[FULL BENCH]

Present : Bertram C.J. and De Sampayo and Garvin J.J.

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MORAES *et al. v.* NALLAN CHETTY. .

321—D. C. Kandy, 29,596.

Mortgage—Civil Procedure Code, ss. 640-644—Address not registered by mortgagee—Sale by second mortgagee under his decree—Second mortgagee not a party to action by first mortgagee—Is purchaser at sale under decree of second mortgagee bound by the first mortgage?

Where a registered mortgagee did not register his address, and brought an action on his bond without making a subsequent mortgagee a party, or giving him notice of the action, and where the subsequent mortgagee obtained judgment on his bond before the first mortgagee instituted his action, and sold in execution the mortgaged property before it was seized under the decree obtained by the first mortgagee,—

Held, that the purchaser at the sale in execution under the decree obtained by the second mortgagee took the property subject to the first mortgage.

The effect of not registering address by primary mortgagee discussed.

Suppramaniam Chetty v. Weerasekera[1] *considered.*

THE facts are set out in the judgment of the Chief Justice.

Samarawickreme (with him *Hayley*), for the appellant.—The sections of the Code relating to mortgage actions merely lay down a quick and expeditious procedure for the enforcing of the rights of a primary mortgagee. If the intention of the Legislature was to

[1] *(1918) 20 N. L. R. 170.*

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create, by means of these sections, substantive law superseding the common law, the Legislature would have proceeded to make the change in explicit terms. If this contention is correct, then the failure of a primary mortgagee to register his address does merely deprive him of the privilege of obtaining in one and the same action a decree binding not only his mortgagor, but also all puisne incumbrancers. Any conflicting interests that may exist between a mortgagee and a puisne incumbrancer can form the subject of a separate and subsequent action, and can be adjudicated upon.

E. W. Jayawardene (with him *Croos-Da Brera* and *Navaratnam*), for the respondent.—The Code imposes on a mortgagee a positive obligation to register his address. The compliance by the mortgagee with the requirements of the sections of the Code is a "condition precedent to a puisne incumbrancer being bound either directly or indirectly by the decree in a mortgage." This principle has been recognized and followed in a series of decisions. In *Appuhamy v. Naide* [1] it was held that compliance with section 643 in the matter of registering an address for service was a condition precedent to success, and that a subsequent purchaser was not bound by the mortgage decree. The Full Court in *Suppramaniam v. Weerasekera* (*supra*) definitely held that only one action was now surviving to a mortgagee, and that was the action under chapter XLVI. of the Code. The failure of the primary mortgagee to register his address is a fatal defect ; and his rights against subsequent incumbrancers when he has not made parties to his mortgage action are completely wiped out.

The following cases were cited at the argument.—*23 N. L. R. 176 ; 20 N. L. R. 170 ; 4 N. L. R. 42 ; 14 N. L. R. 177 ; 12 N. L. R. 139 ; 2 S. C. C. 146 ; 6 N. L. R. 220 ; 14 N. L. R. 47 ; 16 N. L. R. 210 ; 9 N. L. R. 359.*

Cur. adv. vult.

March 20, 1923. BERTRAM C.J.—

In this case we are called upon to discuss a question which has been repeatedly discussed before, namely, the effect to be imputed to sections 643 and 644 of the Civil Procedure Code which deal with registration of the addresses of mortgagees, and of section 640 which declares that the mortgagor must always be a party to a mortgage action. The contest in this case is between a primary mortgagee, who had never registered his address and is now seeking to realize his security by sale of the mortgage property, and certain persons claiming under a sale effected by a secondary mortgagee in execution of his mortgage.

The dates material to the contending claims are as follows : Both mortgages were executed by one Eleanor Downall. The primary

[1] *(1919) 21 N. L. R. 173.*

mortgage, on which the defendant relies, was executed on September 15, 1910, registered on October 14, 1910, put in suit on February 2, 1917, and reduced to judgment on April 24, 1917. The decree was never registered. The property was seized in execution of the mortgage decree on June 20, 1921.

The details with regard to the second mortgage are as follows: It was executed on July 14, 1912, registered on August 16, 1912, put in suit on November 27, 1913, and reduced to judgment on March 23, 1916. The decree was registered on April 15, 1916, and the property seized in execution on May 8, 1917. It was sold on June 20, 1917, to W. J. Soysa, and a Fiscal's transfer was issued on September 15. 1917, and duly registered on October 23, 1917. On February 27, 1919, W. J. Soysa sold to plaintiffs. The history of the somewhat complicated proceedings out of which this matter originates will be found in the case of *Abeysinghe v. Rakkana.*[1] It is sufficient to say that the defendant seized in pursuance of an opinion expressed by this Court that the land was still subject to his primary mortgage. When the seizure was effected plaintiffs claimed the land. It was found against them that they were not in possession, and they were, consequently, reduced to bringing this action under section 247 of the Civil Procedure Code.

What plaintiffs in effect claim is that through non-registration of his address defendant's primary mortgage is wiped out. A primary mortgagee, in fact, who has not registered his address, cannot set up his mortgage against a secondary mortgagee, or a person claiming under a sale in execution of the secondary mortgage. This is said to be the constructive effect of the sections of the Civil Procedure Code above referred to.

The sections in question have been the subject of a series of decisions and it has been declared in those decisions that if a primary mortgagee does not register his address, and does not make a puisne incumbrancer a party to the mortgage action, he cannot, when he discovers the existence of the puisne incumbrancer after the mortgage action, bring a fresh action against him. The puisne incumbrancer in such a case can hold the land free of the mortgage and snap his fingers at the primary mortgagee.

In all the cases in which it has been so held, the puisne incumbrancer was always a person claiming title to the land in some way or other, that is, as transferee, donee, or lessee, and in most of the cases, though not in all of them, he was a person in possession.

The result of these decisions is obviously very unsatisfactory, and it is difficult to see how it can be described as just. Why should a mortgagee, because he has omitted a formality of this description, be deprived of the results of his mortgage? Why should he be deprived of the right of enforcing his rights against a purchaser from the mortgagor of whose existence he was in ignorance at the time

[1] *(1920) 22 N. L. R. 307.*

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of his mortgage action ? Why should a person who has purchased lands subject to a mortgage be permitted to ignore the claims of the mortgagee, simply because the latter has not registered his address ?

It has been found possible in two recent cases to escape from this position in so far as it affects secondary mortgagees. Those cases are *Perera v. Kapuruhamy* [1] and *Waniyasekera v. Ukkuwa.* [2] A similar question arises in the present case. Can a primary mortgagee, who has never registered his address, set up any rights he may have acquired in pursuance of that mortgage as a defence against persons claiming under a sale in execution of a secondary mortgage ?

The difficulty of determining this question arises from the fact that we are called upon to interpret, not so much the words of these sections of the Code, but a superstructure of principles, which, by a logical process, has been developed by the decisions of this Court. These decisions have sought to give effect to certain intentions which the Legislature was presumed to entertain, but which it has omitted to express. The position is thus an artificial one, and we are invited to extend it by affirming further principles which are claimed to be the necessary corollaries of previous decisions of this Court. We are asked to extend this superstructure in two ways. Firstly, by applying to secondary mortgagees what has hitherto only been applied to grantees, donees, or lessess ; secondly, by asserting that what a mortgagee may not set up in attack he may not set up in defence, or, as it has been put in other connections, that he may not use as a shield a contention which the law does not permit him to use as a sword.

Before we commit ourselves to these extensions, it would, I think, be well that we should once more carefully examine, in the first place, what precisely it is that the sections of the Code say ; and, secondly, to what extent we are bound by these previous decisions.

In addressing ourselves to this inquiry, we shall have to consider the rights of secondary mortgagees.

I do not propose to discuss the law on this point in detail as it stood before the enactment of these sections. A very vigorous and trenchant disquisition on the pure law of the subject will be found in the *Report of the Mortgage Law Commission of 1885*, embodied as a Sessional Paper for that year and printed as an Appendix to Mr. Hector Jayawardene's book on the *Law of Mortgage*. With regard to the actual law of Ceylon on the subject, I am content to refer to what has been said by my brother De Sampayo, and to take it as settled law, notwithstanding the opinion of Mr. Berwick, that where a secondary mortgagee sells land in execution of a mortgage, he does so subject to the rights of the primary mortgagee.

[1] *(1921) 23 N. L. R. 176.*
[2] *(1923) 162, D. C. Kurunegala, S. C. Min., Jan. 26, 1923.*

Let us then first consider sections 643 and 644. They in effect declare that a mortgagee by registering his address and by giving notice to any subsequent incumbrancers, who have notified him of their registered deeds and of their own addresses, shall be able, when he seeks to realize his mortgage, to bind by his judgment all such subsequent incumbrancers, who have not themselves applied to be joined as fully and effectually as if he had made them actual parties to the action. That, it seems to me, is all that the sections say. It is accepted that they were intended to confer certain advantages upon a mortgagee, who availed himself of the prescribed procedure, and it is obviously both reasonable and logical to say that compliance with the provisions of the section is a condition precedent to the mortgagee obtaining these advantages. See *per* Lascelles A.C.J. in *Peiris v. Weerasinghe*.[1] But what if he does not comply with this special procedure ? Then, surely, so far as these particular sections are concerned, all that happens is that he loses those advantages, and nothing more.

He is not put in a better position by the sections, but there is nothing in the sections to put him in a worse. All that happens is that if it is necessary for him to bind a puisne incumbrancer, he must do it in the ordinary manner required by law. Indeed, in one case (*Rowel v. Jayawardene* [2]) the Court went further and declared that where the puisne incumbrancer had, in fact, been noticed, he was bound by the decree, even though the primary mortgagee had not registered his address.

In one case, however, the penalization of the mortgagee has been expressed in much stronger terms. I refer to *Eliyatamby v. Valliamma*,[3] and, in particular, to the observations of Wood Renton J. on page 213. He there declares that " compliance by the mortgagee with the requirements of these sections is a condition precedent to a puisne incumbrancer being bound, either directly or indirectly, by the decree in the mortgage action." He seems to imply that the law imposes on the mortgagee a positive obligation to register his address, and that the mortgagee cannot cure his omission to register it, either by giving actual notice to the puisne incumbrancer, or even by making him a party to the action. With very great respect for the high authority of the learned Judge, I am unable myself to see how this principle can be deduced from the words of the sections.

The real section upon which all the determining decisions have been given has not been section 643 or 644, but a previous section, 640. Sections 643 and 644 have been referred to imply for the purpose of throwing light on the supposed meaning of section 640. What is it then that section 640 actually says ? It says simply that a mortgagor must be a party to every action for the realization of a

[1] *(1906) 9 N. L. R. 359.* [2] *(1910) 14 N. L. R. 47.*
[3] *(1913) 16 N. L. R. 210.*

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mortgage. It is this comparatively simple enactment which has been the basis of the superstructure above referred to. It has in fact been declared that in so enacting it was the intention of the Legislature to declare that the mortgagee must embrace all claims against all persons concerned in a single action, and that if owing to ignorance or mistake he does not do so, he cannot bring a supplementary action afterwards. If, then, when the Legislature said that the mortgagor (or someone representing him) must be a party to every mortgage action, it really intended to say that the mortgagee should be allowed one action, and one action only for the purpose of asserting all his rights, it certainly adopted a most singular method of expressing its intentions. I find it difficult to believe that those responsible for drafting the section had any such conscious idea in their minds.

This, nevertheless, has in effect been held by a series of decisions: *Punchi Kira v. Sangu*,[1] *Peiris v. Weerasinghe* (*supra*), *Weerappa Chetty v. Arunasalam Chetty*,[2] *Ramanathan Chetty v. Cassim*,[3] and *Eliyatamby v. Valliamma* (*supra*), and these decisions have been confirmed by a decision of the Full Court in *Suppramaniam Chetty v. Weerasekera* (*supra*).

The *ratio decidendi* of that decision is not unanimously formulated. Ennis J. bases his judgment on the supposed general intention of the chapter, and here he is in accord with what appears to be the spirit of the previous cases. Shaw J., however, puts the case on another ground, viz., that " if the mortgagor or his representatives has been sued and a decree obtained against him in the first action, he cannot again be sued in a subsequent action in respect of the same matter." Herein he is proceeding on somewhat the same lines as Middleton J. in *Ramanathan Chetty v. Cassim* (*supra*), where he bases his decision on section 34 of the Civil Procedure Code, which requires every plaintiff to include all his remedies in one action, unless he obtains the previous consent of the Court to do otherwise. De Sampayo J. simply concurred in the decision with a view to settling the law.

With regard to what is said by Shaw J. and Middleton J., I find myself unable to concur. I see no difficulty in the mortgagor being made a formal party to a subsequent action, provided that his costs are paid. As to section 34, the remedies there referred to seem to me to be remedies which might be sought against the same defendant. However this may be, these expressions of opinion by Shaw J. and Middleton J. are probably best regarded as incidental only. The case of *Suppramaniam Chetty v. Weerasekera* (*supra*) may be considered as based upon the principle enunciated by Ennis J. who gave the principal judgment.

[1] (*1900*) *4 N. L. R. 42.* [2] (*1909*) *12 N. L. R. 139.*
[3] (*1911*) *14 N. L. R. 177.*

As I myself read the section, section 640 simply declares that the mortgagor should be a party defendant to every mortgage action, and sections 643 and 644, for the convenience of the mortgagee, provide machinery by which a written notice to a puisne incumbrancer may be substituted for his formal joinder as a party. In any case, we are bound by the Full Court decision to the full extent to which it goes, but the question for us in this case is to what extent does it actually go ?

It may be accepted, until the law is amended, that it is the implied intention of section 640 that a mortgagee shall not afterwards assert against a puisne incumbrancer a claim which he might have asserted in the original mortgage action. But surely this can only be the case with respect to a claim which it was necessary for him to assert in order to establish his rights. Was it then necessary for a mortgagee to assert any claim at all against a secondary mortgagee ? Was there anything which compelled him to make a secondary mortgagee a party to a mortgage action ? It seems clear that there was not. Under the pure Roman-Dutch law, as expounded by Mr. Berwick, there was certainly no such obligation on the primary mortgagee. With regard to our own law as developed by practice, all that can be said is that in *Oriental Bank v. Naganader et al.*,[1] which was a case in which the secondary mortgagee asked to be joined, Clarence J. expressed the opinion that the primary mortgagee ought to join in his action any secondary mortgagee of whom he had notice, but the question really to be decided was, whether a secondary mortgagee might be joined, if he so desired. Further, Layard C.J. in *Mayappa Chetty v. Rawter*[2] held that there was nothing in the Civil Procedure Code to prevent a primary mortgagee joining a secondary mortgagee as defendant in his suit to realize the mortgage. But this was a case in which the primary mortgagee wanted to join the secondary mortgagees and the latter objected. In many cases it is certainly most reasonable and convenient that a secondary mortgagee should be joined. Accounts might be gone into for the purpose of settling the mortgage debt in which he might be interested, and he clearly would not be bound by any settlement of accounts in an action in which he was not a party. But if he is so joined, he is not joined for the purpose of any order to be made against him. Apart from any such question of accounts, he is really joined for his own information. But there is no decision prior to the Code, and no enactment of the Code itself which requires him to be joined.

There is, therefore, this distinction between the present case and the previously decided cases. They declare that a mortgagee may not bring a supplementary action to fill up a defect in his original action, but in all those cases there was a defect. The person not sued was a necessary party for the purpose of the realization of the

[1] *(1879) 2 S. C. C. 146.*

[2] *(1903) 6 N. L. R. 220.*

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mortgage. In the present case the person not sued was not a necessary party. In the present case, therefore, I see nothing to prevent the primary mortgagee, if he had occasion to do so, from asserting his rights under the primary mortgage as against any person claiming rights through or under the secondary mortgagee.

But there is another distinction. The primary mortgagee is not bringing a supplementary action, he is only defending himself when assailed. Is it settled law that what the mortgagee may not set up by way of attack, he may not set up by way of defence ? The Full Court decision of *Suppramaniam Chetty v. Weerasekera* (*supra*) does not cover this point. Wendt J. in *Weerappa Chetty v. Arunasalam Chetty* (*supra*) was disposed to think that a primary mortgagee might set up his rights in reconvention. Middleton J. suggested that the judgment against the primary mortgagee in that case should be " subject to such rights thereon as the defendant may be entitled to have declared to be in him by virtue of his mortgage decree." It is not necessary for the purpose of this case to give a decision on this question. Certainly it would be anomalous in fact, though not necessarily impossible in law, that a mortgagee should assert in reconvention a right which he could not claim in a plaint, but in the present case, if the above reasoning is correct, there was nothing to prevent the mortgagee from asserting his rights as against the secondary mortgagee in any way he thought necessary.

It is no doubt the case that the distinction here asserted, between a grantee and a mortgagee, was not contemplated in any of the previous decisions to which reference has been made, but there was no actual occasion in those cases to contemplate it. It is, at any rate, satisfactory that such a distinction can now be made. It is, however, in my opinion, most unsatisfactory that it should be necessary to make it. I am unable to see the justice of the law as declared by *Suppramaniam Chetty v. Weerasekera* (*supra*). In my opinion it is most desirable that the law should be amended by the addition of a proviso to section 640 of the Civil Procedure Code declaring that nothing contained therein, or in the other sections of the chapter, should be deemed to preclude any mortgagee or other person aforesaid from bringing a subsequent action for the purpose of asserting any claim which might have been included in the original action against any puisne incumbrancer, who, owing to ignorance or mistake, had not been made a party or noticed for the purpose of that action, subject to that order as to costs, or other relief as the Court may think just.

In the view I take of the case, it is not necessary for me to express any opinion on the subsidiary question of *lis pendens* which was discussed in the argument.

In my opinion the appeal must be allowed, with costs.

DE SAMPAYO J.—

I agree generally with the conclusions of my Lord the Chief Justice with regard to the construction of sections 640, 643, and 644 of the Civil Procedure Code, and I think that the defendant's appeal should be allowed. With regard to *Suppramaniam Chetty v. Weerasekera* (*supra*), I need only point out, as I expressly said in my judgment, that I concurred in the opinion of the rest of the Court for the sake of conformity. My own opinion on the point involved is to be found in the main portion of my judgment and in *Bodia v. Hawadia*,[1] to which I referred.

I wish to add a word on the contention strenuously urged by Mr. E. W. Jayawardene that the effect of the execution sale under the secondary mortgagee's writ was to wipe out the primary mortgage, and that the only right of the defendant who was the primary mortgagee was to claim the proceeds. This contention would be right if we were to apply the pure Roman-Dutch law on the subject of judicial sales. I need not here give references to the authorities ; they will be found collated at pages 45 and 46 of Mr. Hector Jayawardene's book on the *Law of Mortgage*. I may point out, however, that the Roman-Dutch rule is founded, not upon the nature of the remedies available to mortgagees, but upon the general result of an execution sale of the debtor's property at the instance of a creditor, whether secured or unsecured. When a debtor's property was brought under the hammer, there was, so to say, an informal insolvency of the debtor, and the creditors of all sorts could only claim proceeds, in preference or in concurrence, as the case might be. Notwithstanding the view taken in some of the old local decisions, a judicial sale in Ceylon had not the same significance. So long ago as 1838 it was held in D. C. Negombo, 7,999 (*Morg. Dig., p. 12*), that " a sale in execution is an assignment by operation of law, and the purchaser must take the property subject to the same conditions and liable to the same forfeitures as it was subject and liable in the hands of the original owner." In any case, it is very clear that under the Fiscals' Ordinance, No. 4 of 1867, the sale is only of the " right, title, and interest " of the debtor, and it necessarily follows that any existing burdens on the property remain in force, and for satisfying such burdens the property could be pursued into the hands of the purchaser. See also *Fernando v. Bastian Pieris*,[2] which decided that a Fiscal's sale had not the effect of wipping off any prior incumbrances. Cayley J. observed that the Roman-Dutch law did not obtain in Ceylon in its integrity and in all its details, much less in its modes of procedure, and further noted that the conveyance provided by the Fiscals' Ordinance, No. 4 of 1867, passed to the purchaser only the right, title, and interest of the debtor in the property. Then followed *Ludovici v. Perera*,[3] where it was declared by a strong Bench

[1] *(1913) 16 N. L. R. 463.* [2] *(1875) Ram. Rep., 1872–76, p. 151.*
[3] *(1878) 1 S. C. C. 22.*

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consisting of Phear C.J. and Clarence and Dias JJ. that " the purchaser at an execution sale obtains by his purchase such right or title to or interest in the subject of property sold to him as the execution-debtor has power to pass to him," and Mr. Hector Jayawardene concluded the discussion in his book as follows : " Since 1878, in the case of immovable property our Courts have consistently followed the rule that prevails at present, namely, that a sale of mortgaged property by the Fiscal does not wipe off existing mortgages, and that the mortgagee is not entitled to claim the proceeds of sale, and that a purchaser at such a sale buys the property with all existing incumbrances." The matter is now provided for in the same sense by the Civil Procedure Code, for section 352, which deals with the rights to proceeds sale in Court, has the following proviso :—

> " Provided that, when any property is sold which is subject to a mortgage or charge . . . . the mortgagee or incumbrancer shall not as such be entitled to share in any proceeds arising from such sale."

It is thus clear that both under the law prior to the Code, and much more under the Code, any mortgage existing at the time of a judicial sale is not wiped out, but may be enforced in the usual way against the purchaser.

GARVIN J.—

This is a proceeding under the provisions of section 247 of the Civil Procedure Code. The defendant held a mortgage bearing No. 384 dated September 15, 1910, and registered on October 4 of the same year, of the interests of Eleanor Downall in the premises with which this section is concerned. He put his bond in suit on February 22, 1917, in D. C. Kandy, No. 25,219, and obtained a hypothecary decree on April 24, 1917. The interests were seized by the Fiscal on June 20, 1921, and were then claimed by the present plaintiff.

In the interval between the obtaining of the decree and the seizure, certain other proceedings took place, into which it is not necessary to enter.

The claim was disallowed, and the claimant brought this action to have himself declared entitled to the subject under seizure, and to have it declared that those interests were not executable under the decree in No. 25,219. He succeeded, and the defendant appeals.

The present plaintiff himself makes title through Eleanor Downall, who, by bond No. 202 of July 14, 1912, mortgaged these very interests with one Abeysinghe. That bond was put in suit in D. C. Kandy, No. 25,777, on March 23, 1916, and decree was entered in favour of Abeysinghe on March 23, 1916. The premises were seized on May 8, 1917, and sold on June 28, 1917, to one W. J. Soysa, who obtained a Fiscal's transfer on September 15, 1917. The plaintiff acquired Soysa's interests by deed No. 231 of February 27, 1921.

The plaintiff has certainly proved that his predecessor, W. J. Soysa, had acquired Eleanor Downall's interests at the sale held on June 28, 1917. But that was a sale which was held after the District Court had expressly decreed that the present defendant, as the holder of a mortgage prior in date and prior also in the matter of registration, was entitled to a hypothecary decree was duly entered. The defendant contends that such title as Soysa may have purchased is necessarily subject to, and without prejudice to, his rights to execute the hypothecary decree entered in his favour.

From this position the plaintiff seeks to escape by contending that neither he nor W. J. Soysa, his predecessor in title, were parties to the defendant's hypothecary action No. 25,219, and are not, therefore, bound by it. But it is manifest that it was impossible to make them parties, for the reason that neither Soysa nor the plaintiff had acquired title to or possession of the premises till some time subsequent to the institution of that action, and not till after that action had terminated in defendant's favour. W. J. Soysa was in the position of a person who acquired the interests of a person who acquired interests of a party to an action after a hypothecary decree affecting those interests had been entered in favour of the other party, and the plaintiff's position is no better than that of his vendor.

The plaintiff is therefore driven to take his stand upon his main contention, that inasmuch as defendant, when he registered his mortgage, did not also register an address to which the notices contemplated by sections 642 and 643 of the Civil Procedure Code might be forwarded by subsequent grantees or incumbrancers the mortgage in his favour lost the benefits of priority over subsequent mortgages. In effect it is argued that the penalty of failure on the part of the primary mortgagee to register an address is the total loss of his right to realize his security when there are subsequent grantees or other incumbrancers within the meaning of section 642 of the Code, and that he is left in the position of an unsecured creditor.

But nowhere does the Code expressly place a primary mortgagee under a clear obligation to register such an address, nor does it say that these drastic consequences are to be the penalty of failure to comply with this supposed requirement.

The provisions which have been so often appealed to do no doubt prescribe a procedure which a primary mortgagee may, if he so desires, follow, and if he does so, the decree obtained by him will bind, not only the defendant, but " every grantee, mortgagee, lessee, or other incumbrancer whose deed shall not have been registered, or who shall not have furnished such address as aforesaid."

A decree which frees the property under mortgage of all and every claim by persons who have acquired any and every interest in or charge over these premises from or through the mortgagor

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subsequent to the first mortgage is a decree which a primary mortgagee will ordinarily be well advised to obtain, but the mere fact that a means of obtaining such a decree has been provided does not of itself convey to my mind that it was the intention of the Legislature to deprive the primary mortgagee of his right to obtain a decree, which, though it may not effectually and for all purposes bind all subsequent " grantees, lessees, mortgagees, or other incumbrancers," is still effective to bind such subsequent " incumbrancers," as he deems it sufficient or necessary to bind for the purpose he has in view.

What was the position of a mortgagee prior to the enactment of the Civil Procedure Code ? He had a personal action against the debtor, and a hypothecary action to enforce his right to attach the property under mortgage against the person in possession of the property (*Voet 20, 4, 3 ; Grotius 2, 45, 33*). It was competent to him to pursue these remedies separately or together when the mortgagor was in possession. As regards subsequent or secondary mortgagees and other incumbrancers not in possession, he wanted nothing from them, and he was not required as a condition precedent to being granted a hypothecary decree to join them so long as they were not in possession. They were not necessary parties to the hypothecary action.

When property was sold in pursuance of a hypothecary decree obtained by a subsequent or secondary mortgagee, the purchaser took the property subject to the primary mortgage (*Ramanathan, 1875—151, 1 C. L. R. 1, 6 N. L. R. 169*), it being well-settled law in Ceylon that a purchaser at a Fiscal's sale buys the property with all existing incumbrances, and does not obtain an indefeasible title. The special sanctity and credit attached by the Roman-Dutch law as the same obtained in Ceylon has certainly never been admitted for the last fifty years (*Grenier, 1875, p. 22*).

On the other hand, a sale under a hypothecary decree obtained by a primary mortgagee in a properly constituted action to which persons in possession were parties passed to the purchaser the title of the mortgagor as at the date of the mortgage.

To what extent, if at all, has the position been altered by the Civil Procedure Code ? The material sections are 640 and 643. It is provided by section 640 as follows:—

> " Every mortgagee or person entitled to bring any action for the realization of moneys secured to him upon a mortgage shall sue the mortgagor as defendant, whether such mortgagor is or is not in possession."

In the case of *Punchi Kira v. Sangu* (*supra*), Bonser C.J. interpreted that section as abolishing the right given by the Roman-Dutch law to a mortgagee to sue the party in possession without joining the

mortgagor in the action. There remained some uncertainty as to whether a mortgagee who had obtained judgment against his mortgagor may not maintain a second action to bind persons who were in possession at the time when he instituted his action against his mortgagor. The law has been set at rest by the decision of a Full Bench in the case of *Suppramaniam Chetty v. Weerasekera* (*supra*), the effect of which is summarized in the judgment of Shaw J. as follows.—

> " It (the Civil Procedure Code) did not take away the old common law remedies, but renders it necessary for them all to be sought in one action."

Section 640 has thus been interpreted as altering the law to the extent that a mortgagee must now seek all his remedies in one action, and that it is no longer open to him to proceed in a second action against persons whom he should have made, but did not make, parties to the one action permitted to him.

Neither this nor any other case referred to in the course of the argument has held that the right of a primary mortgagee to obtain a valid hypothecary decree by suing in one action the mortgagor, and where persons other than the mortgagor are in possession, the mortgagor and those persons, has been abrogated; nor have we been referred to any authority for the proposition that failure on the part of a mortgagee to register an address deprives him of his common law right to obtain a valid hypothecary decree by the hypothecary action given him by the common law so long as the mortgagor is made a party defendant to that action.

Now, it is provided by section 643 that a mortgagee shall give notice of his action to " all grantees, mortgagees, lessees, and other incumbrancers" who have registered deeds in their favour, and who have in all other respects complied in the matter of registration of addresses and giving of notice with the provisions of that section. and section 644 says that every person—

> " so noticed not applying to be joined as defendants, and every such grantee, mortgagee, lessee, or incumbrancer whose deed shall not have been registered, and who shall not have furnished such address as aforesaid, shall be bound by the action in all respects as fully as though he had been a party thereto,"

but the effect thus attached to a decree is made subject to the proviso that the mortgagee has himself registered his address and furnished to subsequent grantees, mortgagees, lessees, and other incumbrancers who have complied with the provisions of section 643 with his address. It is nowhere stated that the decree is to be wholly inoperative if a primary mortgagee does not furnish such an

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address. Indeed, it distinctly implies that all persons who have been made parties to the action will be bound by the decree, and that is the position for which the appellant contends; for he argues that so long as a primary mortgagee has joined all the necessary parties, a decree obtained in such an action is valid and binding and has all the effect of a hypothecary decree under the Roman-Dutch law. Doubtless such grantees, mortgagees, lessees, and other incumbrancers as have not been made parties to the action, and who have not received the notice contemplated by section 643, will be entitled to claim that their rights remain intact. This is conceded; but what are their rights? There is nothing in the sections to which I have referred which disclose any intention on the part of the Legislature to enlarge the rights which they enjoy under the common law, or to declare that from and after the date of the enactment of the Civil Procedure Code a primary mortgagee's rights to realize on his mortgage is conditional upon the registration of an address and the giving of notice. If, as is contended, that is a condition precedent to the institution of such an action, I should have expected the obligation to have been expressly and explicitly placed upon the mortgagee. As the section runs, this matter of registration of addresses is only a condition precedent to his obtaining for his decree the special effect of binding, not only the parties to the action, but all subsequent grantees, mortgagees, lessees, or other incumbrancers. The necessary parties to a hypothecary action are the mortgagor, and, in the case where he is not in possession, the parties who are in possession of the property under the mortgage. The advantage of complying with the provisions of the Civil Procedure Code is that not only such persons, but other persons falling within the category of grantee, mortgagee, lessee, or other incumbrancer, are for ever estopped and precluded from bringing an action for the purpose of impeaching the decree obtained by the primary mortgagee or any other action available to them in law to protect their interests. If a primary mortgagee chooses to ignore the benefits of these sections, he is at least entitled to claim for his decree that effect which is accorded to it by common law. I am aware of no judgment of this Court which directly or indirectly declares that a primary mortgagee who has not complied in the matter of notice with the provisions of section 643, but has complied in the matter of the constitution of his action with the requirements of the common law, does not take a decree which has the binding force accorded to a hypothecary decree by the common law. It would, indeed, be a serious thing to hold that a duly registered primary mortgage is to be subordinate to an unregistered secondary mortgage, unless the duty to register an address is clear, and unless it is clear also that failure to do so is to be visited by so drastic a penalty. In my opinion the provisions of the Civil Procedure Code have not taken away the rights of action available to a mortgagee under the

Roman-Dutch law, except to the extent that where in the past several actions were open to him he is now restricted to one action, in which he must join all necessary parties if he is to obtain a valid hypothecary decree.

Since writing the above I have had the advantage of seeing the judgment of my Lord the Chief Justice, with which I agree.

Set aside.