rs. 10,000. From that time onwards his indebtedness to the Bank continued up to the date of the suit. On the 21st May, 1914, without notice to the Bank, during the time when he was temporarily free from debt, Maung Tha Baw executed a mortgage of certain of the lands in favour of the respondents in this appeal, and this mortgage was duly registered at the Sub Registration Office at Myohaung where Tha Baw lives. The mortgage was for Rs. 30,000.

The point of contest in both cases is the question of priority of the appellants, the Bank, and the respective respondents in respect of their registered mortgages.

Before discussing the question or examining the judgments below, it is advisable to set out the sections of the Transfer of Property Act, 1882, on which the questions turn. By Section 58 (*a*) it is declared that :—

" A mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability. "

The section goes on to set forth and distinguish in turn simple mortgages (*b*), mortgages by conditional sale (*c*), usufructuary mortgages (*d*) and English mortgages (*e*).

Section 59 provides that :—

> " Where the principal money secured is one hundred rupees or upwards, a mortgage can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses."

and then continues

> " Nothing in this section shall be deemed to render invalid mortgages made in the towns of Calcutta, Madras, Bombay, Karachi, Rangoon, Moulmein, Bassein, and Akyab, by delivery to a creditor or his agent of documents of title to immovable property with intent to create a security thereon."

It is to be observed that there is here no distinction between legal and equitable mortgages as in English law, where the legal mortgage will always prevail against the equitable unless the holder of the legal has done or omitted to do something which prevents him in equity from asserting his paramount rights.

The various classes of mortgages are merely described, and then as regards mortgage by way of deposit of title-deeds, that is spoken of as a known method. That that known method had consisted in applying the doctrine of English law that such deposit effected a mortgage good against the mortgagor, although no actual conveyance of the property had been made, may be taken as certain.

Priority is dealt with in general terms by Section 48 :—

> " Where a person purports to create by transfer at different times rights in or over the same immovable property, and such rights cannot all exist or be exercised to their full extent together, each later created right shall, in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously created."

This is what is expressed in the old maxim *qui prior est tempore potior est jure.* But priority is specifically dealt with in Sections 78, 79 and 80, which are as follows :—

78. " Where, through the fraud, misrepresentation or gross neglect of a prior mortgagee, another person has been induced to advance money on the security of the mortgaged property, the prior mortgagee shall be postponed to the subsequent mortgagee."

79. " If a mortgage made to secure future advances, the performance of an engagement or the balance of a running account, expresses the maximum to be secured thereby, a subsequent mortgage of the same property, shall, if made with notice of the prior mortgage be postponed to the prior mortgage in respect of all advances or debits not exceeding the

maximum though made or allowed with notice of the subsequent mortgage."

80. "No mortgagee paying off a prior mortgage, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his original security. And, except in the case provided for by Section 79, no mortgagee making a subsequent advance to the mortgagor, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his security for such subsequent advance."

Now upon the facts set forth the learned District Judge in appeal No. 148 of 1920 thought that two points and two points only arose:—(1) whether the registration of the respondents' mortgage was *ipso facto* notice to the Bank, thus preventing the Bank from making further advances upon the doctrine of *Hopkinson* v. *Rolt* (9 H.L.C. 514): and (2) whether the fact that the respondents in taking the mortgage did not ask for the title-deeds, brought into play the provisions of Section 78. He decided the first question in the negative and the second in the affirmative. He then gave judgment in favour of the Bank. He did not consider or discuss the effect of the concluding words of Section 80.

In appeal No. 149 of 1920 he held that the two questions were the same. The first he decided in the same way, but the second he decided otherwise. He held that as the mortgaged lands were in the district where the concluding provision of Section 59 did not apply, the Bank were themselves negligent in not inspecting the register before making further advances and that this negligence on their part precluded them from putting forward negligence on the respondents' part under Section 78. He therefore preferred the respondents. Again he did not discuss Section 80.

The appeal in No. 149 of 1920 came on before the appeal in No. 148 of 1920. In that appeal Section 80 was mentioned, but was dismissed with the remark that it did not in any way supersede Section 79, and the question to be decided was declared to be whether in the circumstances the Court could impute gross negligence to the respondents and whether such negligence was a proximate cause of the Bank making further advances. The learned Appeal Judge who delivered the judgment then proceeded to consider the English decisions as to the necessity of a legal mortgagee requiring possession of the title-deeds without perhaps quite adverting to the fact that the question in England is not so much one of priority in time, as of the possibility of an equitable mortgagee being allowed to prevail over a legal. Having come to the conclusion that in the English law there was no absolute necessity to require production of the deeds, he argued that the case became much stronger in the country where registration existed, and he, therefore, came to the conclusion that the omission in this case to ask for the title-deeds was not negligence and dismissed the appeal. In appeal No. 148 of 1920 he held that as he had

decided in appeal No. 149 of 1920, it followed that there was no negligence and preferred the respondents to all except the amount which represented the amount due to the Bank before the date of the mortgage so far as not paid off.

Before their Lordships the argument proceeded on somewhat different and broader lines. The respondents based their case entirely on the concluding words of Section 80. Applying these words they say the Bank is a mortgagee who has made an advance subsequent to an intermediate mortgage and therefore as this is not a case falling within Section 79 they cannot obtain priority therefor. All the discussion as to what is and what is not notice becomes unnecessary. The law being as it stands, Section 78 cannot have any application because nothing done by them caused the Bank to make the further advances.

The appellants sought to rebut this argument in various ways. They first argued that the words of Section 80 " in the case mentioned in Section 79 " meant mortgages to secure further advances or the balance of a running account. Their Lordships cannot accept this argument. They think that the words of Section 79 mean that the mortgage there referred to must express a maximum. The words " to secure further advances, etc.," denominate the different classes of mortgages, but to bring them under Section 79 they must have the common feature of a maximum expressed. As no maximum was expressed in either of the two cases here, the exception in Section 80 cannot apply.

The appellants then argued that when a mortgage was to secure further advances, any advance when made was not truly a subsequent advance. The words of the section, in their Lordships' opinion, are destructive of this argument. " Subsequent " from the context must mean subsequent to the intermediate mortgage, and if that is so, then in the sense of the section an advance when made after another mortgage granted becomes a subsequent advance.

It was then argued that the equitable mortgage effected by deposit of title-deeds was not a mortgage in the sense of the Act and that consequently the priority sections had no application. This seems untenable in view of the words of Section 58 (*a*). Unless the deposit of title-deeds effects the transfer of an interest in a specific immovable property for the purpose of securing the payment of money advanced or to be advanced, it is absolutely nothing at all. Further the concluding words of Section 59 actually use the word mortgage to denote the security effected by delivery of documents of title.

The consideration, however, on which the appellants laid most stress was that it was evident that the legislature wished to preserve the system of mortgaging by deposit of title-deeds in the enumerated towns. Such mortgages are only really useful for the exigencies of business, especially in the timber and rice trades, where balances fluctuate from day to day. It would be impossible at each subsequent advance that there should be a search of registers,

because the registers searched would be not only the registers in the town itself but all those where the security lands mentioned in the deposited title-deeds might be situated, and the exigencies of business require immediate advances without a delay which might be of many days. Therefore it was pressed on their Lordships that they should give such an interpretation to the Act as would not defeat one of its avowed objects.

Such considerations while founded on views as to business which are obviously of the greatest practical importance would, in their Lordships' opinion, be rather arguments for the invocation of the legislature than an incentive to the putting of a forced construction on sections of an Act which in themselves were, in their Lordships' judgment, capable of only one interpretation. It may, however, be not amiss to point out that, in their Lordships' view, the remedy is given in the Act itself, and that is by the insertion in the arrangements for such mortgages of a maximum as indicated by Section 79. The insertion of such a maximum elides the result which otherwise would obtain in terms of the case of *Hopkinson* v. *Rolt* (*supra*). It is true that the subsequent mortgage must be made with notice of the prior mortgage which includes the maximum. But a case like the present, where the lender took the subsequent mortgage without asking for the title-deeds, would be met by Section 3 of the Act which provides :—

> " A person is said to have ' notice ' of a fact when he actually knows that fact, or when, but for wilful abstention from an enquiry or search which he ought to have made, or gross negligence, he would have known it . . . . . "

Taking the case of appeal No. 148 of 1920 as the simpler, their Lordships would be prepared to hold that for a mortgagee taking a mortgage in a place where he knew that mortgages by deposit of title-deeds were legal and usual and not to ascertain whether the title-deeds were already pledged was such abstention from an enquiry which he ought to have made or such negligence as to infer notice in terms of the section. In the present case such a finding is unavailing, because Section 80, in saying " with or without notice " makes notice immaterial. But if there had been a maximum then the exception would have applied and the case would have fallen under Section 79. Appeal No. 148 of 1920 has been taken as the simpler case because the dealings are all within the town, but in appeal No. 149 of 1920, in their Lordships' judgment, the result would have been the same. No doubt each case must be judged of according to circumstances. In parts of India remote from the enumerated towns, it would be out of the question to hold that there was a necessary duty in taking a mortgage to insist on the production of the title-deeds. Registration is sufficient protection. But here the transaction was in Akyab, and the respondents knew that a deposit of title-deeds in Akyab might involve lands situate outside Akyab and not very far remote.

Upon this view of Section 80, 78 does not admit of any application. The Bank who had no maximum expressed so as to get the benefit of Section 79 took the risk of there being an intermediate mortgage. Their further advances could not in any sense be said to have been induced by any action of the respondents.

For the reasons above given their Lordships think, though on different grounds from that given by the learned Judges below, that these appeals fail, and they will humbly advise His Majesty accordingly.

The appellants will pay the costs of the appeals.

The respondents' petition for special leave to cross-appeal will be formally dismissed and no costs in relation to it must be charged in the respondents' bill.

In the Privy Council.

THE IMPERIAL BANK OF INDIA (SUBSTITUTED FOR THE BANK OF BENGAL, AKYAB)

v.

U RAI GYAW THU AND COMPANY, LIMITED

THE IMPERIAL BANK OF INDIA (SUBSTITUTED FOR THE BANK OF BENGAL, AKYAB)

v.

AUNG THA HLA AND OTHERS.

(*Consolidated Appeals.*)

DELIVERED BY LORD DUNEDIN.

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