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SUBROGATION UNDER SECTION 92 T. P. ACT.

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The interpretation of the term " Mortgagor " in paragraphs 1 and 3 of section 92 of the Transfer of Property Act is one of considerable difficulty. Does it include an heir-at-law or legal representative ? Can it mean all representatives ?

Section 59-A which explains that the term " Mortgagor " shall be deemed to include persons deriving title from them respectively cannot obviously be applied to this section. If it is, then the section itself becomes otiose.

If so, where is the line to be drawn. Is the word to be confined to the original contracting party or does it extend to the heirs-at-law and devisees as well ? The section is said to embody the principle of section 69 of the Indian Contract Act. (*See* Mulla's Commentary and *Kutti Goundan* v. *Mahali Ammal*[1].)

It is now settled that a purchaser of the equity of redemption is entitled to the benefit of the section.

The right of subrogation which a purchaser gets under section 92 is transmissible to his assigns and a purchaser from such purchaser is also entitled to the benefit of the section (Vide *Abarthoraman Kutti* v. *Ittikaparambil Athan*[2] and *Venkatachari* v. *Karuppan Chetti*[3].)

A purchaser from such purchaser who covenants to pay the prior mortgage, will be entitled to the benefit of the section and he can hold the first mortgage as a shield against a later mortgagee whom he had not undertaken to pay. (*Ayyareddi* v. *Gopalakrishnayya*[4] and *Lakshmi Amma* v. *Sankara Narayana Menon*[5], and the cases reviewed in *Subbarayudu* v. *Lakshmi Narasamma*[6])

It has been recently explained by their Lordships Somayya and Yahya Ali, JJ., reviewing all the earlier authorities that the proposition "covenant excludes subrogation " must be understood in a limited sense. It will certainly exclude the right of subrogation against a mortgagee whom the purchaser has covenanted to pay. (S. A No. 1005 of 1944, decided on 4th January, 1946.) Even here the Privy Council decision reported in *Janaki Nath Ray* v. *Pramatha Nath Malia*[7]

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1. (1911) 22 M L J 364 : I.L.R. 36 Mad. 426.
2. (1919) 11 L W 215.
3. (1933) 67 M L J 91.
4. (1923) 46 M L J 164 · L.R. 51 I.A. 140 : I.L.R. 47 Mad. 190 (P.C.).
5. (1935) 70 M.L.J. 1 : I.L R. 59 Mad. 359 (F B).
6. (1939) 2 M L J. 533.
7. (1940) 1 M.L J. 446 · L R. 67 I A. 82 : I.L.R. (1940) 1 Cal. 291 (P.C.).

throws a doubt since notwithstanding the covenant to pay, the further covenant reserving rights of subrogation, helped the man who did not pay the last debt.

Then the question arises whether an heir-at-law or a devisee is entitled to the benefit of the section In the recent case decided by their Lordships Somayya and Yahya Ali, JJ, already referred to, an heir-at-law has been placed in the same position as the mortgagor, the principal contracting party But this point did not arise for decision and does not appear to be necessary on the facts of the case.

The principle of the section is that the actual borrower cannot become his own creditor by paying an earlier debt as he would be derogating from his own grant. So that if a person who is under a personal or contractual liability to pay the creditor, pays the debt, he is really discharging his own debt and he cannot by any legal fiction be deemed to keep alive the debt for his benefit (vide *Subbarayudu* v. *Lakshmi Narasamma*[1] and the cases cited therein). The theory of an agency in making the payment, and the ownership of the money paid, adumbrated in the above case of *Subbarayudu* v. *Lakshmi Narasamma*[1] is not universally accepted. (*See* the observation of Varadachariar, J, in *Lakshmi Amma* v *Sankara Narayana Menon*[2], and *Dinobandhu Shaw Chowdhry* v. *Jogmaya Dasi*[3])

If this is the position, every owner of the equity of redemption, howsoever he may come to own it, other than the principal contracting party is entitled to the benefit of the section. Cases do appear to support this view

In *Kutti Goundan* v. *Mahali Ammal*[4], a bench of our High Court has taken the view that a reversioner of the mortgagor's estate who pays under the threat of Court sale is entitled to the benefit of the section. He could transmit this right to his own purchaser.

That was accepted in *Mollaya Padayachi* v *Krishnaswami Ayya*[5] Again in *Ayyareddi* v. *Gopalakrishnayya*[6], the observations at pages 195-6 are capable of taking in persons other than the buyers of the equity of redemption among the owners of the said equity entitled to the benefit of subrogation Finally in summing up the propositions derivable from a review of the case-law on the subject, His Lordship Justice Venkataramana Rao states that persons, who obtain the equity of redemption by descent, or devise and the purchasers thereof stand on the same footing. The observations of Sir John Romilly in *Davis* v. *Barrett*[7] are relied on also. (*Subbarayudu* v. *Lakshmi Narasamma*[1])

If then the word "mortgagor" in the section will only mean the man, who contracted the debt and is under a personal obligation to pay it, on the principle stated above, the word must have the same sense in both parts of the section

That is why Justice Venkatasubba Rao observes *obiter* in *Srinivasulu Naidu* v. *Damodaraswami Naidu*[8], that the pre-existence of any interest is not necessary for applying clause (*i*) of section 92. The danger in such a construction is that it lets in a whole class of volunteers, who, it is now universally accepted, are excluded by the section.

There is only one more decision to notice in this connection. In *Lakshmi Amma* v *Sankara Narayana Menon*[2], His Lordship Justice Varadachariar explains that a legal representative continues the "persona" of the debtor. The liability for the debt is that of the taker, though the estate only furnishes the measure of such liability; and the remedy of the creditor is only against the representative and not the property. Can this fiction be applied here? These are questions which still remain for solution.

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1. (1939) 2 M L J 533.
2. (1933) 70 M.L.J. 1 I L R 59 Mad. 359 (F.B).
3. (1901) 12 M.L J 73 L R. 29 I.A. 9 : I. L.R. 29 Cal 154 at 165 (P C).
4. (1911) 22 M.L.J. 364 : I.L.R. 36 Mad. 426.
5. (1924) 47 M.L J 622 (640).
6. (1923) 46 M L J 164 L.R. 51 I A. 140 : J.L R 47 Mad 190 (P C)
7. (1851) 14 Beav 542 51 E R. 394.
8. A I.R. 1938 Mad. 779.

SUMMARY OF ENGLISH CASES.

R. *v.* THE JUSTICES OF THE APPEALS COMMITTEE OF THE COUNTY OF LONDON QUARTER SESSIONS, (1946) 1 All E R. 129 (C A).

Criminal Trial—Dismissal of charge of selling intoxicating liquor without licence—Appeal—If from criminal cause or matter—Test

In an appeal against an order refusing an application for an order of prohibition against the hearing and determination of an appeal by the excise authorities against dismissal of information that the appellant sold intoxicating liquor by retail without licence, a preliminary objection was raised that no appeal lay as it was a criminal matter within the meaning of the Supreme Court of Judicature (Consolidation) Act, 1925, S 31 (1) (*a*).

Held, the test to be applied in deciding whether the judgment under appeal was in a " criminal cause or matter " within the meaning of section 31 (1) (*a*) of the Supreme Court of Judicature (Consolidation) Act, 1925, is this : If the cause or matter is one which if carried to its conclusion may result in the conviction of the person charged and in a sentence of some punishment, such as imprisonment or fine, it is a criminal cause or matter. Accordingly the preliminary objection that no appeal lay as it was a criminal matter must prevail.

DAGGER *v.* SHEPHERD, (1946) 1 All E.R. 133 (C A.)

Landlord and tenant—Notice to quit " on or before " a specified date—Validity and construction.

A notice to quit demanded :—

" Dear Sir, on behalf of our client Mrs W A. M Dagger, we hereby give you notice to quit " Kenwood " on or before March 25, next . . . ." It was held by the County Court that the insertion of the word, " or before " in the phrase " notice to quit on or before March 25," rendered an otherwise good notice uncertain and ambiguous and fatal to its efficacy. On appeal,

Held, (1) a notice to quit being a " a unilateral act " in exercise of a contractual right to put an end to an existing relation of landlord and tenant must conform strictly to the legal requirements of the contract There must be plain and unambiguous words claiming to determine the existing tenancy at a certain time. (ii) The Court must assume that the parties to the contract of tenancy are aware of its terms particularly of the provisions relative to its termination (iii) The effect of the notice on its construction is first to give to the tenant notice that the landlord did thereby give an irrevocable notice to determine on March 25, 1945, and secondly, to make to the tenant an offer to accept from him a determination of that relationship on any earlier date (of the tenant's choice) on which the tenant should give up in fact possession of the premises.

Accordingly a notice to quit " on or before " a fixed date is *prima facie* valid and effective (Authorities reviewed).

STENOR, LTD *v* WHITESIDES (CLITHEROE), LTD , (1946) 1 All. E R. 176 (C.A.)

Patents and Designs Act, section 93—Fuse of cutout having shape dictated solely by the function it has to perform—Mere mechanical device which is not registrable Mechanical device—Test.

A " design " under section 93 of the Patents and Designs Act does not include any mode or principle of construction or anything which is in substance a mere mechanical device. A mechanical device is a shape in which all the features are dictated solely by the function or functions which the article has to perform. Where in a design for an electric fuse all the features are dictated solely by the function which is to be performed by the article to which the shape is applied, and that shape possesses no features beyond those necessary to enable the article to fulfil

its function, the design is in substance "a mere mechanical device and not a proper subject for registration."

JOYCE *v.* DIRECTOR OF PUBLIC PROSECUTIONS, (1946) 1 All.E R. 186 (H L.).

Treason—Alien enjoying privileges under British passport—Allegiance to King when he is out of the realm.

An alien who has been resident within the realm can be held guilty and convicted in England for high treason in respect of acts committed by him outside the realm. So long as an alien holds a British passport, if he is adherent to the King's enemies in the realm or elsewhere he commits an act of treason.

(1945) 2 All.E R. 673 (C.A) affirmed.

TWINE *v* BEANS EXPRESS, LTD , (1946) 1 All E R. 202 (K B D).

Negligence—Unauthorised passenger in commercial van—Fatal accident due to driver's negligence—Owner of vehicle not liable.

The owners of a commercial van provided it for use by a Post Office Savings Bank along with a driver. The instructions to the driver provided that no persons were to travel on the company's commercial vehicles and notices were put up to that effect in the vehicles themselves. *T.*, a mail porter, while returning from a branch of the bank took a lift back in the commercial van to the head office when he met with a fatal accident due to the negligent driving of the van. In an action by his dependants for damages.

Held, the owners of the vehicle did not owe any duty to the deceased to take care in the driving of the van, as he was merely a trespasser. The owners had taken every step reasonably practicable to secure, that there would be none but duly authorised persons on their van They could not reasonably anticipate that there would be this passenger in the van at the time and place of the accident.

INLAND REVENUE COMMISSIONERS *v* THE NATIONAL ANTI-VIVISECTION SOCIETY, (1946) 1 All E R 205 (C A.).

Income-tax Act, sections 37 and 40—National Anti-vivisection Society—If entitled to exemption from tax as established for charitable purposes only.

The National Anti-vivisection Society cannot be said to be one established for "charitable purposes only" Whether the society is "established for charitable purposes only" that is "for purposes beneficial to the community" is clearly a question of fact to be decided upon evidence. The motive of the donors or founders to benefit the community cannot be the test. The Court can determine whether the purpose of the society is for the public benefit.

(1945) 2 All.E.R. 529, affirmed.

[END OF VOLUME, 1946—I.]