1903.
January 23 and 27.

MEYAPPA CHETTY *v.* RAWTER.

D. C., Chilaw, 2,216.

Mortgagees—Action by primary mortgagee against puisne incumbrancers—Civil Procedure Code, ss. 640 and 648—Ordinance No. 14 of 1891, s. 17.

There is nothing in the Civil Procedure Code to prevent a primary mortgagee joining a puisne incumbrancer as a defendant in his suit to realize his mortgage.

The plaintiff and the second and the third defendants were mortgagees of the first defendant. Plaintiff's mortgage was registered, but not that of the second and third defendants, who put their bond in suit and obtained a decree on 5th April, 1900, which was registered on 16th October, 1900. The second and third defendants bought the land in execution of their decree, but the fiscal did not give them possession or a conveyance. The plaintiff had no notice of this suit, but, having knowledge of the mortgage in favour of the second and third defendants, which had become subject to his own by reason of the registration of his mortgage, sued the first defendant as mortgagor, and joined in the suit the second and third defendants also.

Held, that plaintiff exercised a wise discretion in joining them as puisne incumbrancers.

THE first defendant granted a mortgage bond to the second and third defendants in December, 1897. It was not registered. It was put in suit, and the second and third defendants obtained a decree against the first on 5th April, 1900. This decree was registered on 16th October, 1900. In execution of it the second and third defendants purchased the property.

The plaintiff, who was also a mortgagee of first defendant, and whose mortgage bond was duly registered, had no notice of that suit. On 25th September, 1900, he put the bond in his favour in suit against the first defendant and joined in it the second and third defendants also, though they were not in possession of the property.

The District Judge dismissed the plaintiff's action as against the second and third defendants.

Plaintiff appealed. The appeal was argued on 23rd January, 1903.

Dornhorst, K.C., for appellant.—The plaintiff's mortgage, though subsequent in date to that of the defendants, is prior to it by registration. The property mortgaged has been bought by the first and second defendants. If plaintiff did not join them also in his action against the mortgagor, the result would have been that while the present case was pending they would have got their conveyance registered, and such registration would affect the plaintiff prejudicially. By his prior registration, the first and second defendants became puisne encumbrancers. *Ex abundanti cautela*, the plaintiff has brought his action against the

puisne incumbrancers. Sections 643 and 644 of the 'Civil Procedure Code necessitates the joining of secondary mortgagees. In the circumstances of the present case the plaintiff ought not to be prevented from safeguarding his interests by the procedure he has adopted.

Bawa, for the second and third defendants.—The plaintiff has no cause of action against the second and third defendants. They are not in possession. Unless the plaintiff has some ground of complaint against them, they should not be put to the trouble and expense of defending the suit. The mortgage in their favour is void as against him by reason of prior registration. He is entitled to disregard it altogether. The plaintiff has by force of law become a primary mortgagee, and the second and third defendants have become secondary mortgagees. They did not give him notice under section 243 of the Code. The Code does not contemplate a secondary mortgagee being joined at all. In practice such a procedure is unknown. Supposing a simple money decree-holder against the first defendant had bought the land, would the plaintiff have a cause of action against him?

Cur. adv. vult.

27th January, 1903. LAYARD, C.J.—

The admitted facts of this case are as follows:—The plaintiff and second and third defendants are mortgagees. Plaintiff's mortgage was duly registered. The second and third defendants have not registered their mortgage. They put their bond in suit and obtained a decree on the 5th April, 1900, which was registered on the 16th October, 1900. In execution of that decree the land mortgaged was sold and purchased by the second and third defendants, but no conveyance has been made to them by the Fiscal.

The District Judge has decided that the plaintiff was wrong in making the second and third defendants parties in this action brought by him against the first defendant, the mortgagor, to realize his mortgage, because the title of the first defendant in the land mortgaged is not vested in the second and the third defendants, and they are not in possession of it.

It is contended for the plaintiff appellant that the second and third defendants are puisne incumbrancers, and that the plaintiff, as first mortgagee, having notice of such puisne incumbrance, is entitled to join them as parties to this suit. The respondent's counsel, however, contends that as the second and the third defendants have not registered their mortgage, their mortgage, is void as against the plaintiff's subsequently registered mortgage, under the provisions of section 17 of Ordinance No. 14 of 1891.

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It is clear, however, from the last part of the proviso to that section, that the provisions of it merely confer priority on the subsequent duly registered instrument, and the second and third defendants thereby become puisne incumbrancers. It was laid down by Mr. Justice Clarence in the case of the *Oriental Bank v. Rogers* (*4 S. C. C. 1*) that a first mortgagee, who had notice of puisne incumbrancers, ought to make such puisne incumbrancers parties to his suit to realize his mortgage. It has however been suggested that since the passing of the Civil Procedure Code the puisne incumbrancers cannot be made parties on actions to realize moneys due or secured upon mortgages. Section 640 of that Code provides that the mortgagor shall be made a party, and section 643 provides for puisne incumbrancers, whose deeds are of date subsequent to that of the mortgage on which the action is brought, being noticed under certain circumstances, and it may be that, unless those circumstances are complied with, a puisne incumbrancer, whose deed is of subsequent date to that of the mortgage on which the action is brought, would have no right to complain if not noticed in manner provided by that section. The puisne incumbrancers in this case claim, however, under a mortgage prior in date to that of the plaintiff, and section 643 does not refer to a mortgage of a prior date. Prior to the passing of the Civil Procedure Code, according to the judgment of Mr. Justice Clarence above referred to, the primary mortgagee was bound to join in his action to realize his mortgage any puisne incumbrancer of whom he had notice, and consequently a puisne incumbrancer was a proper person to be made a party to such suit. The sections in the Civil Procedure Code above referred to do not enact that after the passing of the Code no puisne incumbrancer shall be made a party to an action by a primary mortgagee. It may be that in certain cases after the passing of the Code a puisne incumbrancer cannot claim to have notice given to him of an action to realize a primary mortgage; there is nothing, however, in the Civil Procedure Code to prevent a primary mortgagee joining a puisne incumbrancer, should he think it desirable to do so, and I cannot see what the puisne incumbrancers have to complain of in being joined in this action. The plaintiff, in my opinion, has exercised a wise discretion in joining the puisne incumbrancers as parties to his action.

The judgment of the District Judge is set aside, and the respondents must pay the appellant's costs in this Court and the District Court, and the case must proceed against all three defendants.

MONCREIFF, J.—I agree.