Present : Middleton J. and Wood Renton J. *July 28, 1910*

ROWEL *et al. v.* JAYAWARDENE.

81—*D. C. Chilaw*, 4,138.

Address furnished to the Registrar of Lands by primary mortgagee and puisne incumbrancer—Action by primary mortgagee on the mortgage bond with notice to the puisne incumbrancer—Hypothecary decree binding on the puisne incumbrancer—Civil Procedure Code, ss. 237, 643, 644.

Where the primary mortgagee and puisne incumbrancer had both failed to comply with the provisions of section 644 of the Civil Procedure Code as to furnishing an address to the Registrar of Lands for notice, and where the primary mortgagee brought a hypothecary action on the bond and gave the puisne incumbrancer full notice of the action and the puisne incumbrancer failed to intervene in the action,—

Held, that the puisne incumbrancer was bound by the hypothecary decree.

THE facts of this case are fully set out in the following judgment of the District Judge (T. W. Roberts, Esq.) :—

"The property in dispute was mortgaged by its owner in 1900. In March, 1906, the defendant, an unsecured creditor, seized the property in execution of his money decree and himself bought it at the sale held on June 23, 1906.

July 28, 1910

Rowel v. Jayawardene

" On July 5, 1906, the mortgagee put his bond of 1900 in suit, in case No. 3,571, D. C. Chilaw. In execution under writ issued in that case the property was sold to the plaintiff in 3,571 in August, 1906, and he subsequently conveyed it to the present plaintiffs.

" The question is whether defendant is bound by the decree in case No. 3,571. It was contended for plaintiffs (1) that the defendant's purchase was explicitly subject to the mortgage of 1900 ; (2) that the seizure in defendant's interest of March, 1906, was not a deed of incumbrance, and the date at which the owner and mortgagor was divested of and the defendant invested with the title to the property was subsequent to the institution of the mortgage action, and could not on the principle of *lis pendens* affect the interests of the parties to that action.

" The first contention is categorically negatived by the decision reported on the 139th page of the *New Law Reports, vol. XII.*

" The second is partly a misrepresentation, in that the seizure was certainly an act creating certain rights in the property. As such it was capable of being, and was in fact, registered. As such it was a deed of incumbrance.

" Even if that were not so, the sale occurred before the mortgage action was instituted, and the decision in S. C. 305, C. R. Balapitiya, is precisely in point on the facts with the present case, and is against the plaintiffs' contention.

" The decisions are numerous and particularly decisive, that the leaving of his address with the Registrar of Lands is a condition precedent which a primary mortgagee must fulfil before his decree can without notice bind puisne incumbrancers. It is admitted that the plaintiff left no address. He omitted, that is to say, to do what it lay on him to do, viz., to give the purchaser at the sale on defendant's writ the opportunity of notifying him of his purchase or subsequent incumbrance. It follows that the argument was unsound in its denial of the necessity of notice.

" The next point was the sufficiency of the notice given. Notice was in fact given to the defendant at the time of the issue of summons in D. C. 3,571. The plaintiff is uncertain whether a copy of the summons accompanied that notice or not, and asked the Court to presume that it did from the fact of the motion made in that case (P 1). The presumption does not arise that the proctor for plaintiff in 3,571 did what he ought to have done ; the record does not mention any issue of any copy of the summons, and the presumption is rather the other way. The fact of issue of a copy of the summons to defendant is a fact the burden of proving which lay on the plaintiffs. So it has been ruled expressly in exactly similar circumstances (3 *Balasingham* 227).

" I conclude that no copy of the summons in 3,571 was attached to the notice therein sent to defendant under section 643. The notice was therefore formally defective, but I should perhaps have

been prepared to disregard the formal defect if the notice had been substantially equivalent to the summons copy in its statement of the material facts. The notice has been filed by the defendant (D 4),[1] and it gives most of the required information. But it lacks the force of a summons, in that it is not signed by any officer of the Court, and, what is more important, it does not give the date of the case.

"I would reluctantly hold, therefore, that the defendant is not bound by the decree in the case No. 3,571. The case must be dismissed, and with costs."

The plaintiffs appealed.

Sampayo, K.C. (with him *Wadsworth*), for the appellants.—At the date of the commencement of the action the first defendant was only a purchaser at a Fiscal's sale ; he had not got a Fiscal's transfer ; he was therefore not a person entitled to be either made a party to the mortgage action or to be noticed. The Fiscal's sale was merely an inchoate sale.

Sections 643 and 644 do not apply to either the primary mortgagee or to the first defendant, as neither of them had furnished the Registrar of Lands with an address as required by those sections. The ordinary law of mortgage must apply to this case. Voet (20, 4, 2, *Berwick*, *2nd ed.*, *p.* 375) indicates the class of persons who should be joined in hypothecary actions. Moreover, the first defendant cannot be said to be a puisne incumbrancer. [Middleton J.—Cannot an incumbrance be created by registered judgment ?] No ; an incumbrance can be created only by a deed. [Wood Renton J.—Is not a seizure an incumbrance ?] It is, but it is

[1] D 4. To Francis Wijeyesinha Jayawardene of Madampe,

Chilaw, July 7, 1906.

SIR,—YOU are hereby informed that Muttu Kuna Pana Palaniappa Chetty of Madampe has instituted an action, No. 3,571, for the recovery of Rs. 2,922.50, being amount due to him on bonds Nos. 3,954 dated September 17, 1900, and 3,625 dated January 31, 1900. The property mortgaged on the said bonds is the land called Wuduwalevukani, situate at Chilaw, which was purchased by you in execution of writ in D. C. 788 K.

Yours, &c.,

C. MUNASINHA,
Proctor for M. K. P. Palaniappa Chetty.

The first defendant sent the following reply to the above letter :—

Madampe, N. W. P.,
P 2. July 13, 1906.

SIR,—WITH reference to your letter dated the 7th instant, informing me of the institution of action No. 3,571, D. C. Chilaw, I have to give you notice that I do not admit the plaintiff's claim therein stated in its entirety, and am prepared to contest any action in which I am a party.

Yours, &c.,

FRANCIS W. JAYAWARDENE.

July 28, 1910

Rowel v. Jayawardene

not an incumbrance within the meaning of section 644. The registration of seizure is a special provision of the Code (section 237), and its purpose is only to invalidate subsequent alienations. The cases relied on by the District Judge refer to encumbrances by deed.

A. St. V. Jayewardene, for the respondent.—The term "puisne incumbrancer" has no technical meaning. *Evans v. Evans*,[1] *Pack v. Tarpley*.[2] "Deed" need not necessarily be one which is executed notarially; the term includes any instrument creating an incumbrance. See (1909) 12 *N. L. R.* 281; see Registration Ordinance, No. 3 of 1907, section 3; Ordinance No. 14 of 1891, section 16. The old hypothecary actions have been superseded by the Code; the old procedure would not apply now. See *Punchi Kira v. Sangu*.[3] [Middleton J.—May not the primary mortgagee give notice in any way he pleases ?] The puisne incumbrancer cannot be bound except by a notice as provided by section 644. [Middleton J.—What is the object of the notice ? It is to enable the puisne incumbrancer to come into the action. If he gets the information by getting the summons or other notice, what more does he want ?]

Sampayo, K.C., in reply.—The definition of "deed" in Ordinance No. 3 of 1907 is not its legal or ordinary meaning; it is a definition for the purpose of that Ordinance. If seizure is to be deemed an encumbrance, to whom is notice to be given ? Is it to the execution-creditor ? Documents D 4 and P 2 clearly show that the first defendant had full notice of the action. He would therefore be bound by the hypothecary decree.

Cur. adv. vult.

July 28, 1910. MIDDLETON J.—

This is a case in which at the argument we were rather led away from the substance of the matter to a critical consideration of its shadow. The question as raised before us was whether a judgment creditor on a money decree, who had seized and registered his seizure of property under section 237 of the Civil Procedure Code, was a puisne incumbrancer under section 643 of the Civil Procedure Code, and as such entitled to notice of proceedings in a hypothecary action by a mortgagee of the same property in order to bind the property by a mortgage decree. The question is an interesting one, but it requires no decision at our hands here.

Assuming that the first defendant was a puisne incumbrancer, it seems to me he received the notice D 4 sent to him by the mortgagee's proctor on July 7, 1906, and by his letter in reply (P 2) of July 13, 1906, was fully aware of the hypothecary action, its number, the

[1] (1853) 22 *L. J. ch.* 785. [2] (1839) 9 *A. & E.* 468.

[3] (1900) 4 *N. L. R.* 42.

Court in which it was brought, and its claimed amount. The object of notice under sections 643 and 644 is to enable the puisne incumbrancer to intervene in the hypothecary action and to support his interests therein, and here the first defendant had ample information to enable him to do so, but failed to avail himself of it. It is true that here no copy of the summons was attached, and that the mortgagee did not furnish an address to the Registrar of Lands to which the alleged puisne incumbrancer could have notified him in writing, according to section 643, that he had registered his seizer or (as the learned counsel for the first defendant argues it to be) his deed of incumbrance. At the same time it does not appear that the first defendant gave any address for service to the Registrar-General. His alleged incumbrance, however, became known to the mortgagee, and he got a clear and distinct notice of the hypothecary action 3,571 in time to have intervened had he chosen to do so.

In *Peiris v. Weerasinghe*,[1] Lascelles A.C.J. and I held that a strict compliance with the procedure laid down in the first proviso to section 644 was a condition precedent to the mortgagee coming within the benefit of the provisions of section 644. Here the mortgagee had not complied with the proviso as to furnishing an address for notice, and it is clear also, I think, that the alleged puisne incumbrancer failed to do the same. Both have ignored the details of the section, but notice was in fact given which, if the sections are ignored, would be the obvious course to obtain a binding mortgage decree.

I think, therefore, that the appeal must succeed, and the judgment of the District Court be set aside and judgment entered for the plaintiffs in the terms of the order proposed by my brother Wood Renton.

WOOD RENTON J.—

I think it is unnecessary for us to decide the interesting question raised at the argument of this appeal as to whether or not a person who has registered a seizure of property in execution of a decree may be regarded as a puisne incumbrancer so as to entitle him to notice, under the provisions of section 643 of the Civil Procedure Code, of any action brought by a prior mortgagee in respect of the property forming the subject of the seizure. Assuming that the first defendant-respondent was a puisne imcumbrancer within the meaning of that section, I am clearly of opinion that in view of the terms of the letter D 4 dated July 7, 1906, from the prior mortgagee's proctor, and of the reply to that letter (P 2) dated July 13, 1906, by the first defendant-respondent himself, he cannot be allowed to allege in this action that he had not notice of the proceedings. I would, therefore, set aside the decree under appeal and declare

[1] *(1907) 9 N. L. R. 359.*

July 28, 1910

WOOD RENTON J.

Rowel v. Jayawardene

that the plaintiffs-appellants are entitled to the land and premises described in the plaint, and that the first defendant-respondent should be ejected therefrom and the appellants put in possession thereof forthwith. The first defendant-respondent must pay to the plaintiff-appellants the damages agreed on at the trial, namely, Rs. 25 a month from October 17, 1906, till the land and premises are restored to the appellants' possession. The appellants are entitled to all costs of this appeal and of the action.

Appeal allowed.