1863.
March 13,
Aug. 13.

LATE SUPREME COURT, PLEA SIDE.

MANCHARJI PESTANJI ..... *Plaintiff.*
NA'RA'YAN LAKSHUMANJI and others ..... *Defendants.*

Defects of Title—Vendor and Purchaser—Conditions of Sale—Title—Hindú Will—Attestation.

When it is provided by conditions of sale of land that the vendor shall not be bound to show any title prior to an instrument of a certain date, the purchaser may insist upon a defect of title appearing *aliunde* and before that date, and, if it be proved to exist, may rescind the contract and recover back earnest-money, interest, and expenses.

A Will of a Hindú in writing signed by him but not attested by witnesses is to be admitted to probate, and operates to pass not only moveable but also immoveable property.*

THIS case, with a similar one of *Lakshmidás Dámji* v. *Náráyan Lakshumanji and others* (which, it was arranged, should be bound by the verdict in the first case) came on for trial before COUCH, J., on the 12th, 13th, and 23rd days of February 1863.

Westropp and *Green* for the plaintiff.

White, Dunbar, and *Scoble* for the defendants.

The facts of the case sufficiently appear in the following judgment, which, on the 13th of March, was delivered by COUCH, J.:—

In this case a piece of land with a dwelling-house thereon, situate in the Girgaum Road, was put up to sale by public auction, on the 3rd of May 1862, and the plaintiff became the purchaser at the price of Rs. 13,500, and paid into the hands of Messrs. Bennett & Co., the auctioneers, Rs. 3,375 by way of deposit and in part payment of the purchase-money. The purchase was made subject to certain conditions of sale, the ninth of which was "that the vendors sell as mortgagees, and shall not be bound to show any title prior to a deed of the 2nd day of September 1854, being the mortgage deed, under the powers contained in which, and in a deed of mortgage dated the 23rd of October 1858, the said property is sold, but will, for the satisfaction of the purchaser, produce such (if any) documents relating to the title to the said property as

* See and compare Manikji Mehervanji v. Rahimtula Alubhai; Appendix p. I. and Mad. H. C. Rep. 37.

are in their possession; and the said vendors shall not be bound to give any evidence of identity of the property sold with that included in the said mortgage deeds, and shall not be bound to give up the said mortgage deeds, but will furnish attested copies thereof, if required, at the expense of the respective purchasers." On the 16th of May 1862 the defendants (the vendors) delivered an abstract of title, setting out the deed of the 2nd of September 1854 referred to in the ninth condition, which appeared to be made between Lakshmi Náráyaṇ Rám Bhandári of the one part, and the defendant Náráyaṇ Lakshumaṇji of the other part, and by which, after reciting that Lakshmi Náráyaṇ Rám Bhandári was, or claimed to be, seised of, or well entitled to, the premises in question, and a previous mortgage to Náráyaṇ Lakshumaṇji, the premises were, with other property, conveyed to Náráyaṇ Lakshumaṇji by way of mortgage in fee, to secure Rs. 6,001 and interest. The subsequent deed of the 23rd of October 1858 was a mortgage of the premises by Lakshmi Náráyaṇ Rám Bhandári to the other defendants Gulál Devá and Jethá Bhimá subject to the prior mortgage. On the 21st of May the plaintiff delivered his requisitions and observations on the title, to which the vendor's solicitor replied on the 30th; and on the 11th of June the plaintiff's solicitors, in answer to those replies, delivered further requisitions, by which they objected that no notice was taken in the abstract of the Will of Rámá Bápsiá, the father of Lakshmi Náráyaṇ, proved in the late Recorder's Court of Bombay on the 30th of May 1820, by which he bequeathed his immoveable property to his son, and wife Ramá, who was still living, and requiring that she should join in the conveyance: in answer to which the vendors' solicitor, on the 14th of June, insisted that by the ninth condition of sale they were not bound to show any title prior to the 2nd of September 1854, and declined to comply with the requisition. On the 23rd of June the vendors' solicitor wrote requesting that the draft conveyance should be sent for his approval, in reply to which the purchaser's solicitors, on the 25th, wrote saying that they could not waive the above requisition, and giving notice that unless it was complied with or satisfied within a week the purchaser would consider the purchase as null and void, and require repayment of his deposit and interest, in answer to which the vendors' solicitor wrote, on the 9th of July, declining to comply. The plaintiff contends that, though he is precluded by the ninth condition from requiring the vendors to show any title prior to the mortgage of the

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2nd of September 1854, he is at liberty to show *aliunde* that the title is defective, and he insists that it is so by reason of a bequest in the Will of Rámá Bápsiá, the father of Lakshmi Náráyaṇ, and the former owner of the property. In *Shepherd* v. *Keatley* (*a*), by the conditions of sale of leasehold premises, the vendors stipulated that they should not be obliged to produce the lessor's title, and it was held that the purchaser was not precluded from inquiring *aliunde* into it. This case was recognised and acted upon in *Sellick* v. *Trevor* (*b*) and *Leatham* v. *Allen* (*c*), and must be considered as a binding authority upon this point, notwithstanding the case of *Spratt* v. *Jeffery*, (*d*) which may perhaps be distinguishable, but if not must be considered as overruled. The learned counsel for the defendants argued that the terms of the condition in the present case were different from those in *Shepherd* v. *Keatley*, the words in the one being "not be obliged to produce," and in the other "not be bound to show any title;" but all the authorities agree that a stipulation of this nature should be free from ambiguity, and the seller will be held strictly to the representation of the title, which the purchaser is bound by the condition to accept: and I am of opinion that there is no substantial difference between the two conditions, and that the plaintiff in this case is at liberty to show *aliunde* that the title is defective. It becomes, therefore, necessary to inquire whether the will of Rámá Bápsiá constitutes a defect in the title.

He being, as has been stated, owner of the property died in 1820, leaving a widow, Ramá, who is still living, and a son, Lakshmi Náráyaṇ. By the Will in question he gave and bequeathed to his son, Lakshmi Náráyaṇ, and his wife, namely, Ramá, all and singular his lands, messuages, tenements, dead stock, wearing apparel, plate, outstandings, joys, jewels, debts owing to him, and ready cash, &c., by them freely to be possessed and enjoyed, provided his son, Lakshmi Náráyaṇ, should attain the age of twenty-one years, and prove himself to be neither vagabond nor debauchee nor senseless: in such case his wife and executors were to retain until his said son should prove himself to be moral in his good conduct. Whatever obscurity there may be in other parts of the Will, there is here a distinct gift to the widow of an interest in the land, and which is not affected by the subsequent provisions. Evidence was given on the part of the defendants that Lakshmi

(*a*) 1 C. M. & R. 117.
(*b*) 11 M. & W. 722.
(*c*) 1 Ir. Ch. Rep. 683.
(*d*) 10 B. & C. 249.

Náráyan had lived in the house in question with his mother ever since his father's death, and had been in possession of all his father's property, and from the time he came of age had received the rents, nor did it appear that Ramá had ever interfered in the management; and in particular that he had received a sum of money from the Municipal Commissioners for part of an open piece of ground in front of the house, which had been taken for widening the road, and that on the occasion of the Sheriff seizing the house as part of Lakshmi Náráyan's property, and also of the property mortgaged being advertised for sale by the mortgagee, of both of which Ramá was aware, she did not set up any claim. From this it might be inferred either that the bequest in the Will had been disregarded, or that Ramá had parted with her interest to her own son; but I doubt whether such an inference would be warranted by the facts, and it is certainly not one which, in the event of Ramá hereafter claiming any title against the purchaser, a court would be bound to draw. In this respect the title would depend on a doubtful question of fact. It is a settled and invariable rule that a purchaser shall not be compelled to accept a doubtful title; and in *Simmons* v. *Heseltine* (*e*) it was held that where the ability of the vendor to make a good title to a portion of the premises sold depended on a doubtful question of fact or law, the title would not be deemed a good or a sufficient title as between vendor and purchaser, and that the purchaser was entitled to recover back his deposit and interest, and the expenses of investigating the title, in an action against the vendor. The probate of the Will, granted by the Court of the Recorder of Bombay on the 30th of May 1820, was produced at the trial, and also the original Will, signed by Rámá Bápsiá, and bearing his seal, but not attested. Although the Hindú Law knew no such instrument as a Will, and the sustaining of a Will by a Hindú was an innovation originating in Bengal, but afterwards extended to Madras and Bombay, the power of a Hindú to make a Will must now be considered as firmly established. It was objected by the defendant's counsel that the Will is not attested according to English Law, but by the Charter establishing the late Supreme Court the inheritance and succession to lands, rents, and goods, and all matters of contract and dealing between party and party, are to be determined in the case of Hindús by the laws and usages of the Gentús, and by the Letters Patent constituting this court

(*e*) 5 C. B. N. S. 554; L. J. C. P. 129.

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the same law is now to be administered. The law of Wills is part of the law of inheritance and succession. A Will is an instrument by which the devolution of an inheritance is prescribed, and in the Civil Law it is said that inheritance is of two kinds, for it is acquired either *ex testamento* or *ab intestato*. (*f*) The English Law, as to the execution and attestation of Wills, therefore, did not before Act XXV. of 1838 of the Legislative Council of India (the Wills Act) apply to the Wills of Hindús and Muhammadans, and they are, by the 3rd section of that Act, exempted from its operation. Unless attestation is required to a Will by Hindú Law, the want of attestation is no objection to the validity of the Will in this case. I have not been able to find any authority for the proposition that by Hindú Law attestation is necessary. In some cases the testamentary instrument appears to have been a deed, in others only a writing, and in *Sree Muttee Berjessory Dossee* v. *Ramconny Dutt and another* (*g*) the Pandits were of opinion that a Hindú may make a testamentary disposition of his estate by writing and also by parol. Probably no particular mode of making a Will can be said to be prescribed by the Hindú Law. But I need go no further than to decide that I must treat the instrument, which is signed and sealed by the testator, and has been admitted to probate, as a valid Will. Consequently the title of the vendors is defective, and the plaintiff is entitled to recover back his deposit and interest. The verdict will, therefore, be entered for the plaintiff accordingly.

On the 11th of April 1863, *White*, on behalf of the defendants, moved the full Court (consisting of SAUSSE, C. J., and ARNOULD, J.,) for a rule that the verdict should be set aside, upon the grounds—

1*st*—That under the conditions of sale, the plaintiff was not at liberty to object to any defect in the title.

2*nd*—That the Will, under which the objection to title arose, was void as to immoveable property for want of attestation, according to the Statute of Frauds.

The Court refused to grant a rule upon the first ground, as the law was clear upon the point: but as it was alleged at the bar, that the second was of first impression in this court, a rule was granted to show cause why the verdict should not be set aside, on the point that immoveable property does not pass under an unattested Will of a Hindú.

(*f*) Instit., Lib. II., tit. 9, p. 6. (*g*) East's Notes of Cases No. 54.

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Westropp and *Green* showed cause.

Aug. 13, SAUSSE, C.J., now delivered judgment:—In this case the plaintiff was a purchaser of immoveable property sold by the defendant as mortgagee with a power of sale. The action was brought to recover back the deposit paid, upon the ground that the defendant had failed to make out a good title to the premises. It appeared that the father of the mortgagor died in 1818, leaving a widow and a son, the mortgagor surviving him, and that he had devised the property in question to them jointly. The widow is living, but was no party to the mortgage nor to the sale to the plaintiff, who, upon discovering the above facts, required that she should be a party to the conveyance. The defendant having refused, this action was brought, and at the trial before Mr. Justice Couch it was insisted that, as the Will was not attested by three witnesses, in the manner required by the Statute of Frauds, it was void against the Hindú heir, who as such would thus have full power to mortgage without regard to the devise in that Will. The Judge having held that a Hindú Will did not require attestation, there was a verdict for the plaintiff; and the defendant obtained a rule *nisi* to set aside that verdict, for the purpose of allowing him to raise the question, which was said to be of first impression in this court, viz., whether a Will of immoveable estate executed by a Hindú is required to be attested by three witnesses, as a Will of real estate in England should have been, under the Statute of Frauds. The Will was proved in the late Recorder's Court of Bombay in 1820. It devised immoveable estates, was signed by the testator, but was wholly unattested; and the defendant insists that, under those circumstances, the Will is void against the testator's heir, under whom he derives title. It was argued by the defendant that as devises were unknown to Hindús, the power of making a Will—borrowed from the English Law—could only be exercised with those accessories of signature and attestation rendered necessary by the statute of Charles II., which, with the then other existing statute law, was introduced into Bombay in 1726, on the establishment of the Mayor's Court; and it was further urged that immoveable property in India must be considered to rank with real property in England, and thus to be devisable only by a Will duly attested by three witnesses, which the present Will is not.

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We think it would be difficult to maintain the proposition that Hindú immoveable property, and what is technically known as "real property" in England, are identical in their nature. The descent of Hindú immoveable and moveable property, as a general rule, is the same—the person entitled to one is entitled to the other; whilst "real estate" in England goes in one line of descent, and chattels, real or personal, may go in another. Each class of Hindú property is primarily liable to debts and execution, whilst the contrary doctrine prevailed in respect of English real property. So an administrator or executor of a Hindú estate takes both moveable and immoveable, whilst the executor or administrator in England takes only the personalty or moveable property, and freehold or immoveable property goes to the heir. It is impossible to illustrate by any of our English tenures the exact legal character of Hindú immoveable property, nor, in the view which we take of this question is it very material to do so.

This is not a case of the first impression, as was alleged. For it appears to have been decided by long-established practice in this court that a Will of Hindú immoveable property does not require to be attested.

In a matter of so much importance to the Hindú community at all times, but particularly when the Civil laws for India are being codified, if not in some respects remodelled, we thought it desirable to have the fullest inquiry made as to the practice of this court since its institution in 1824; and we have recently received from the Ecclesiastical Registrar a voluminous and laborious return of all Wills filed in his office from 1820 to 1860. This return shows all Wills which devised moveable and immoveable estate, and which were attested by three witnesses—by a lesser number,—or by no witness at all. The result is that 418 Wills were filed within that period, of which 283 were attested by three witnesses; 114 by two witnesses only; 11 by one witness, and 10 without any witness whatsoever. Of the 135 Wills attested by less than three witnesses, it appears, from the Wills and the inventories filed, that 102 at least were conversant about immoveable property. There were 17 caveats argued in court in which the number of attesting witnesses was less than three, and in fifteen of those caveats immoveable property appears, upon the face of the Will, to have been devised. In one (1849) there was no

witness at all; in another (1854) one witness only. Five of those caveats have been argued, since 1855, within my own experience, and in none of these latter was the objection taken, that the Will was not sufficiently attested.

It has been properly admitted at the bar that the Indian Wills Act of 1837 does not apply to Hindús or Muhammadans by reason of the exception in Sec. 3, and, therefore, that all Wills by Hindús devising immmoveable property, if they require attestation at all, must at the present day be attested by three witnesses with the formalities required by the statute of Charles II. The presence of that exception in the Act proves, that the Legislature had Wills by Hindús in its contemplation at the time it was simplifying the mode of executing Wills, and it is scarcely possible to conceive that it would have left Wills by Hindús subjected to all the risks and inconveniences under the statute of Charles II., from which it was relieving other Wills, if it was then considered that Wills by Hindús required attestation at all. In addition to the inference to be derived from that circumstance in favour of Wills by Hindús not requiring attestation, there is the powerful argument which arises from the great public inconvenience that a contrary decision would create: for we should substantially declare no less than 102 out of 418 to be void devises, if we were now to decide that Wills by Hindús required to be executed by three witnesses. Even were the argument against the validity of this Will far stronger, yet we think it would be too late now to reverse the practice of this Court for forty years, and thus to unsettle the title to the large amount of property covered by those 102 Wills. We entertain no doubt that we ought to allow the cause shown, with costs, and to hold that, as the law stands, Wills by Hindús are valid instruments without attestation. It may be desirable that greater formality should be required for the execution of so important and solemn an instrument, but that is for the Legislature, and not for this Court, to regulate and decide. Allow the cause shown with costs.

Rule discharged.