THE

INDIAN LAW REPORTS,

Bombay Series.

PRIVY COUNCIL*.

BANK OF BOMBAY AND OTHERS (DEFENDANTS) *v.* SULEMAN SOMJI AND OTHERS (PLAINTIFFS) AND OTHERS (DEFENDANTS).

1903.
May 13, 14.
July 31.

[On appeal from the High Court of Judicature at Bombay.]

Mortgagor and Mortgagee—Mortgage by executors and residuary legatees of property which was subject to a charge under the will—Deposit of title-deeds previously with mortgagees—Constructive notice—Mortgagee's omission to investigate title—Creditors and legatees under will—Lapse of time between testator's death and execution of mortgage, effect of.

A Hindu carrying on business in Bombay died in 1885 having executed a will by which he left to his four elder sons certain immoveable property subject to a charge of Rs. 30,000 in favour of his widow and four younger sons, and made his four elder sons executors and residuary legatees of his will, directing them to carry on the business. After their father's death the elder sons in the course of their business transactions became indebted to the Bank of Bombay in respect of advances by the Bank, to secure which on 13th September 1890 (two of the younger sons being then minors), the elder sons deposited with the Bank by way of equitable mortgage certain title-deeds relating to the property charged by the will; and on 12th January 1899 executed a mortgage of the same property in favour of the Bank for Rs. 52,000 without stating the charge upon it. In one of the documents of title deposited with the Bank the title of the mortgagors was indicated, and had the Bank investigated the title (which they did not do) they would have been put upon inquiry and would

* *Present* :—LORD MACNAGHTEN, LORD ATKINSON, SIR ANDREW SCOBLE and SIR ARTHUR WILSON.

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have become aware of the charge created on the property by the will. The younger sons only became aware of the transaction in June 1903 when the Bank advertised the property for sale under their mortgage. In a suit brought by them on 15th September 1903 against the Bank and the mortgagors to establish the priority of their charge over the mortgage to the Bank, the latter pleaded that the mortgage was made for valuable consideration, and that they were *bonâ fide* transferees without notice.

Held (upholding the decision of the High Court) that under the circumstances the Bank had constructive notice of the charge under the will. The Bank had on the facts dealt with the mortgagors not as executors but as persons pledging their own property for their own debts, and under the circumstances took no better title than that which their debtors really had in the capacity in which they were dealt with, namely, residuary legatees.

In re Queale's Estate (1) followed.

Held also that, the plaintiffs being legatees the Bank took the property subject to the charge upon it created by the will. Distinction drawn between creditors and legatees in such a case: Spence's "Equitable Jurisdiction," Vol. II, page 376, referred to.

By the terms of the will the legacy was to be made up and paid within six years after the testator's death which period expired in 1891, and the mortgage was not executed until eight years afterwards; and it was contended that assuming that the Bank had notice of the will they were entitled to assume that the executors were acting with the consent of the legatees (plaintiffs).

Held that, although in cases of this kind delay was a circumstance to be taken into consideration, yet, having regard to the fact that two of the plaintiffs were still minors when the title-deeds were deposited with the Bank, and that continued possession by the executors and mortgagors was not inconsistent with the purposes of the will, the rights of the parties were unaffected by that circumstance.

APPEAL from a decree (14th April 1905) of the High Court at Bombay in its appellate jurisdiction which reversed or varied a decree (23rd August 1904) passed by a Judge of the said Court sitting in exercise of its Original Civil Jurisdiction.

The main question for decision on this appeal was whether a mortgage, dated 12th January 1899, in favour of the appellants, the Bank of Bombay, had priority over the claims of certain pecuniary legatees under the will of one Somji Parpia deceased.

The testator was a Khoja Mahomedan, inhabitant of Bombay, who traded as a furniture dealer and died on 15th February

(1) (1886) Ir. L. R. 17 Ch. D. 261 at page 368.

1885. He had a brother Dhanji, and both the brothers jointly purchased a house in Bhájipala Street, one of the properties now in dispute. Dhanji died childless in 1867 leaving his widow, Meenabai, as his heir.

At Somji Papia's death he left him surviving his widow Labai and eight sons, of whom four were sons of a former wife, namely, Rahimtoola Somji Parpia, the respondent Jaffer Somji, Goolam Hussein Somji, and the respondent Alladin Somji. The four younger sons were the respondents, Suleman Somji, Goolam Ali Somji aged 4, Mahomed Somji, and Habib Somji (who were twins) aged 2.

The will of Somji Parpia was dated 13th February 1885, and by it, after enumerating the items of property belonging to him (which included the moiety of the house in Bhájipala Street, and the entirety of some land in Falkland Road on which the Elphinstone Theatre was erected, and which then stood in the name of his son Goolam Hussein Somji) and defining his heirs made the following (among other) provisions.

"*Clause 3.*—I bequeath all my abovementioned property, such as all the goods in the two shops, outstanding debts, claims and debts and the abovementioned moiety of the house, situated in Bhajipala Street and the theatre, &c. (*i. e.*), the whole of the (said) property and goods to the sons of my former deceased wife (namely), Rahimtulla, Jaffer, Gulam Hussein and Alladin (4 persons). None of (my) other heirs has any claim or title thereto. But as to the moiety of the abovementioned house belonging to me I exclude the right thereto of my elder son Rahimtulla and I reserve the right of my three sons only, namely, Jaffer, Gulam Hussein, and Alladin, these three persons to (my) said moiety of the house. To the remaining property the abovementioned four persons are entitled in equal (shares).

"*Clause 4.*—For (my) remaining heirs I order my abovementioned sons (four persons), whose names are Rahimtulla, Jaffar, Gulam Hussein, and Alladin, that they shall duly give and act in accordance with what is written below:—

"*Clause 5.*—To my present surviving wife Labai and to her sons named Suleman, Gulam Ali, Mahomed and Habib my said elder sons, four persons to whom I entrust all my goods and property, shall within 6 years, namely six years after my decease, duly make up and pay Rs. 30,000, namely thirty thousand, to my surviving wife and to her sons. The same shall be paid (to them) in the following manner. No interest on the said (sum of) money shall be paid up to the abovementioned period, and upto that period there shall duly be paid Rs. 125, namely one hundred and twenty-five every month, for

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house-hold expenses and before the abovementioned sum of Rs. 30,000, namely thirty thousand, is fully made up if the betrothal (or marriage, &c.) of any son or daughter should take place, then as to the proper (sum of) money that may be required for the expenses thereof the same shall truly be paid out of the (abovementioned) sum, and when the abovementioned sum of Rupees thirty thousand shall have been fully made up (and paid) then from that day the aforesaid (sum) of Rupees one hundred and twenty-five, being the amount of the instalment payable every month for the expenses shall duly cease, that is to say, the same shall not be paid thereafter. Besides this my second surviving wife and her children shall have no manner of right or claim against the four persons (namely my) sons by my first deceased wife, or against my said goods and property in any way whatever.

"*Clause 6.*—As to the (sum of) Rupees thirty thousand directed to be paid out of my abovementioned goods and property as a share of inheritance by my abovementioned elder sons (four persons) to my surviving wife and her sons mentioned in the 5th Clause, I appoint four persons as trustees in respect of the said (sum of) money. Their names are Jaffer Somji, Gulam Hussein Somji, Jaffer Ladhabhai Chatu and my second surviving wife. I appoint these four persons (as trustees) and I direct them as follows:—The said (sum of) money shall truly be appropriated in accordance with what is written below. Out of the abovementioned sum of Rupees thirty thousand which my elder sons shall pay to my surviving wife and her sons as a share of inheritance the outlays on auspicious and inauspicious occasions, whatever the same may come to—having been deducted, as to whatever sum may remain over, a good estate or a house shall be purchased therewith and given (to them). The same shall be purchased in the names of my surviving wife and her sons and given to them; or (the money) shall be deposited at interest at a good place, and out of the income that may be realized therefrom, (moneys) shall be paid to my surviving wife during her lifetime for her and her children's lodging food and clothes and other expenses. And after the decease of my surviving wife when her youngest son shall come of age whatever property there may be (left out) of the said (sum of) Rs. 30,000 the same shall truly be divided and given in equal shares to her children.

"*Clause 9.*—I recommend my four elder sons mentioned in the 4th Clause as follows:—If my second surviving wife and her sons should live in peace and harmony with them (my sons) shall allow them to live in the moiety belonging to me of the said house situated in the Bhajipala Street.

"*Clause 10*—I recommend my said four elder sons, to whom I bequeath all my goods and property, shop, &c., as follows:—After my life-time they shall continue to carry on trade and business in my name and having come to an understanding between themselves and apportioned their respective shares they shall make a writing in respect thereof and shall carry on trade and business in accordance with their own free will and pleasure.

"*Clause 12.*—I nominate or (and) appoint my said four sons named Rahimtulla, Jaffer, Gulam Hussein and Alladin executors of (this) my said will."

Meenabai, the widow of Dhanji, died in 1889 leaving a will dated 18th December 1880 by which after reciting that the house in Bhajipala Street had belonged to Somji Parpia and her husband in equal shares, she bequeathed the half-share which came to her from her husband to Rahimtulla Somji Parpia whom she described in the will as her and her husband's adopted son.

After the death of Somji Parpia the four elder sons and the widow Labai (until her death in 1894) and the four younger sons all lived amicably in the house in Bhajipala Street; and the four elder sons took over the whole of the property and carried on business as Somji Parpia and Company, the Bank of Bombay acting as their bankers; and in the course of their business they became largely indebted to the Bank, and eventually on 12th January 1899 executed in favour of the Bank the mortgage now in suit for Rs. 52,000, as security for which they deposited with the Bank certain documents relating to the house in Bhajipala Street, namely a copy of the will of Meenabai, and a conveyance dated 12th March 1861, by one Khan Mahomed Habibhoy and Karim Khatav to Dhanji Parpia; and others relating to the Elphinstone Theatre in Falkland Road, namely, a copy of lease, dated 14th October 1892, by one Sha Mulchand Nensey to Gulam Hussein Somji Parpia; a conveyance dated 26th August 1882 by one Peerbhoy Nathu to Gulam Hussein Somji; and an Indenture dated August 22nd 1884 between one Javerbai and Gulam Hussein Somji. The mortgage included the house in Bhajipala Street and the land in Falkland Road with the theatre erected thereon which are in dispute on this appeal.

In June 1903 the Bank of Bombay, in exercise of the power contained in their mortgage, advertised the sale by public auction of the properties comprised in it, whereupon the four younger sons of Somji Parpia gave notice in writing to the Bank that under the will of their father they claimed a charge on the properties in suit to the extent of Rs. 30,000 and that if the properties were sold they should be sold subject to the charge. The Bank postponed the sale after having intimated in writing that the sale was to be of the right, title and interest of the mortgagors.

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The four younger sons then, on 15th September 1903, filed the suit out of which the present appeal arose, against the four elder sons and the Bank claiming a charge on the properties in suit in priority to that of the Bank for the balance they stated to be due to them in respect of the legacy of Rs. 30,000. They alleged that the mortgage was executed in fraud of their rights and in breach of the trust imposed on the first four defendants by the will of Somji Parpia; and that the Bank took the mortgage with actual or constructive notice of the charge; and they asked for a decree for the due administration of the properties of the deceased Somji Parpia which they alleged became vested in the first four defendants as his executors and heirs, subject to the charge.

On 14th January 1904 before the suit came on for hearing the Bank of Bombay transferred their mortgage to one Dwarkadas Dharamsey who was added as a defendant to the suit.

The defendant Rahimtulla did not defend the suit. The defences made by the other defendants appear from the issues which were as follows:—(1) What was the property or properties conveyed by the mortgage of 12th January 1899? (2) Whether the plaintiffs have a charge on the property, the subject of the said mortgage? (3) Whether the Bank of Bombay were not *bonâ fide* transferees for value of the property mentioned in the said mortgage? (4) Whether the Bank of Bombay had notice of the charge, if any, in favour of the plaintiffs? (5) Whether the plaintiffs are entitled to the relief claimed or any part thereof? (6) Whether in any event plaintiffs have any claim to one moiety of the Bhajipala Street property subject to the said mortgage?

On these issues the first Court (CHANDAVARKAR, J.) held that on the construction of Somji Parpia's will the plaintiffs had a charge on the properties conveyed by the mortgage; that the Bank had no actual notice of the charge made by the will; but that they had constructive notice of it from the recitals in Meenabai's will which was one of the documents deposited in their custody; that according to the law in India there was no distinction between the powers of an executor over the real pro-

perty and personal estate of a testator such as obtains in English law; that a purchaser or mortgagee from an executor who was also devisee obtained a free, complete, and valid title unaffected by the debts or legacies charged, unless it was clearly proved that the purchaser or mortgagee had notice of any fraud or breach of duty on the part of the devisee-executor in the transaction; that the Bank did not know of the breach of trust on the part of the defendants 1 to 4 and was not a party to their fraud; and that the Bank were *bonâ fide* transferees for value of the properties comprised in their mortgage.

As to the findings on the 3rd and 4th issues the learned Judge said:

"If then I must presume from the fact that the Bank had notice of the recitals in Meenabai's will that they had notice of the charge in plaintiffs' favour under their father's will and of the capacity of the defendants 1 to 4 as absolute devisees and executors, I must deal with the equities between the parties to the mortgage on the footing that defendants 1 to 4 mortgaged the properties to the Bank in both the capacities and gave a good title unless it be proved that the Bank had knowledge that the loans advanced by them which formed the consideration for the mortgage were the personal debts of defendants 1 to 4."

And after considering the evidence as to that and the circumstances of the case bearing on the matter he concluded:—

"Upon the whole then I am not satisfied that the Bank knew of the breach of trust on the part of the defendants 1 to 4 and was a party to their fraud.

"The truth of the matter appears to me to be this. Judging from the evidence and the surrounding circumstances neither Labai and her adult son plaintiff No. 1 nor defendants 1 to 4 had any idea that the legacy in favour of the former was a charge on the property. All the parties lived amicably in the same house and thought as defendants 1 to 4 had the property absolutely bequeathed to them under their father's will they had every right to alineate it. Defendants 1 to 4 began to trade on their own account and the parties thought that that would bring in more money to them and enable them to make up the legacy to Labai and her sons. It cannot be that Labai and plaintiff 1 were unaware of the fact that defendants 1 to 4 had deposited their deeds with the Bank and were contracting debts. They hoped to share in the profits which defendants 1 to 4 were expected to make out of their trade by having their legacy provided out of those profits. The Bank were not informed of the legacy or the will because the parties believed that the legacy had nothing to do with the property bequeathed to defendants 1 to 4. When however they saw that Ahmedbhoy had fallen out with defendants 1 to 4 and the Bank

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were trying to enforce their rights under the mortgage, they (plaintiffs and defendants 1 to 4) found that plaintiffs had a charge and that that was a good weapon of attack. These are the probabilities of the case and they go to support the *bonâ fides* of the Bank. * * * * * * * *

Chandavarkar, J., also held that Meenabai had no power to dispose of the moiety of the Bhaji Pala Street property by will and that therefore the half part of that moiety which devolved on the plaintiffs was unaffected by the mortgage; and that the theatre on the land in Falkland Road was included in the mortgage to the Bank.

The decree was that the Bank had a prior charge on the properties mortgaged which comprised three-fourth parts of the house in Bhaji Pala Street, and the entirety of the land and buildings in Falkland Road; that the plaintiffs were entitled to the remaining one-fourth part of the house in Bhaji Pala Street; and they were entitled to a charge for the legacy in the will but ranking subsequently to the Bank's mortgage.

From that decision the plaintiffs appealed, and the Bank and Dwarkadas Dharamsey filed cross-objections claiming that the whole of the house in Bhaji Pala Street was comprised in their mortgage. The first four defendants appealed from the finding that the mortgage included the building on the land in Falkland Road.

The appeals were heard by Sir L. JENKINS, C. J., and BATTY, J., who agreed with the lower Court that the plaintiffs had a charge on the property; that the Bank had constructive notice of the will; and that there is according to Indian law no such distinction as there is in English law between moveable and immoveable property; but they held without impeaching the *bonâ fides* of the Bank, that the Bank's mortgage was subject to the payment of the plaintiff's legacy of Rs. 30,000. The material portion of the judgment, which was delivered by the Chief Justice, was as follows:—

"Though the 1st four defendants derive their title from the will of their father, it is not suggested that this was known to the Bank. This want of knowledge was not due to any concealment on the part of the mortgagors; the Bank made no investigation of title, and so far as the mortgage of the 12th

January 1899 goes took this security without any enquiry, assuming that the mortgagors were the owners of the property mortgaged. But ignorance resulting from abstention to make the ordinary investigations and enquiries cannot better the Bank's position. In not investigating the title under which he takes a person is ordinarily guilty of great and culpable negligence (*Jones* v. *Smith*(1) and *Neesom* v. *Clarkson*(2)) which disentiles him from defeating claims that would have come to his notice had he exercised reasonable care.

"The title therefore under the mortgage must be judged as though the Bank had actual notice of the will and its contents. What then would have been its knowledge with that notice? It would have seen that in his will the testator gave a list of his properties; that he gave all those properties to his four sons, the first four defendants; that he directed those four sons to whom, as he said, he *entrusted all his goods and property* to pay within 6 years the legacy in respect of which the plaintiffs now claim; that he described that legacy as directed to be paid out of his *abovementioned goods and property as a share of inheritance* by the first four defendants; and that he appointed his first four sons executors of his will.

"And so we have to see how matters would have stood had the Bank taken the mortgage with that knowledge.

"It must be borne in mind that for this purpose there is no such distinction here, as there has been in England, between moveable and immoveable property. The English authorities, therefore, which appear to me most pertinent, are those that relate to the disposition by executors of personal estate, and they have not been cited in argument either here or before the first Court. These authorities may legitimately be considered, for in regard to the questions at issue the law here and in England runs at parallel lines.

"I will first then consider the first four defendants' power to effect the mortgage as executors of their father's will.

"Executors have full power of disposal over their testator's estate, and generally speaking neither creditors nor legatees can follow assets alienod for value in exercise of that power. And so strong is this rule, that the alienees for value are safe in their title, though the alienation was for a purpose foreign to the will, if they took without notice of this vice. But if the alienees take with notice, then they are in no better position than the executors from whom they claim, and the assets can be followed in their hands both by creditors and by legatees, who have been prejudicially affected. *Elliot* v. *Merriman*(3), *Bonney* v. *Ridgard*(4), *Hill* v. *Simpson*(5).

(1) (1843) 1 Phillips 244 at p. 255, 1 Hare 43.
(2) (1842) 2 Hare 163 at p. 173.
(3) (1740) Barn. 78 : 2 Atk. 41.
(4) (1784) 1 Cox. Ch. 145 cited in 4 Bro. Ch. C. 150.
(5) (1802) 7 Ves. Jun. 152.

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"We must therefore see whether in this case the money intended to be secured by the mortgage was applied in accordance with the duties of the first four defendants as executors. It is clear it was not: it was applied wholly for the private purposes of the executors, and this was a devastation of the testator's assets.

"Then, had the Bank notice of this? We start with the fact that the Bank admittedly did not deal with the first four defendants as executors, but as owners of the property mortgaged; this was conceded before us in argument and is a fair inference from what is stated in the mortgage. Then the consideration for the mortgage was not an advance at the time but an antecedent liability of the first four defendants; and the materiality of this is a matter of common and obvious comment: *M'Leod* v. *Drummond*(1).

"But the matter does not rest there, because the recitals in the deed clearly indicate that the liability arose in connection with partnership transactions in which the first four defendants were jointly engaged. From the recitals it appears that the liability was in respect of bills drawn by the mortgagors' Bombay firm on their Indore firm and the Bank's witness Chunilal states in reference to the Indore firm that they 'used to draw hundies on themselves in Bombay under instructions from the head office of the Bank of Bombay.' This point is not clearly made in the pleadings, but the Bank's Counsel raised the issue, 'Whether the Bank of Bombay were not *bonâ fide* transferees for value of the property mentioned in the mortgage,' and it was apparently discussed before Chandavarkar J. as it certainly was before us, without any complaint that it was outside the legitimate scope of the suit.

"On a consideration of all the materials in the case I hold that the Bank knew that the assets were applied to the private purposes of the executors, and that treating the mortgage, as I at present do, as one by the first four defendants in exercise of their executorial powers the Bank became a party to the devastation: see *Wilson* v. *Moore*(2). The result would be if things rested there that the plaintiffs as pecuniary legatees prejudiced by the mortgage could follow the assets into the hands of the Bank or its transferee.

"In coming to this conclusion I have not overlooked *Nugent* v. *Gifford*(3) and *Mead* v. *Lord Orrery*(4). But they cannot be regarded as authorities on the facts with which I have hitherto been dealing. Lord Brougham said of them in *Wilson* v. *Moore*(5): 'It is impossible to read the argument of Lord Hardwicke in each of these decisions without being satisfied that he considered the knowledge of the executors' misappropriation as not distinctly brought home to the party.' And in *M'Leod* v. *Drummond*(6) Lord Eldon says that 'It is impossible to deny that Sir Thomas Sewell in effect, and Lord Kenyon in terms, shook the authourity of *Nugent* v. *Gifford*(3) and *Mead* v. *Lord*

(1) (1809-10) 17 Ves. Jun. 152 at p. 155.
(2) (1834) 1 Myl. & K. 337.
(3) (1738) 1 Atk. 463.
(4) (1745) 3 Atk. 235.
(5) (1834) 1 Myl. & K. 337 at p. 355.
(6) (1809-10) 17 Ves. Jun. 152 at p. 165.

Orrery(1); if those cases are supposed to establish doctrine so general as some of the dicta upon this subject import.' But in the suggested explanation of these cases it has been pointed out that in *Nugent* v. *Gifford*(2) the executor was the sole residuary legatee, and in *Mead* v. *Lord Orrery*(1) he was one of the residuary legatees: *M'Leod* v. *Drummond*(3), though Mr. Roper in his work on legacies maintains that this circumstance did not influence Lord Hardwick.

"And this leads me to consider how far it makes a difference in the case that the first four defendants were universal lagatees as well as executors. That this may in some respects alter the position is apparent from *Taylor* v. *Hawkins*(4), and *Graham* v. *Drummond*(5).

"In *Graham* v. *Drummond*(5) a second mortgage from an executor and residuary legatee was held to have a title which prevailed against creditors and Romer, J. (as he then was), in delivering judgment said: 'I think it is settled law that, if an executor who is also residuary legatee sells or mortgages an asset of the testator for valuable consideration to a person who has no notice of the existance of unsatisfied debts of the testator, or of any ground which rendered it improper for the executor so to deal with the asset, that person's purchase or mortgage is valid against any unsatisfied creditor of the testator.' Later the learned Judge says: 'The Chief reasons given are that unsatisfied creditors have no lien or charge on any asset, and that persons dealing with the executor in good faith are entitled to look to him alone, and are not bound to ascertain that all debts and liabilities have been discharged. For if they were so bound, they would never be safe in dealing for valuable consideration with any asset, even though a considerable time might have elapsed since the testator's death (as happened in the case before me), and so a legatee whose legacy was assented to by the executor would be unfairly and unduly hampered in dealing with it. Further, the case of an executor who is a residuary legatee dealing with an asset is the same in principle as the case of a legatee who is not executor, but whose legacy has been assented to by the executor, and who deals with his legacy for valuable consideration. In the last case unsatisfied creditors have the right to follow the legacy as against the legatee or volunteers claiming through him, but not as against purchasers from the legatee for valuable consideration.' But in *Graham* v. *Drummond*(5) as in *Taylor* v. *Hawkins*(4) it was a creditor who sought to impugn the alienation: here the plantiffs are legatees.

"This is not a fanciful distinction; it is recognised in *Spence's Equitable Jurisdiction*, Vol. II, p. 376, where it is said 'A mortgage by an executor who is also residuary legatee to secure his private debt may be set aside even at the suit of a pecuniary lagatee, for the nature of the claims of legatees, they taking under the will, may be ascertained; but as to creditors it is different; if

(1) (1745) 3 Atk. 235.
(2) (1738) 1 Atk. 463.
(3) (1809-10) 17 Ves. Jun. 152 at p. 165.
(4) (1803) 8 Ves. Jun. 209.
(5) [1896] 1 Ch. 968.

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a reasonable time has elapsed since the death of the testator, and then the executor deals with the residue as his own, the purchaser may, in the absence of notice to the contrary, assume that the debts have been paid, or that there are other assets to payment of the debts, if any; therefore the mortgagee would be safe as against creditors.'

"If the view of Chandavarkar, J., is correct, there is a still further distinction, for he held that the legacy was charged on the property in suit, while the decision in *Graham* v. *Drummond*(1) proceeded on the ground that 'unsatisfied creditors have no lien or charge on any asset'. In support of this view Chandavarkar, J., has relied not only on the language of the will as rendered in the translation before the Court, but also on the vernacular, which seemed to him to bring out the intention still more clearly.

"I have nothing to add to the reasoning of the learned Judge on this point; my only doubt has been whether it can be said that the charge is nugatory and inoperative, as adding nothing to the obligations that would exist without it: *cf. Scott* v. *Jones*(2); *Freake* v. *Cranefeldt*(3). But agreeing as I do with Chandavarkar J. as to the effect of the will, I think there is a charge on specific property which has a legal operation: *cf. Girish Chunder Maiti* v. *Anundo Moyi Debi*(4). The testator in the first clause of the will enumerates the items of which his property at that time consisted and he therein mentions the property in suit. It is on the 'above mentioned goods and property', that the charge is imposed, and though in fact he died two days after the execution of the will, he might have acquired other property, to which this express charge would not have applied.

"Had the Bank's advisers seen the will they would have learnt of the legacy and that it was charged on the property in suit. This must have led to the enquiry whether the legacy had been discharged, and we must assume that an honest and not a false answer would have been given: *In re Morgan*(5) and *In re The Alms Corn Charity*(6). That answer must have been that the legacy had not been satisfied, and if the Bank took with knowledge of that fact, it would have held subject to the charge.

"I see no reason to suppose that the mortgagors would have met the enquiry with the answer that the Bank must be satisfied with the fact that the mortgagors were both executors and legatees of the property and must take that as evidence of assent, for even apart from the specific charge it would have been wrong on their part to have deprived the legatees of the right they had to have the property realized for payment of the legacy, and we ought not to presume that they would have done an act which would have been a breach of trust: *In re Queale's Estate*(7).

(1) [1896] 1 Ch. 968.
(2) (1838) 4 Cl. & F. 382.
(3) (1838) 3 Myl. & Cr. 499.
(4) (1887) 15 Cal. 66; L. R. 14 I. A. 137.
(5) (1881) 18 Ch. D. 93 at p. 102.
(6) [1901] 2 Ch. 750 at p. 762.
(7) (1886) 17 Ir. L. R. Ch. D. 361 at p. 368.

"This last cited case, a decision of the Court of Appeal in Ireland, bears a striking resemblance to the present, and there the Bank, a mortgagee by deposit of title deeds, was held to be postponed to a pecuniary legatee who had no specific charge.

"No doubt some reliance is placed on the fact that the mortgage was only equitable, but the cases seem to show that for the purpose in hand it makes no difference that the assignee or mortgagee does not obtain the legal estate in or legal control over the asset: see *Graham* v. *Drummond*(1).

"The question seems to hinge not so much on the character of the disposition as upon whether the circumstances justified the inference that the mortgagor was in possession as legatee and not as executor, and on this point the reasoning in the Irish decision is closely applicable to the facts of this case.

"Mr. Roper in his work on Legacies at page 443 deals with a disposal of an asset by one in whom the double character of executor and legatee is combined, and after pointing out that as mere executor his disposal of assets to pay or secure his own debt would not prejudice individuals interested under the testator's will, he says, 'and as residuary legatee he could only dispose of what he was entitled to in that character, *viz.*, what remained after all the trusts of the will were performed. It appears then that the accident of an executor being also residuary legatee cannot upon principle impart to him any larger authority over the assets than what he possessed by virtue of his office as executor.' No doubt the learned author does not here notice the implication of assent to which Romer, J., alludes in *Graham* v. *Drummond*(1) but the passage shows what in his opinion the position would be apart from assent. Here there was no representation to the Bank that the mortgagors were legatees to whose legacy an assent had been given; the Bank had no knowledge and sought no knowledge as to the title; and as I have already said we ought *not* (in my opinion) to presume that the mortgagors would have made any representation involving a breach of trust.

"In Mr. Lewin's book on Trusts, pages 529, 530 of the 9th Edition, we have a conveyancer's view of the position.

"The whole doctrine which enables an executor legatee to dispose of a testator's assets to the detriment of claimants under the will is founded on convenience; but I cannot see in the circumstances of this case anything that requires us on that score to treat the Bank as alienees free from the legacy bequeathed by the will.

"It is true that in the cases there are expressions which point to fraud or collusion as being an essential element but this is not an exhaustive statement of the law. *Hill* v. *Simpson*(2) shows that gross negligence will suffice. There an executor and residuary legatee assigned to his bankers certain stocks

(1) [1896] 1 Ch. 968 at p. 975. (2) (1802) 7 Ves. Jun. 152.

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as a security for his private debt, and the Bank accepted without looking at the will his representation that he was residuary legatee subject only to a few small legacies. It was, however, held by Sir William Grant that the funds were liable to answer the demands of persons treated as being in the position of pecuniary legatees. The Master of the Rolls in the course of his judgment remarked 'common prudence required that they should look at the will, and not take the debtor's word as to his right under it. If they neglect that and take the chance of his speaking the truth, they must incur the hazard of his falsehood. The rights of third persons must not be affected by their negligence. I do not impute to them direct fraud; but they acted rashly, incautiously and without the common attention used in the ordinary course of business; the reference in the will of Mrs. Smith to the will of her husband making it the same as if a legatee of her own was disappointed by this. It was gross negligence not to look at the will under which alone a title could be given to them. It was not necessary to use any exertion to obtain information which without extraordinary neglect they could not avoid receiving. No transaction with executors can be rendered unsafe by holding that assets transferred under such circumstances may be followed.' So here, I do not impute direct fraud to the Bank, but it certainly was guilty of gross negligence unless (as the circumstances suggest) the Bank was content to get what it could, and so that its conduct should be judged not by the standard of one exercising an unfettered choice, but of one seeking to secure a desperate debt as best he can.

"There is much in common between the facts of *Hill* v. *Simpson*(1) and those now under consideration, the principal divergence being the difference in the time that elapsed between the coming into operation of the will and the impugned disposition. There as here we find a complete transfer by way of security while the present case is stronger in that there the claimant was treated as being in the position of a simple pecuniary legatee without a specific charge. No doubt here there is the difference that a considerable time had elapsed between the death of the testator and the mortgage in suit, but in the opinion of Chatterton, V. C., 'the circumstance that there the transaction was very shortly after the death of the testator was not the only or even the main ground on which the Master of the Rolls grounded his decision'. *Connolly* v. *Munster Bank*(2).

"Moreover *In re Queale's Estate*(3) shows that lapse of time is not necessarily a bar where, as here, possession is consistent with the purposes of the will, and in the argument before us no contention was based on the lapse of time as a bar to the suit or a circumstance affecting the rights of the parties.

"Hitherto I have dealt with the cases as though the Bank's claim rested on the mortgage of the 12th of January 1899, and on that alone and as a consequence that the charge was to secure an antecedent debt. But Mr. Inverarity

(1) (1802) 7 Ves. Jun. 152. (2) (1887) Ir. L. R. 19 Ch. D. 119 at p. 127.
(3) (1886) Ir. L. R. 17 Ch. D. 361.

has sought to escape from this position and the inferences it involves, by suggesting that long before this there had been a mortgage by deposit of title deeds; therefore, he argues it cannot be said that the security originally was for an antecedent debt. But no reference is made to this in the Bank's written statement nor was any issue raised on the point. The evidence as to the deposit is of the vaguest description and leaves it absolutely uncertain what was the liability in respect of which the deposit was made. There certainly is no ground to assume that the documents of title were deposited to secure a contemporaneous advance: for the deposit alleged is said to have been made in 1890 while the evidence of the 1st defendant is that his firm began to get credit from the Bank of Bombay about a year or a year and a half after his father's death, *i. e.*, in 1886 or 1887 and this is confirmed by Ex. A 4.

"I must not omit to notice the learned Judge's determination that clause 10 of the will does not forward the Bank's claim. Apparently it was never suggested until the plaintiff's reply that the clause had any bearing on the case, and then the suggestion proceeded from the learned Judge who on further reflection decided not to hear the plaintiffs' Counsel on the point, having regard to the admitted facts of the case and the terms of the will. It is admitted that the testator carried on a business in his lifetime and that the business of the partnership in respect of which the indebtedness was incurred was in no sense a continuance of it, and it is manifest that the Bank was not misled or influenced by the presence of this clause. In the circumstances therefore I am of opinion that the Bank's position is in no way bettered by clause 10 of the will.

"I see that in the course of his judgment it is said by Chandavarkar, J., that 'It cannot be that Labai and plaintiff No. 1 were unaware of the fact that defendants 1 to 4 had deposited their deeds with the Bank and were contracting debts'. If by that is meant that Labai and plaintiff No. 1 knowingly stood by and permitted defendants 1 to 4 to deal with the Bank as if they were the absolute owners of the mortgaged property, it so far as these two were concerned might have made a material difference in their rights. But no plea to this effect is to be found in the pleadings nor is the point raised in the issues; not a word in support of this view was urged in the course of the argument before us, and I cannot find any real foundation for it in the evidence. The first plaintiff distinctly says that the first intimation he had of the mortgage was in June 1903. I think therefore the suggestion of the learned Judge can be no more than mere speculation and impression and therefore not a legitimate basis for legal decision.

"The conclusion therefore to which I have come on this part of the case is that the plaintiffs' claim must prevail over the mortgage to the Bank and the title of its transferee."

The appellate Court dismissed the appeal of the first four defendants and overruled the objections taken by the Bank and Dwarkadas Dharamsey, and concluded—

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"We must declare that the undivided moiety of the house in Bhaji Pala Street, and the property in Falkland Road left by the will of Khoja Somji Parpia, deceased, form part of the estate of the testator and are as such available for the payment of the plaintiffs' legacy in priority to the claim thereon of the Bank as mortgagee of the same and of its transferee the defendant Dwarkadas Dharamsey.

"The decree must therefore contain a declaration to the above effect."

On this appeal *Sir R. Finlay, K. C.*; *Levett, K. C.*; and *Frank Russell, K. C.*, for the appellants contended that under their mortgage the Bank of Bombay had a complete title to the property mortgaged and not subject to any charge created by the will of Somji Parpia. The mortgage had been executed in good faith and for valuable consideration by the executors of the will who were also residuary legatees, and the Bank was fully justified in believing that their mortgagors were competent to give them a good title. Under the law of India the executors had full power to dispose as they thought fit of all property moveable or immoveable vested in them as executors. The Probate and Administration Act (V of 1881), sections 4, 90, 113, 115, 116, and the Amending Act (IV of 1889), section 14, were refered to. The Bank had no notice, actual or constructive, of the existence of any charge on the property in priority to their mortgage. Under those circumstances, and considering that the Bank had no notice of any other ground which rendered it improper for the executors to deal with the property under the will as the mortgagors had done, the Bank's mortgage was, it was submitted, valid against any unsatisfied creditors of the testator. Reference was made to *Graham* v. *Drummond*[1]; *In re Whistler*[2]; *Colyer* v. *Finch*[3]; and *In re Venn and Furze's Contract*[4]. The two last cited cases showed that the fact that the mortgage purported to secure a debt due from the mortgagors personally was immaterial and did not affect the title of the mortgagee. But even assuming that the Bank had constructive notice of the will, the fact that the mortgage was executed 14 years after the death of the testator entitled the Bank to assume that at the time of its execution the legacy now said to be a charge on the property

(1) [1896] 1 Ch. 968 at pp. 971–974.
(2) (1887) 35 Ch. D. 561.
(3) (1856) 5 H. L. C. 905.
(4) [1894] 2 Ch. 101 (111, 114).

mortgaged had been paid, especially as by the terms of the will it was payable within 6 years after the testator's death; and it was not necessary for the Bank to inquire whether it had been paid or not. Reference was made to *In re Queale's Estate* (1) relied upon by the Appellate Court in India which it was contended was distinguished from the present case by the length of time that had elapsed between Somji Parpia's death and the execution of the mortgage; and by the fact that in the case in Ireland the mortgage was merely an equitable one. Lewin on Trusts, 11th Ed., page 557, was also referred to. The executors had full power to pledge the assets of the testator's estate, and no concurrence or assent of the plaintiffs was necessary to free the mortgage, at its execution, from the charge, if any, created by the will.

Danckwerts, K. C., and *P. S. Stokes* for the plaintiff-respondents contended that the Appeal Court in India had rightly held that the mortgage to the Bank was subject to the charge in favour of the plaintiffs under the will of Somji Parpia. Some facts had been concurrently found by both the Courts in India, one of which was that the Bank had constructive notice of the charge created by the will on the estate, and the rights of the plaintiffs under it. That being so, and the defect in the title of the executors and mortgagors to mortgage the property appearing on the face of the documents of title deposited with the Bank, the latter were thereby put upon inquiry and were guilty of negligence in not calling for and investigating the title of the mortgagors to the property comprised in the mortgage, and must be held to have taken the mortgage subject to the charge on it created by the will. Reference was made to *Agra Bank, Limited*, v. *Barry* (2); *Corser* v. *Cartwright* (3), as to constructive notice through Solicitors, the latter case showing that the plea that the mortgage was for value without notice was no protection where the Bank might have had notice by using due diligence in investigating the title; *Jackson* v. *Rowe* (4); *Jones* v. *Smith* (5); *Patman* v. *Harland* (6), where an express representation by the vendor that a deed

(1) (1886) Ir. L. R. 17 Ch. D. 361.
(2) (1874) L. R. 7 H. L. 135 (157).
(3) (1875) L. R. 7 H. L. 731.
(4) (1826) 2 Sim. & Stu. 472.
(5) (1841) 1 Hare 43 : 1 Phillips 244.
(6) (1881) 17 Ch. D. 353.

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did not affect his title was held not to protect a mortgagee or purchaser who had not looked at the deed; *Wilson* v. *Hart*[1]; and *In re Whistler*[2].

Another fact concurrently found by the Courts below was that the mortgage was executed on account of money borrowed to pay pre-existing debts of the mortgagors; it was therefore not in respect of matters or transactions or for purposes authorised by the will, and the Appellate Court in India found that the money had been in fact applied to the private purposes of the executors and mortgagors. As to this it was contended that, for such purposes, the mortgagors had no power to pledge the assets of the testator to the prejudice of any charge the plaintiffs had under the will, and that the fact that they were also residuary legatees could not give them any larger authority over the assets than they had as executors, their power as residuary legatees being limited to disposing of what they were entitled to in that capacity after all the trusts of the will had been performed, that, in short, the Bank could not acquire from their mortgagors any greater interest than those mortgagors themselves had in the property under the will. Reference was made to Roper on Legacies, page 443; and on the construction of the will *In re Kirk*[3], and *Wigg* v. *Wigg*[4] were cited.

As to the powers of an executor under the will of a Mahomedan the case of *Shaik Moosa* v. *Shaik Essa*[5] was cited; and the Succession Act (X of 1865), section 271; and the Probate and Administration Act (V of 1881), sections 2, 4, 5, 12 and 90, were referred to.

As to the advantages to the plaintiffs of their being not merely creditors, but legatees with a specific charge on the testator's estate the arguments and authorities cited in the judgment of the High Court on appeal were adopted; and that judgment, it was submitted, should be affirmed.

(1) (1866) L. R. 1 Ch. 463 (466, 467).
(2) (1887) 35 Ch. D. 561.
(3) (1882) 21 Ch. D. 431 (437).
(4) (1739) 1 Atk. 383.
(5) (1884) 8 Bom. 241.

Levett, K. C., replied, referring to *Graham* v. *Drummond*(1); *Mead* v. *Lord Orrery*(2); and *Taylor* v. *Hawkins* [*Danckwerts, K. C.*, with reference to the two last named cases cited *In re Morgan*(4), and *In re The Alms Corn Charity*(5).]

1908, July 21st:—The judgment of their Lordships was delivered by—

SIR ANDREW SCOBLE:—The facts relating to this appeal are not in dispute, and may be shortly stated.

Somji Parpia died on the 15th February 1885. He left eight sons, four by his first wife (hereafter called the elder sons) and four (hereafter called the younger sons) by his second wife Labai, who also survived him. By his will, he left all his property to his elder sons, subject to a charge of Rs. 30,000 in favour of his widow Labai and his younger sons. Both Courts in India have found that this legacy was charged upon the property in suit, and their Lordships agree with this decision.

After their father's death, the elder sons entered upon large business transactions, under the style of Somji Parpia & Co., and in the course of their business became indebted to the Bank of Bombay in respect of advances on bills drawn by the firm in Bombay upon a branch of the firm at Indore. To secure these advances, the elder sons, on the 1st September 1890, deposited certain title-deeds relating to the property in suit, by way of equitable mortgage, with the Bank; and on the 12th of January 1899 the Bank obtained from them a formal mortgage of the same property, to secure the repayment of Rs. 52,000 in respect of bills then due or to become due drawn by the firm on their Indore branch. It is not disputed that this debt was a debt of the four elder sons in respect of their own business, and that the legacy to the widow and the younger sons was at the time, and still is, unsatisfied.

The property comprised in the mortgage consisted of a house in Bhaji Pala Street and a piece of land in the Falkland Road, in the City of Bombay, to both of which the mortgagors declared themselves to be entitled, but both of which had been specified

(1) [1896] 1 Ch. 968 (974).
(2) (1745) 3 Atk. 235 (241).
(3) (1803) 8 Ves. Jun. 209.
(4) (1881) 18 Ch. D. 93 (103).
(5) [1901] 2 Ch. 750 (762).

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by their father Somji Parpia, in his will, as subject to the charge of Rs. 30,000 in favour of his widow and younger sons. This will was not among the documents of title deposited with the Bank, but the root of the title to the house in Bhaji Pala Street, the more valuable of the two properties, was indicated in the will of Meenabai, widow of Somji Parpia's father Dhunji Parpia, which was deposited. From this it appeared that the house had been the joint property of the two brothers, and if the Bank's legal advisers had made any investigation of title, they must have enquired how Somji's share had come to the mortgagors, and in this way obtained cognizance of his will, and of the charge on this portion of his estate. But they made no enquiry, and appear to have assumed that the mortgagors were the absolute owners of the property mortgaged. It is not suggested that the mortgagors practised any concealment of the real facts of the case; and if they had been asked about their father's will, it is to be presumed that they would have given an honest answer.

Nor is it suggested that the younger sons had any knowledge of the dealings of their elders with the Bank. But when the Bank advertised the properties for sale, they filed this suit in order to establish the priority of their charge over the mortgage to the Bank. And the only question in this appeal is whether they are entitled to such priority.

Mr. Levett, in his able argument for the appellants, contended that, under the will of Somji Parpia, the mortgagors were residuary legatees as well as executors, and he relied upon a passage in the judgment of Romer, J., in *Graham* v. *Drummond*[1] in which that learned Judge says (at p. 974):—

"I think it is settled law that, if an executor who is also residuary legatee sells or mortgages an asset of the testator for valuable consideration to a person who has no notice of the existence of unsatisfied debts of the testator, or of any ground which rendered it improper for the executor so to deal with the asset, that person's purchase or mortgage is valid against any unsatisfied creditor of the testator."

But this does not dispose of the present case. Here the plaintiffs are legatees, and the distinction between creditors and

[1] [1896] 1 Ch. 968 at p. 974.

legatees is well pointed out in Spence's "Equitable Jurisdiction," Vol. II., p. 376, where it is said :—

"A mortgage by an executor, who is also residuary legatee, to secure his private debt, may be set aside even at the suit of a pecuniary legatee, for the nature of the claims of legatees, they taking under the will, may be ascertained: but as to creditors it is different; if a reasonable time has elapsed since the death of the testator, and then the executor deals with the residue as his own, the purchaser may, in the absence of notice to the contrary, assume that the debts have been paid, or that there are other assets for payment of the debts if any; therefore the mortgagee would be safe as against creditors."

Moreover, in this case, the mortgagee had constructive notice, and has only himself to thank if his position is not safe; for had he taken the slightest pains to investigate the title of the mortgagors he must certainly have discovered the charge created by the will of Somji in favour of the widow and her sons.

It was also contended that by the terms of the will the legacy was to be made up and paid within six years after the testator's decease; that this period would have expired in 1891, eight years before the date of the mortgage; and that, assuming notice of the will on the part of the Bank, the Bank was entitled to assume that the executors were acting with the consent of the legatees. Lapse of time is, no doubt, a circumstance that may be taken into consideration in cases of this kind; but having regard to the fact that, in this case, two of the younger sons were still minors when the title-deeds were deposited with the Bank, and that continued possession by the elder sons was not inconsistent with the purposes of the will, their Lordships agree with the Court below in holding the rights of the parties unaffected by this circumstance.

The case of *In re Queale's Estate*[1] bears a strong resemblance, in its facts, to that now under consideration. There the testator's son deposited with a Bank three leases to secure his own overdrawn account. The Bank dealt with him as absolute owner, and eventually proceeded to sell the leaseholds; whereupon the testator's daughters claimed to be placed on the schedule as encumbrancers in respect of unpaid legacies, and their claim was allowed. In delivering judgment, FitzGibbon, L. J., says :—

(1) (1886) Ir. L. R. 17 Ch. D. 361.

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"The Bank dealt with him (the mortgagor) as, and in his capacity of, an individual owner—not an executor, but a person pledging his own property for his own debt, giving as security his own interest for his own purposes. Under such circumstances the Bank can, in my opinion, have no better title than that which its creditor really had in the capacity in which he was dealt with, namely, as beneficial owner, *i.e.*, as residuary legatee."

Their Lordships agree with the learned Judges of the High Court of Bombay that the claim of the first four respondents (the younger sons of Somji Parpia) must prevail over the mortgage to the Bank and the title of its transferee, Dwarkadas Dharamsey, and they will humbly advise His Majesty that this appeal should be dismissed, and the decree of the High Court of the 14th April 1905 confirmed. The appellants must pay the costs of the appeal.

Appeal dismissed.

Solicitors for the appellants :—*Cameron Kemm & Co.*

Solicitors for the respondents :—*Rawle Johnstone & Co.*

J. V. W.

CRIMINAL REFERENCE.

Before Mr. Justice Chandavarkar and Mr. Justice Aston.

EMPEROR *v.* DHONDU BIN KRISHNA KAMBLYA.*

1904. *February 4.*

Workman's Breach of Contract Act (XIII of 1859), sections 1, 2—Summary inquiry into an offence punishable under the Workman's Breach of Contract Act—Court Fees Act (VII of 1870), section 31—Court fee on petition of complaint—Liability of the workman to pay.

An offence under the Workman's Breach of Contract Act (XIII of 1859) cannot be tried summarily. A penal enactment must be construed strictly. The proceedings of the Magistrate, under the Act, up to and inclusive of the passing by him of an order for either the repayment of the advance or performance of the contract do not constitute a trial for any offence as defined in the Criminal Procedure Code.

In a proceeding under the Workman's Compensation Act where the workman admits the advance and repays the same it is not competent to the Magistrate to make him pay to the complainant the Court fee paid on the petition of complaint.

* Criminal Reference No. 142 of 1903.