Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Bank of Bombay and another v. *Suleman Somji and others, from the High Court of Judicature at Bombay; delivered the 21st July* 1908.

Present at the Hearing:

LORD MACNAGHTEN.
LORD ATKINSON.
SIR ANDREW SCOBLE.
SIR ARTHUR WILSON.

[*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

i (22)55481. [44.] 125.—7/08. Wt. 243. E. & S. A

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 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* (L.R. 1896, 1 Ch., 965) 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 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* (17 L.R. (Ireland) 361) 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:—

> "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 debtor 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.
