1870.
March 25.

Suit No. 195 *of* 1869.

JIVANDA'S KESHAVJI.....*Plaintiff.*
FRA'MJI NA'NA'BHA'I .....*Defendant.*

Hindú Law—Equitable Mortgage—Deposit of Title-deeds—Merger of Verbal Agreement in subsequent Writing—Registration—Oral Agreement prior to Registration Acts—Subsequent Registered Agreement—Notice—Act XVI. of 1864—*Act XX. of* 1866, *Sec.* 48.

A lien created by verbal contract and deposit of title-deeds of immoveable property in the island of Bombay by a Hindú in favour of a Hindú upheld.

Where such a lien was created before the 1st of January 1865, when the first general Registration Act (XVI. of 1864) came into force, and a Gujaráti document (unregistered) was subsequently (on the 13th of June 1865) executed by the giver of the lien which set out its particulars, and acknowledged the receipt of the loan on account of which the lien was given : *it was held* that the original oral contract of lien, being in itself a perfected transaction, was not merged in or invalidated by the subsequent document, and that, therefore, the fact of the latter not being registered did not affect the validity of the prior transaction.

Sec. 48 of Act XX. of 1866, which enacts that all instruments duly registered under that Act and relating to moveable or immoveable property shall take effect against any oral agreement relating to the same property, does not apply to oral agreements completed before Act XVI. of 1864 came into force.

The English equitable doctrine of notice where there is a contest as to the priority of a deed registered under Act XVI. of 1864, or Act XX. of 1866, over an unregistered deed of a date prior to those Acts, is applicable in India.

THE facts of this case fully appear from the judgment of the Court.

The suit was tried by BAYLEY, J., in a Division Court, in January 1870, when the hearing occupied several days.

Green (with him *Scoble,* Acting Advocate General) for the plaintiff.

Mayhew and *Starling* for the defendant.

Cur. adv. vult.

25th March 1870. BAYLEY, J.:—The plaint in this suit, which was filed on the 3rd of April 1869, prayed that it might be declared that certain legal and equitable mortgages of a piece of land, with the dwelling-house and buildings standing

1870.

JIVANDA'S KESHAVJI v. FRA'MJI NA'NA'BHA'I.

thereon, situate at Naigám, within the sub-district of Máhim, in the island of Bombay, alleged to have been made on or about the 13th of June 1865 to one Mávji Prágji, might have priority over a certain mortgage thereof, by an indenture dated the 28th of August 1866, to the defendant; and that the plaintiff was entitled to recover possession of the said mortgaged premises from the defendant; that the defendant might be decreed to deliver up possession to the plaintiff of the property in question; and that the plaintiff might have such other relief as the nature of the case might require.

The case came on for hearing before me on the 8th of January last, when the following issues were raised:—

1. Whether the Gujaráti instrument or mortgage of the 13th of June 1865 in para. 3 of the plaint mentioned, notwithstanding its non-registration, entitles the plaintiff to priority over the defendant's registered mortgage of the 28th of August 1866.

2. Whether any valid equitable mortgage or charge was made in favour of Mávji Prágji—an issue which, under the powers given by Sec. 141 of the Code of Civil Procedure, I have amended, and which now stands as follows:—Whether any valid lien, charge, or contract for a security on the lands and premises in the plaint mentioned was, on or about the 31st of October 1864, created or made in favour of Mávji Prágji.

3. Whether the defendant lent his money, and was placed in possession of the mortgaged premises, in consequence of the representations alleged in paragraph 3 of the written statement.

(Issues 4, 5, and 6 are not material for the purpose of this report.)

7. Whether the plaintiff is entitled to the relief prayed, or any part thereof.

Before examining the evidence adduced on behalf of the plaintiff, I will remark that the plaint describes, and, as was admitted at the hearing, correctly describes, the plaintiff to be a Hindú, and the defendant a Pársi.

By cl. 29 of the Charter of the late Supreme Court, dated the 8th of December 1823, it was directed and ordained that the Supreme Court should have full power to hear and determine all suits and actions that might be brought against the inhabitants of Bombay, with certain exceptions in favour of Muhammadans and Gentús; "and, where one of the parties shall be a Mahomedan or Gentoo, by the laws and usages of the defendant."

That clause, as was pointed out by Sir Joseph Arnould in delivering judgment, on the 11th of February 1869, in *Davlatrám Shrírám* v. *Bulákidás Khemchand* (*a*), was continued in force by cl. 18 of the Letters Patent of the High Court of 26th June 1862 and cl. 19 of the Amended Letters Patent of 28th December 1865.

Here the defendant is a Pársi inhabitant of, and a resident in, the island of Bombay. He is, therefore, subject to English law. This appears to be clear from two recent decisions in the Bombay High Court.

In *Naoroji Berámji* v. *Rogers and others* (*b*), decided on the 1st of August 1867 by Sir Richard Couch, C. J., and Westropp, J., which was a suit for the specific performance of an agreement for the renewal of a lease of a house and premises within the Fort in the island of Bombay, the Court, in giving judgment, say (pp. 11 and 12): "Until the recent legislation in the year 1865" (Act XV. of 1865, the Pársi Marriage and Divorce Act, 1865; Act XXI. of 1865, to define and amend the Law relating to Intestate Succession among Pársis; and Act X. of 1865, the Indian Succession Act, 1865) "the law uniformly applied to Pársis and their property in the island of Bombay by the Supreme Court, and, since it was closed, by the High Court at its Original Jurisdiction side, has been, as correctly stated in the clear and able Report of the Pársi Law Commission (of which Sir Joseph Arnould and Mr. Justice Newton were members), the English law, except so far as it is varied by Act IX. of 1837, and also, since the decision of the Privy Council in

(*a*) 6 Bom. H. C. Rep., O. C. J. 24.
(*b*) 4 Bom. H. C. Rep., O. C. J. 1.

1870.
JIVANDA'S KESHAVJI v. FRA'MJI NA'NA'BHA'I.

1856 in *Ardasir Cursetjee* v. *Perozebaee* (*s*), except as to matrimonial suits at the Ecclesiastical side of the court, and perhaps except as to bigamy. Whether, then, we have regard to the plaintiffs" (Messrs. Rogers and Co., who were European British subjects), "or to the defendant and his wife" (who were Párs), "the law applicable to this case was English law."

And in *Mancharshá Aspándiárji* v. *Kamrunisá Begam* (*d*), decided on the 22nd of July 1868, on appeal from the decision of the District Judge of Súrat, which was a suit brought by a Muhammadan against a Párs to redeem certain property in the Mofussil which had been conveyed by the ancestor of the former to the ancestor of the latter by a *by-al-wafa* or deed of conditional sale, Sir Richard Couch, C.J., said: "This was a contract entered into between the Hindú agent of a Muhammadan of the one part, and a Párs on the other part. The Judge, in an elaborate judgment, has treated the question according to Muhammadan law, but there is no authority for his doing this. According to Sec. 26 of Reg. IV. of 1827, this case is to be governed by the law of the defendant, who is a Párs. There is no law generally applicable to Pársis in India, but the law applicable to them within the jurisdiction of the High Court on its Original side is that which is applied to British-born subjects, and in the absence of any specific law for the Pársis in the Mofussil, the rule of justice, equity, and good conscience should be observed; and in such cases we should follow, with certain necessary qualifications, the practice of Courts of Equity in England."

The hearing of the evidence, and of the extremely able arguments on the various points of law which were addressed to me by Mr. Green on behalf of the plaintiff, and by Mr. Mayhew on behalf of the defendant, occupied the sittings of the Court on the 8th, 10th, 13th, and 14th of January last, when the following facts appeared in evidence:—

By an indenture, bearing date the 21st of May 1864, in the English language and form, attested by Mr. Charles Peile,

(*c*) 6 Moo. Ind. App. 348.
(*d*) 5 Bom. H. C. Rep., A. C. J. 109.

then and now a solicitor of this court, and Bamanshá Kávasji, a witness in this suit, and the managing clerk of the then firm of Messrs. Bickersteth, Cleveland, and Peile, made between Daniel Francis Moorzalo of Bombay, described in the indenture as of Bombay Christian inhabitant, of the one part, and Devji Keshavji, therein described as of Bombay Hindú inhabitant, of the other part, after reciting that Moorzalo was seised of, or otherwise well and absolutely entitled to, an estate equivalent to an estate of inheritance in fee simple, in possession of, and in, the piece of ground, messuage, and hereditaments thereinafter described, and thereby conveyed or intended so to be, and that Moorzalo had agreed to sell the same to Devji Keshavji, Moorzalo, in consideration of Rs. 34,900 that day paid by Devji, granted the land and premises at Naigám now in dispute unto, and to the use of, Devji Keshavji, his heirs and assigns for ever.

Devji Keshavji entered into possession of the said premises so conveyed to him by the above indenture.

Devji Keshavji, who with Tulsidás Devji, one of his five sons, traded in Bombay under the style or firm of Keshavji Chattu, being in want of money for the purposes of his firm towards the latter part of the same year (1864), applied to one Karsandás Mádhavji, the *munim* of Mávji Prágji, a Hindú who lived at Modikháná, in the Fort of Bombay, for a loan of Rs. 25,000 from Mávji Prágji, and on the 31st of October 1864 Devji Keshavji handed to Karsandás Mádhavji (on which day an advance of Rs. 1,500 was made) the title-deeds connected with the property at Naigám.

The plaintiff's case at the hearing was rested partly upon the deposit of title-deeds, and partly upon the Gujaráti document of the 13th of June 1865, but most reliance appears to have been placed by the learned counsel for the plaintiff upon the former transaction. (His Lordship here reviewed the evidence relating to the deposit of the title-deeds, and the execution of the Gujaráti document of the 13th of June 1865, and continued.) In substance, therefore, Karsandás, on the 31st of October 1864, agreed, on behalf of his master, Mávji Prágji, to advance Rs. 25,000 to Devji and his son

1870.

JIVANDA'S KESHAVJI v. FRA'MJI NA'NA'BHA'I.

Tulsidás upon security of the title-deeds, or, as the witness expresses it, by way of mortgage, of Devji's property at Naigám; and on that day, namely, the 31st of October 1864, the title-deeds were deposited by Devji with Karsandás, an advance of Rs. 1,500 obtained, and a Gujaráti receipt taken, in which it was stated that the money had been received, and in security therefor the oart had been mortgaged, the English word "mortgage" being written in Gujaráti. That on the following days further sums were advanced and similar receipts taken, viz:—

	Rs.
On 11th April 1865	2,000
20th „ „	2,000
29th „ „	6,000
3rd May „	8,000
5th „ „	3,500
6th „ „	175
10th June „	1,800
13th „ „	25
To which add amount advanced	23,500
31st October 1864	1,500
	Rs. 25,000

A few days before the last advance of Rs. 25 Karsandás prepared a document in Gujaráti, which was subsequently dated the 13th of June 1865, addressed to Mávji Prágji, represented by Karsandás Mádhavji, and signed in the partnership name of Devji Keshavji's firm "Keshavji Chattu, represented by Devji and Tulsidás, his signature," in which it was stated that Rs. 25,000 had been received or borrowed at interest on different dates in ready cash and currency notes, and after giving the particulars of the amounts and dates the official translation of the document by Mr. Flynn, the Chief Translator of the High Court, proceeded as follows:—"According to these particulars I have received or borrowed from you at interest Rs. 25,000 in cash and currency notes. On account of the same (there are mortgaged) at your place my piece of land at Naigám, namely, a garden with a building

(or) a bungalow, which (land) is registered under No. 36 in the Collector's books, and the building or dwelling-house built on the said piece of land that is registered under No. ——in the books of the house-assessment Collector. All the deeds and other 'vouchers' relating to the said land having been left in mortgage at your place, Rs. 25,000, namely, twenty-five thousand, have been received (or borrowed) at interest thereon for an unlimited time. Interest thereon has been agreed upon at the rate of Rs. ¾, namely, twelve annas per 1 centum per 1 mensem. The same accordingly accrues. I am duly to pay to you the said money with the interest whenever you may demand (the same). I am not to raise any objection or dispute in respect thereof. This instrument I have given in writing to you of my own free will and accord in sound mind. It is agreed to and approved by me and my heirs and representatives. The 4th Jeth Vadya of Samvat 1921, the day of the week Tuesday, the 13th day of June in the English year 1865.

(Signature &c. as follows:—)

Th. (Thakar) Keshavji Chattu, represented by Devji and Tulsidás, his signature. Agreeably to what is written above, it is valid."

As soon as this document had been executed all the receipts were torn up.

Such being the undisputed facts connected with the transaction between Devji Keshavji on the one side and Karsandás Mádhavji on behalf of Mávji Prágji on the other, and no evidence on the subject having been offered on behalf of the defendant, I now proceed to consider the rights, if any, acquired by Mávji Prágji on the 31st of October 1864 or afterwards in respect of the land and premises the subject-matter of the present suit.

It appears to be quite settled that "there is no transaction of Hindú Law which absolutely requires a writing. Contracts of every description, involving both temporal and spiritual consequences, may be made orally:" per Holloway, J., in delivering the judgment of the High Court at

1870.

JIVANDA'S KESHAVJI v. FRA'MJI NA'NA'BHA'I.

Madras in *Crinavásammál* v. *Vijayammál* (*e*), in which case the court held that a Hindú may make a nuncupative will of property, whether immoveable or moveable. A similar decision took place in November 1867 in the High Court at Calcutta, when it was held that in India there are no formalities to be gone through in order to the constitution of a valid will, and all that is required is that the intention of the testator should be ascertained—in whatever way it may be ascertained, whether by word of mouth or in writing—clearly and unmistakeably: *Sudanund Mohapattur* v. *Soorjo Monee Debee* (*f*).

This, so far as my experience has gone, has always been treated as the law in the High Court in Bombay.

It was said by Lord Chelmsford, in the course of the argument in *Shreemutty Anundomohey Dossee* v. *Doe dem. The East India Company* (*g*), that one Muttyloll Seal was a Hindú, and that he could, by the Hindú law, pass land without writing. The Lords of the Privy Council held that a freehold interest cannot be created by parol or by an informal written instrument; but at page 65 they say: "The Agent passed no legal interest out of the East India Company to Muttyloll Seal. The Company did not grant, nor did they intend to grant, as Hindús; if they had so intended they must have failed in their intention, for they could only grant according to law. Yet the instrument was binding upon them as an agreement, and a Court of Equity would have protected the appellants against any attempt to dispossess them contrary to its stipulations. Notwithstanding the provision which it contains for a month's notice, the East India Company might have maintained an ejectment the day after the agreement was entered into, because it passed no legal interest, but they could have been instantly restrained from proceeding by a Court of Equity."

Now here Devji Keshavji and Mávji Prágji are both Hindús and live in the island, and, therefore, within the local limits of the High Court of Bombay. The one, on or

(*e*) 2 Mad. H. C. Rep. 37. (*f*) 8 Calc. W. Rep., Civ. R. 455.
(*g*) 8 Moo. Ind. App. 54.

before the 31st of October 1864, agrees to borrow, and the other agrees to lend, moneys on the security of Devji Keshavji's property at Naigám, and the one on that day deposits and the other receives Devji's title-deeds, the delivery of them apparently taking place in Mávji Prágji's house or shop at Modikháná, within the Fort, as security for an advance of Rs. 25,000 agreed to be made on security of the property mentioned in the deeds—an advance which, it is sworn, would not have been made upon personal security. Of the sum so agreed to be advanced, Rs. 1,500 are actually paid by Karsandás to Devji Keshavji on that day (31st October 1864), and a receipt given in which the English word "mortgage" is inserted in Gujaráti, in order that there may be no mistake as to the security on which the money was advanced.

It was argued on behalf of the defendant that there can be no equitable mortgage in the strict English sense between Hindús; and Mr. Mayhew stated that he had not found any Indian case in which an equitable mortgage had been given as distinct from a legal one.

There is, however, authority upon the point.

In a case (not cited at the bar), *Sibchundar Ghose* v. *Russick Chunder Neoghy* (*h*), decided by the Supreme Court at Calcutta in July 1842, the then Chief Justice, Sir Lawrence Peel, in the course of his judgment, said (p. 62) that he laid aside in the consideration of that case the deposit of the title-deeds, and that the question was one exclusively of Hindú law, to which the doctrine of an equitable mortgage was inapplicable.

In that case there was a demurrer to a bill of review, the chief ground of demurrer being that a form of instrument called a "Bengáli mortgage" must be accompanied by possession in order to constitute a charge upon the lands over which it extends. It was held by Sir Lawrence Peel, C.J., and Sir Henry Wilmot Seton (the author of the well-known work on decrees), against the opinion of Sir John

(*h*) 1 Fulton 36.

1870.
JIVANDA'S KESHAVJI v. FRA'MJI NA'NA'BHA'I.

Peter Grant, that such a mortgage, even though unaccompanied with possession, gives a lien upon lands.

Sir Lawrence Peel, in the course of his elaborate judgment, said (p. 62): "The principal question remaining to be considered is whether by the Hindu law the execution of the instrument set forth in the complainant's bill, one of that class of instruments commonly designated Bengali mortgages, accompanied by a deposit of the title-deeds of the property which that instrument purports to pledge, but neither accompanied nor followed by any possession of that property by the alleged mortgagee, constitutes a perfected contract of pledge, so as to give a security upon the lands. I lay aside, in the consideration of this case, the deposit of the title-deeds. The question is one exclusively of Hindu law, to which the doctrine of an equitable mortgage is inapplicable. The deposit cannot, in my opinion, be considered as a symbolical transfer of the lands; there is nothing to show that it was intended so to operate, and it is unnecessary to consider whether it could so have operated, had that intention been apparent. Nor can I consider the deposit as indicating an intention and agreement that the transaction should be governed by the English law, since the principal instrument, being in a form common amongst the Hindus, and conforming to their laws and usages, rebuts any presumption of the adoption in the particular contract of the English law."

The learned Chief Justice then proceeds (p. 63) to consider the validity of the instrument as a perfected contract of pledge, first upon the written texts to which the Judges are in the habit of referring as authorities on questions of Hindú law, and next upon the decisions which, as evidence of the practice and usage amongst that people, may, upon the principles of that very law, control the texts to which they may be opposed.

He examines the texts and finds that they are far from uniform, and proceeds thus (p. 64): "Had these written authorities not been, as in my judgment they are, conflicting,

still I should have felt myself bound to decide this case on the practice and usage under which such instruments unaccompanied by possession have been received and acted on, as valid and effectual securities evidenced, as that practice and usage are, by judicial decisions in accordance with the view which I take of this question.

"The decisions of the Company's courts upon this subject may, in my opinion, as the judicial decisions of courts of competent jurisdiction upon the point, be viewed by us as evidence of the Hindu law on the subject. And it is beyond all doubt that those courts, including the highest, the Sudder Dewanny Adawlut, treat these instruments as valid mortgages, though no possession have been had under them." (p. 65.)

The Chief Justice afterwards proceeds to notice the decisions of the Supreme Court at Calcutta, and says (p. 68): "These are collected in the Appendix to Morton's Decisions (p. 372). It is not my intention to go into a minute examination of them. Some are *exparte* decisions, others not. But there is not one in which any statement of the delivery of possession is contained in the abstract of the bill set forth, and if possession be indispensable to perfect the contract of pledge no title in the mortgagee is alleged in any one of the cases, and no decree of foreclosure could have been rightly made in any one of those suits. Viewing the whole of them together, they appear to me to furnish irresistible proof that the Court which decided them entertained, declared, and acted on the same opinion on the point which has for a long time been entertained and acted upon by the Judges of the Sudder Dewanny Adawlut, as we learn from their own communication. These instruments have become a common assurance; the English form of conveyance by lease and release has for an equal length of time been a common mode of mortgaging lands amongst Hindus; under neither mode of conveyance has any possession in fact been taken."

This case seems to be a clear authority that, as between Hindús and in Bengal, there may be a contract operating as

1870.

JIVANDA'S KESHAVJI v. FRA'MJI NA'NA BHA'I.

a charge or lien so as to give a security upon lands, though neither accompanied nor followed by any possession of that property by the person lending money upon such security.

Parbutty Ghose v. *Bholanauth Mitter and others* (*i*) was a case before the Supreme Court at Calcutta in 1839 respecting the mortgage of a pottáh.

The late Horace Hayman Wilson, in his Glossary of Judicial and Revenue Terms, compiled and published in 1850, under the authority of the Court of Directors of the East India Company, defines a pottáh as "a deed of lease; a document given by the Collector to the Zamindar, or by some other receiver of revenue to the cultivator or under-tenant, specifying the condition on which the lands are held, and the value or proportion of the produce to be paid to the authority or person from whom the lands are held; the term is laxly applied to a variety of deeds securing rights or property in land."

The late Mr. W. H. Morley, in the Glossary in Vol. I. of his Digest (p. 640), describes a pottáh as "a lease granted to the cultivators on the part of Government, either written on paper, or engraved with a style on the leaves of the talipot-tree, by Europeans called a cadjan."

In the case now under citation (1 Fulton 368) the parties to the suit appear to have been Hindús, and the Judge, Sir Henry Wilmot Seton, treated the mortgage of the *pottáh* as an equitable mortgage of the land which it represented. The nature and character of a Bengáli *pottáh* were very fully considered by Lord Chancellor Lyndhurst in *Freeman* v. *Fairlie* (*j*), where he held that the *pottáh* granted by the Collector is not a muniment of title, but only an evidence of holding according to a local and fiscal regulation.

I next proceed to consider a case, *Varden Seth Sam* v. *Luckpathy Royjee Lallah and others* (*k*), which appears to me to be of very great importance, decided by the Privy Council

(*i*) 1 Fulton 368.
(*j*) 1 Moo. Ind. App. 305. (*k*) 9 Moo. Ind. App. 303.

in 1862, on appeal from the Ṣadr Diváni Adálat at Madras, and which was argued before the late Lord Kingsdown, before Dr. Lushington, and three Judges who had been formerly Chief Justices of the Supreme Court at Calcutta, viz., Sir Edward Ryan, Sir Lawrence Peel, and Sir James Colvile.

The question in that case related to the validity of a lien created by deposit of the title-deeds of an estate called the Muttah of Tirupassur, in the Mofussil of the presidency of Madras, in consideration of pecuniary advances made by the plaintiff, the appellant, for the benefit of that estate.

The plaintiff in the court of original jurisdiction had succeeded in establishing a lien on certain landed property called the Muttah (or district of villages) of Tirupassur. This Muttah, which was the property of the first defendant on the record, had been, as the plaintiff alleged, duly charged in his favour by the first defendant as a security in respect of the non-delivery of the title-deeds of another estate, called the Muttah of Ekattur, purchased by the plaintiff from him. After the creation of such charge the property was transferred first to the third defendant, and by him, pending the present litigation, to the last defendant, on the record, Mr. Ouchterlony. In the court of original jurisdiction and in the first appellate court the plaintiff succeeded in establishing his charge, but on appeal to the Ṣadr Diváni Adálat at Madras the decree was reversed.

The plaintiff was a Christian, and from his name appeared to be an Armenian; the first defendant was the son of the second defendant, and both were Muhammadans; the third defendant was a Hindú; and the last on the record was a Christian, and a British subject.

Though both the third and the last defendants pleaded in effect that they were *boná fide* purchasers for value without notice, yet they did not prove that defence, though the plaintiff charged notice and collusion with the first defendant.

Lord Kingsdown, in pronouncing the decision of the Lords of the Privy Council, after stating the above facts, proceeded

1870.

JIVANDA'S KESHAVJI v. FRA'MJI NA'NA'BHA'I.

as follows, and in words which, in my opinion, have a very important bearing upon the present case :—

"It appeared in evidence that, on the non-production of the title-deeds of the estate, *Ekattur*, it was promised on the part of the seller that they would be produced in a few days, but this promise was not fulfilled, as they proved to be in the possession of a prior incumbrancer. The plaintiff was obliged, in order to procure them, to pay off this incumbrance, and, having previously paid a large part of the purchase-money, his whole payments exceeded the purchase-money by a considerable sum (Rs. 3,810), for which, with interest, he claimed to be indemnified by his alleged security on the pledged estate. The contract of pledge contained also a further stipulation of purchase.

"The decision of the Sudder Dewany Adawlut, so far as it respects the enforcement of the lien against the third and last defendants, appears to have proceeded upon the ground that the principles of the English law applicable to a similar state of circumstances ought not to govern the decision of that suit in those Courts. This was correct if the authoritative obligation of that law on the Company's Courts were insisted on. There is, properly, no prescribed general law to which their decisions must conform. They are directed in the Madras Presidency to proceed generally according to justice, equity, and good conscience. The question then is, whether the decision appealed against violates that direction or not. The Court of appeal, reversing the prior decisions, has decided that the contract was not operative as a hypothecation, or pledge, even between the parties to it. Yet the evidence shows that the plaintiff looked, not simply to the personal credit of the person with whom he contracted, but bargained for a security on land. If any positive law had forbidden effect to be given to the actual agreement of the parties to create that lien, the Court, of course, must have obeyed that law. If the contract of lien were imperfect for want of some necessary condition, effect must have been, in like manner, denied to it as a perfected lien. But nothing of this sort is suggested in the pleadings, or proved. It is not

shown that, in fact, the parties contracted with reference to any particular law. They were not of the same race and creed. By the Mahomedan law, such a contract as the one under consideration, for a security in respect of a contingent loss, would be one not of pawn, but of trust (Hedeya, Vol. IV., p. 208, tit. 'Pawns'). It is not declared that any writing or actual delivery is essential to the creation of such trust by that law; but, as the contracting parties are not both Mahomedans, that law would not have governed the question of the validity and force of their contract, even in the Supreme Court. The plaintiff is a Christian; the contract took place with parties living within the local limits of the Supreme Court of Madras, though it related to land beyond them. It is not shown that any local law, any *lex loci rei sitæ*, exists, forbidding the creation of a lien by the contract and deposit of deeds which existed in this case; and by the general law of the place where the contract was made, that is, the English law, the deposit of title-deeds as a security would create a lien on lands; though, as between parties who can convey by deed only, or conveyance in writing, such lien would necessarily be equitable. In this case there is an express contract for a security on the lands, to which, no law invalidating it, effect must be given between the parties themselves. The circumstance that the plaintiff had not sued for a specific performance of the contract to sell the land to him (on which the Sudder Court laid some stress), does not in the least affect his claim for a lien. By the contract this latter interest is immediately created, and expressed to be immediate. The sale is contemplated as future. The first defendant's own acts, in dealing with his land as he did, would effectually bar him, and those taking derivative titles from him, from insisting on this objection, if it had had any original foundation of justice and equity to support it; but, in truth, they are distinct and independent parts of the same contract.

"The contract, then, created between the parties a lien on the land. It is immaterial for the decision of this suit to consider or decide whether that lien between these parties,

1870.

JIVANDA'S KESHAVJI v. FRAMJI NA'NA'BHA'I.

looking to the power in the first defendant to convey without writing, is legal or equitable (*Doe dem. Seebkristo* v. *The East India Company*, 6 Moore's Ind. App. Cases, 267)."

In the case now before me the evidence shows that Karsandás Mádhavji lent the money of his master, Mávji Prágji, on the security of the oart; and, as I have already pointed out, he swore that he would not have lent the money on the personal security of Devji Keshavji and his son Tulsidás. "I only agreed" (he says in examination) "to lend the money on mortgage. I took the receipts to show the moneys were lent on security of the oart. It was mentioned in all the receipts that there were deeds of the oart."

Then, even assuming (what I am not prepared to admit) that the present defendant, a Párși, is entitled to rely on the Hindú law, on the ground that the contracting parties were both Hindús, it must be borne in mind that the contract took place between persons living within the local limits of the High Court at Bombay, and that the contract related to land within such local limits. No law that I am aware of exists in the city of Bombay forbidding the creation of a lien or charge by a contract and deposit of deeds, such as that which existed in this case; and by the general law of the place where the contract was made, that is, the English law, and by which law the defendant, a Párși, is bound, the deposit of title-deeds as a security would create a lien on land. Devji Keshavji, a Hindú, could convey or make any contract he chose without writing, and I cannot see what is to affect the validity of a lien so created by a verbal agreement between the parties. To borrow once more the language of Lord Kingsdown in the appeal from Madras, "In this case" (and the contract there, though made in Madras, related to lands in the Mofussil) "there *is an express contract for a security on the lands, to which, no law invalidating it, effect must be given between the parties themselves.*

"*The contract, then, created between the parties a lien on the land.* It is immaterial for the decision of this suit to consider or decide whether that lien between these parties, look-

ing at the power of the first defendant" (a Muhammadan) "to convey without writing, is legal or equitable" (*l*).

There would, moreover, be this difficulty in ignoring an equitable mortgage, that a second mortgage would be invalid, as the equity of redemption only is conveyed. But second mortgages, which are mortgages of an equity of redemption, are constantly recognised in this court. To hold that a Hindú mortgage can only be of the legal estate, and that possession must be given, would in effect overturn decrees passed in this court (*m*), as well as be contrary to what has been and is the general practice of persons in Bombay; for it is a matter of frequent occurrence in this island for natives to obtain an advance of money upon the security only of a deposit of title-deeds. It was stated, too, by counsel that in a recent case before Mr. Justice Westropp, *Sarasvatibái* v. *Viṭhobá Pánḍurang*, effect was given to an equitable mortgage.

It was objected by the learned counsel for the defendant that although the loan was from the very first for Rs. 25,000 on mortgage of the oart, yet that the deposit was made accompanied with a writing which alone can be looked at for the purpose of seeing what right (if any) the plaintiff has against the land. That all acts previous to the execution of the Gujaráti document of the 13th of June 1865 led up to and merged in that instrument, which, it was argued, was in fact a substitution for all previous writings. That, the English word "mortgage" having been written in the vernacular in the receipts, it was intended that Mávji Prágji should have a mortgagee's right against the land. That the word "mortgage" used in the receipts, and in the Gujaráti document of the 13th of June 1865, must be construed so as to create an interest in the land, and that as the receipts and the Gujaráti document were confessedly not registered under the Indian Registration Act No. XVI. of 1864, Sec. 13, or any other Registration Act, they could not be looked at or be

(*l*) 9 Moo. Ind. App. 322.

(*m*) See *Vithaldás Narotamdás* v. *Karsandás Keshavdás*, 5 Bom. H. C. Rep., O. C. J. 76.

1870.
JIVANDA'S KESHAVJI v. FRA'MJI NA'NA'BHA'I.

considered as conferring any title upon Mávji Prágji, or derivatively through him upon the plaintiff.

I do not think these objections are well founded.

On the 31st of October 1864, the day on which all the title-deeds were handed over to Karsandás and the first advance of Rs. 1,500 was made and the first receipt given, the first Indian General Registration Act, No. XVI. of 1864, was not in force, as by Sec. 71 of that Act it is provided that the Act should take effect on the 1st of January 1865. There was, in fact, on the 31st of October 1864, no compulsory registration whatever in the island of Bombay.

I consider that the contract for a security on the land was created when the loan was applied for and agreed to, and when the deeds were handed over to Karsandás; and that the receipt then and those subsequently given did not, nor did the Gujaráti document of the 13th of June 1865, on which day Rs. 25, the last instalment of the Rs. 25,000, was advanced, create or declare any right or interest within the meaning of the Registration Acts. The rights of the parties, be they legal or be they equitable, had already been created and perfected on the 31st of October 1864, and it required no memorandum or writing to render such rights valid, nor in fact was there evidence that any such document, or any deed or writing, was on the 31st of October 1864 contemplated by the parties. Suppose the receipts and the instrument of the 13th of June 1865 had never existed, the lien or charge on the property would still, in my opinion, have been perfect and valid. The fact of such informal Native documents being subsequently given and executed after the transaction had been completed cannot, I think, in any way be held to affect the validity of that which Sir Lawrence Peel, in the Calcutta case (*n*), calls "*a perfected contract of pledge*," or, to borrow the words of Lord Kingsdown, (*o*), was a "*contract which created between the parties a lien on the land.*"

In general, no doubt, where a contract has been reduced into writing by the parties, the writing is the best evidence

(*n*) 1 Fulton 63. (*o*) 9 Moo. Ind. App. 322.

of it, and must be produced. But it is not in every case necessary, where the matter to be proved has been committed to writing, that the writing should be produced. If, for instance, the narrative of an extrinsic fact has been committed to writing, it may yet be proved by parol evidence. Upon this principle a receipt for money given on unstamped paper will not exclude parol evidence of the payment, and the paper on which it is written may be produced not as evidence of itself, but as a material memorandum which a witness who saw it given may refer to, and give parol evidence of the fact of payment: *Rambert* v. *Cohen* (*p*); 1 Taylor on Evidence, p. 412 (5th ed). So a verbal demand of goods is admissible in trover though a demand in writing was made at the same time: *Smith* v. *Young* (*q*). The fact, too, of birth, baptism, marriage, death, or burial may be proved by parol testimony, though a narrative or memorandum of these events may have been entered in registers which the law requires to be kept; for the existence or contents of these registers form no part of the fact to be proved, and the entry is no more than a collateral or subsequent memorial of that fact, which may furnish a satisfactory and convenient mode of proof, but cannot exclude other evidence, though its non-production may afford grounds for scrutinising such evidence with more than ordinary care: 1 Taylor on Evidence, p. 413.

Two decisions (not cited at the bar) upon the English Stamp Laws may, I think, not inaptly be quoted here.

In *Beeching* v. *Westbrook* (*r*), which was an action for board and lodging supplied to an illegitimate child of the defendant, letters of the defendant containing promises to remit money to the plaintiff, and making excuses for not having done so, were held not to require an agreement-stamp as being "evidence of a contract" within the meaning of those words in the Stamp Act 55 Geo. III., c. 184, Sched. Part I., tit. "Agreement." Mr. Baron Parke said that a stamp was not imposed by the Act upon every document which

(*p*) 4 Esp. 213. (*q*) 1 Campb. 439. (*r*) 8 M. & W. 411.

1870.
JIVANDA'S KESHAVJI v. FRA'MJI NA'NA'BHA'I.

refers to, and so furnishes evidence to prove, an agreement; it was required only on documents in which the parties put down the terms by which they intend to be mutually bound; and that he was clearly of opinion that a written instrument, to come within the clause, must have been made with the intention of containing in itself the terms of an agreement between the parties. Mr. Baron Alderson said that those letters only require a stamp which are written, if he might so express himself, while the agreement was being made; but no stamp was necessary upon letters which were written after the agreement had been made.

That decision was followed by the Court of Queen's Bench in *Fancourt* v. *Thorne* (*s*). There the defendant made a promissory note in the following terms:—"On demand I promise to pay W. T. Hodsoll or order £500 for value received, with interest at the rate of 4 per cent.; and I have lodged with the said W. T. Hodsoll the counterpart leases signed by G. Davis, J. Jewell, Wm. Hill, and Wm. Gould for ground let by me to them respectively, as a collateral security for the said £500 and interest. £500. Wm. Thorne."

This paper was stamped as a promissory note, and it was objected at the trial that in respect of the latter part of it there should also have been a stamp as for a mortgage or agreement. The Judge, Mr. Justice John Williams, admitted the note, giving leave to move for a nonsuit. On showing cause against the rule, it was argued by Mr. Maynard that no stamp was requisite in respect of the latter part of the instrument even if considered by itself. That it was not a mortgage at all; it was a memorandum of a fact only, and neither constituted nor furnished evidence of a contract. On the other hand, Mr. Butt and Mr. Gray contended that there was an equitable mortgage, or at least a writing furnishing evidence of a contract of lending and borrowing, without any stamp. Mr. Justice Patteson, interposing at this point, said "No, it is merely an assertion of the fact of the deposit. How can you distinguish the case from *Beeching* v. *Westbrook* (*t*)?

(*s*) 9 Q. B. 312. (*t*) 8 M. & W. 411.

How can you say it is an instrument binding the parties?" Lord Denman, C.J., said: "It merely mentions a fact which in itself might be treated in Chancery as a mortgage: the written instrument is no mortgage. * * * This is not a contract between parties: it is *in vacuo*."

I find a difficulty in distinguishing these two cases in principle from the present one.

I will next call attention to three decisions upon the statute of Anne (7 Anne, c. 20) requiring deeds or conveyances affecting lands in Middlesex to be registered, which, though not cited at the bar, are, I think, well worthy of notice.

In the first case, *Sumpter* v. *Cooper* (*u*), a debtor had deposited the title-deeds of houses with his creditor as a security, and afterwards executed an assignment of his interest in the houses to the same party, but this instrument was never registered pursuant to the Stat. 7 Anne, c. 20. The debtor afterwards became bankrupt, and the assignment of his effects under the commission was duly registered. The assignee brought an action against the creditor for the rents of the houses which he had received from the time of the assignment made to him by the bankrupt. Lord Tenterden, C.J., directed a nonsuit, reserving liberty to the plaintiffs to move to enter a verdict in their favour if the court should think the equitable mortgage unavailable. Lord Campbell, then Mr. Campbell, moved accordingly, and argued that whatever lien the defendant had upon these houses as equitable mortgagee was merged when he took an absolute assignment of the same property, and that by that assignment his title must stand or fall (a similar argument to that urged by Mr. Mayhew in the present case).

The Court took time to consider, and subsequently gave judgment sustaining the ruling of the learned Judge. Lord Tenterden, C.J., said: "We are of opinion that the non-suit was right. The defendant was the equitable mortgagee of the bankrupt's moiety of the premises, and having received the whole of the rents he would have had an equitable

(*u*) 2 B. & Ad. 223.

1870.

JIVANDA'S KESHAVJI v. FRA'MJI NA'NA'BHA'I.

right to retain them against the bank if he had remained solvent, and he has the same right against the assignees, who can only recover that to which the bank was both legally and equitably entitled. As to the Statute of Anne, we think it cannot be held to apply to the case of an equitable mortgage. It refers only to the registration of deeds, and where there is merely a lien or equitable mortgage created by the deposit of deeds there is no instrument to be registered."

In *Wright* v. *Stanfield* (*v*) Lord Romilly held that an agreement to mortgage a Middlesex property did not come within the Middlesex Registry Act (7 Anne, c. 20); and, therefore, that where the owner of property in that county had first mortgaged to A, and then agreed to mortgage to B, and had subsequently mortgaged to C, and C had registered and B had not; he held that C had not obtained priority over B: saying that he thought it clear that the Registry Act does not require the registration of a memorandum like that given to the plaintiff.

In a subsequent case, *Moore* v. *Culverhouse* (*w*), Lord Romilly, distinguishing it from *Wright* v. *Stanfield*, held that an unregistered equitable charge on the equity of redemption of a property in Middlesex must be postponed to a subsequent registered mortgage of it, being of opinion that the word "conveyance" in the Act (7 Anne, c. 20) applied to equitable as well as to legal incumbrances, and that the memorandum of actual charge in that case was within the Act.

It was decided by Norman and Seton-Karr, JJ., in 1867, in *Bunwaree Lal* v. *Sungum Lal* (*x*), that it was not intended that compulsory registration under Sec. 13 of the General Registration Act XVI. of 1864 should apply to deeds which are merely preliminary to the main contract or engagement, or that deeds which are steps in, or mere parts of, a transaction should be registered before they could be used as evidence. And in a recent case decided by Mr. Justice Macpherson on the 19th of April 1869, *Bhairabnath Khettri* v. *Kishori*

(*v*) 27 Beav. 8. (*w*) 27 Beav. 639.
(*x*) 7 Calc. W. Rep., Civ. R. 280.

Mohan (*y*), it was held that an agreement for a lease does not require registration, Mr. Justice Macpherson saying that he thought the agreement did not come under Sec. 17 of the Registration Act, as it only led up to a lease; that if he were to hold that an agreement such as that required to be registered, he should also have to hold that an agreement to register required registration; and that the case was governed by the case of *Bunwaree Lal* v. *Sungum Lal*.

The High Court at Bombay has also arrived at a similar conclusion with respect to an agreement for the purchase of land in Bombay. I allude to the case of *Hargovandás Girdharlál* v. *Bálkrishna Kánobá* (not reported), which was an appeal from a decision of Sir Charles Sargent, and was argued by myself, when at the bar, for the appellant, and defendant before, and decided on the 4th of October 1866 by, the court of appeal, presided over by Sir Richard Couch, C. J., who has courteously placed his note-book at my disposal.

The suit in that case was for the specific performance of an agreement in the native language for the purchase of land in the island of Bombay. I argued, as I had already unsuccessfully done before the court below, that the document ought to have been registered, under Sec. 13 of Act XVI. of 1864. The Court held, however, in conformity with the decision of Sir Charles Sargent, that the instrument which contemplated the execution of a regular deed prepared in an attorney's office did not require to be registered, and the decree in favour of the plaintiff below was confirmed, and the appeal dismissed, with costs.

The case of *Sheikh Rahmatulla* v. *Sheikh Sariutulla Kagchi* (*z*), decided by Sir Barnes Peacock, C.J., and four other Judges, in August 1868, was much pressed on me in argument by the learned counsel for the defendant, and the following passage from the judgment of Mr. Justice Macpherson (p. 88), which is well worthy of being cited here, is one to which I entirely subscribe:—

(*y*) 3 Beng. L. Rep., Appendix, p. 1.
(*z*) 1 Beng. L. Rep., F. B. R. 58.

1870.

JIVANDA'S KESHAVJI v. FRA'MJI NA'NA'BHA'I.

"It has been argued that in this country people in making a contract usually enter first into a verbal contract, whether they eventually put it into writing or not; and, therefore, that though there is this unregistered *Kabula* in existence, the plaintiff may ignore it, and fall back upon the original verbal agreement. In every country, and just as much in England as in India, certain negotiations almost invariably take place before a contract is reduced to writing; and in every country it is usual that the terms of the contract should, with more or less accuracy, be agreed on verbally before the written instrument embodying them is prepared. I am not aware that any difference whatsoever exists between natives of this country and natives of any other country as regards contracts which have been entered into verbally and are afterwards put in writing. When a contract has once been put in writing and signed by the parties, the written instrument contains, and is, the only evidence of the contract, and the parties cannot give it the go-by, and fall back upon the original verbal agreement. It may be that in India a title to land may be passed without writing, but when once the sale or conveyance has been embodied in a written instrument, that instrument, and that instrument alone, contains the contract between the parties. This question has been before me on several occasions, and the more I consider it the more I am confirmed in the opinion which I have now expressed, and which I first expressed in the case of *Manmohini Dasi* (*a*). The point really involved is whether or not the court, by admitting parol evidence of unregistered deeds, are to assist parties in ignoring and evading the provisions of the Registration Act."

In accordance with those principles the case of *Kala Chand Mundul* v. *Gopal Chunder Bhuttacharjee* (*b*), cited by Mr. Mayhew, was decided in Calcutta by Jackson and Markby, JJ., in July 1869. There the suit was brought upon a document by which the lien was actually created, and as the document was unregistered it was held—and, I think,

(*a*) 7 Calc. W. Rep., Civ. R. 112.
(*b*) 12 Calc. W. Rep., Civ. R. 163.

properly so—that, under Sec. 49 of the Registration Act XX. of 1866, the instrument could not be received in evidence.

Now here there was no compulsory Registration Act in force within the island of Bombay when the verbal agreement for the charge or lien on the lands was made, on the 31st of October 1864; no contract was agreed to be put, nor in fact was any ever put, in writing and signed by the parties; parol evidence of the verbal contract, which was the only contract made between the parties, was clearly admissible, and, consequently, the cases just cited are no authority against the right of the plaintiff to recover in the present suit.

On the same ground may be distinguished the case of *Bhándu Rájárám* v. *Dámáji Jiváji* (*c*).

Moreover, I do not consider that Sec. 48 of Act XX. of 1866, which enacts that all instruments duly registered under that Act and relating to any moveable or immoveable property should take effect against any oral agreement or declaration relating to the same property, applies to oral agreements made previous to Act XVI. of 1864 coming into operation. To give it such a retrospective effect would be to violate a well-known canon of construction of Acts of the Legislature. Statutes are *primâ facie* deemed to be prospective only: "*Nova constitutio futuris formam imponere debet, non præteritis:*" *Doolubdass Pettamberdass* v. *Ramlall Thakoorseydass* (*d*). A retrospective effect will not be given to a statute unless the statute, by precise words, clearly shows that such was the intention of the Legislature: *Thompson* v. *Lack* (*e*). Clear and unambiguous words are necessary to give a retrospective effect to an Act of Parliament, so as to deprive a party of a vested right of action: *Marsh* v. *Higgins* (*f*).

The decision in February 1869 of Lord Hatherley, C., in *Hicks* v. *Powell* (*g*), that The Indian Registration Act of 1866

(*c*) 6 Bom. H. C. Rep., A. C. J. 59. (*d*) 5 Moo. Ind. App. 109.
(*e*) 3 C. B. 540. (*f*) 9 C. B. 551. (*g*) Law Rep. 4 Ch. App. 741.

1870.

JIVANDA'S KESHAVJI v. FRA'MJI NA'NA'BHA'I.

makes void all instruments relating to real estate in India, which ought to have been registered under the Indian Registration Act of 1864, but were not so registered, and destroys all equities arising out of them, does not affect the present case, where the lien was created before the 1st of January 1865, the day on which the Registration Act of 1864 came into operation.

Act XVI. of 1864, too, contains no section corresponding with Sec. 48 of Act XX. of 1866.

The decisions cited by Mr. Mayhew reported in 4 Bom. H. C. Rep., A. C. J. 69, that an unregistered mortgage without possession is not valid against a purchaser with possession, and in 5 Bom. H. C. Rep., A. C. J. 147, that an unregistered mortgage without possession upon which a decree has been obtained but not executed has not, by virtue of such decree, priority over a subsequent deed of sale which is registered, appear to me to differ materially from the present case.

The learned counsel asserted, but, so far as I could judge, entirely failed to show, that there was an analogy between mortgages between Hindús and in mortgages in England of ships, in which subsequent registered mortgages have priority over previous unregistered ones.

I think, too, he was incorrect in stating (as I understood him to do) generally that the decisions in India have proceeded on the ground that the English registration of land is different from the Indian land registration.

The decision of Forbes and Warden, JJ., reported in 1 Bom. H. C. Rep. 10, that a registered deed was entitled to priority over an unregistered deed of an earlier date; and that of Mr. Justice Holloway and Mr. Justice Collett, reported in 3 Mad. H. C. Rep. 89, that a registered deed of sale, though subsequent in date, invalidates, as against the registered purchaser, a prior deed of sale unregistered, notwithstanding that notice of the prior deed be alleged; the decision of Newton and Westropp, JJ., reported in 2 Bom. H. C. Rep. 213, that a registered *miráspatra* was entitled to pre-

ference over an unregistered *miráspatra* of a prior date accompanied with possession; that of Newton and Warden, JJ., in 2 Bom. H. C. Rep. 233, giving preference to the latter of two deeds of sale of immoveable property when registered over the earlier unregistered deed, though the first deed had not been carried into effect, as every duly registered deed of sale, if authentic, invalidates any other deed of sale which may not have been registered—cited by Mr. Mayhew; and the decision of Sir Barnes Peacock, C.J., and Mitter, J., in August 1868, reported in 1 Beng. L. Rep., A. J. 197, that the purchaser under a decree for sale in satisfaction of a registered mortgage is entitled in priority to the purchaser under another decree for sale in satisfaction of another unregistered mortgage, although the latter mortgage be of an earlier date—cited by Mr. Starling—were all decisions under Act XIX. of 1843 of the Legislative Council of India, by Section 2 of which Act it was expressly enacted that every deed of sale or mortgage should invalidate a prior deed, or be satisfied in preference to any other mortgage on the same property, which may not have been registered, "any knowledge or notice of any such unregistered deed or certificate alleged to be had by any party to such registered deed or certificate notwithstanding."

That Act (XIX. of 1843), and the five decisions just quoted founded on it, are inapplicable to the present case, for two reasons:—(1) because the Act, as well as Act I. of 1843,* which it amended and partially repealed, applied only to the Mofussil, and not to the Presidency towns of Calcutta, Madras, or Bombay; (2) because the Act XIX. of 1843 was repealed by the General Registration Act XVI. of 1864, as from the 1st of January 1865, and, consequently, had ceased to have any effect on the 28th of August 1866, the date of the mortgage under which the defendant derives his title, and upon which he rests his defence to the present suit.

I may here mention that under Act XIX. of 1843 it was not every registered deed that was entitled to priority over an unregistered one, as it was decided by the Privy

* See especially the Preamble to Act I. of 1843.

1870.

JIVANDA'S KESHAVJI v. FRA'MJI NA'NA'BHA'I.

Council in 1865, in a case on appeal from the Ṣadr Diváni Adálat of Bengal, *Shreenaunth Bhuttacharjee* v. *Ram Comul Gungopadya and others* (*h*), that the proviso in the 2nd section of Act XIX. of 1843, that "its authenticity be established to the satisfaction of the Court," pointed out merely the exclusion of a fraudulent deed from the benefit of the Act, as it was not intended that a deed which was tainted by fraud, although in other respects genuine, should be placed on the same footing as a *bonâ fide* deed, and, consequently, that a registered deed could be deprived of the priority given by that Act if it be proved that there was fraud on the part of the grantee.

A case was cited by counsel where the plaintiff had sued on a bond which stated not only that the money would be repaid, but that certain lands should be held to be pledged for the repayment of the loan, the lands being mentioned in the bond as collateral security. In that case Sir Barnes Peacock, C.J., and Hobhouse, J., held (January 1868)—9 Calc. W. Rep., Civ. R. 111—that the registration of such a bond was not compulsory under cl. 2, Sec. XVII. of Act XX. of 1866 (the General Registration Act now in force), and that the reception of such a bond in evidence, though not registered, was not barred by Sec. 49 of that Act, as no immoveable property would be affected by the personal or money decree sought by the plaintiff.

In the course of the argument I called attention to a decision of Kemp and Jackson, JJ., in August 1868, of *Gopal Prasad* v. *Nandarani* (*i*). There A executed an instrument in favour of B, covenanting to repay him the amount of a loan together with interest, and mortgaging certain immoveable property as security for repayment of the same. B sued A for the debt. It was held that the instrument did not directly create, declare, transfer, or extinguish any right or title in immoveable property; that the land was mentioned in the bond as a collateral security, and, therefore, the instrument was not inadmissible, under Sec. 13 of Act XVI. of 1864, the registration of the bond not being compulsory.

(*h*) 10 Moo. Ind. App. 220. (*i*) 1 Beng. L. Rep., A. J. 192.

1870.

JIVANDA'S KESHAVJI v. FRA'MJI NA'NA'BHA'I.

To this I may add the decision of Sir Barnes Peacock and a full Bench, in September 1869, in *Sham Narayan Lall* v. *Khimajit Matoe* (*j*), where, in a suit for breach of a covenant to register contained in an unregistered mortgage-deed, it was held that the defendant could not plead the non-registration of the instrument for the purpose of protecting himself, and that such a deed was admissible in evidence for a collateral purpose without being registered.

I do not rely on these three cases as authorities in favour of the plaintiff, as the suits in them were brought upon the covenants, and no decrees were sought against the lands. I mention them in order to show that I have not overlooked them in the investigation of this important subject.

The point as to notice remains to be considered.

It was contended by Mr. Mayhew that the question of notice had nothing to do with the Indian Registration Acts, and I was referred generally to the cases already cited from the Bombay High Court Reports.

Those cases proceeded on Act XIX. of 1843, an Act which, while in force in the Mofussil, did away in express terms with the doctrine of notice. That Act, as I have just shown, does not apply to the present case.

I am of opinion that the mortgage to the defendant (registered though it was under Act XX. of 1866), with express notice of the previous charge created in favour of Mávji Prágji, is not entitled to priority over it.

There is an instrument in evidence in this suit, namely, the defendant's deed of mortgage dated the 28th of June 1866, registered under Act XX. of 1866, and under which the defendant claims to hold the property as against the plaintiff, by which the fact of the plaintiff's charge appears, the conveyance being expressly made to the defendant in the following words :—"Subject to a mortgage thereof made by the deposit of the title-deeds relating to the same hereditaments with one Mávji Prágji, to secure payment of any balance that might be found due on a running account with the

(*j*) 4 Beng. L. Rep., F. B. R. 1.

1870.
JIVANDA'S KESHAVJI v. FRA'MJI NA'NA'BHA'I,

said Mávji Prágji, and upon which running account there is due, on the day of the date of the execution of these presents, the sum of Rs. 20,763, for principal sums and interest."

I think that Lord Hardwicke's doctrine in the well-known case of *Le Neve* v. *Le Neve* (*k*)—that where lands in Middlesex (one of the three register counties in England), settled by a deed which was not registered, were settled upon a second marriage with notice of the former settlement, and the second settlement was registered pursuant to the Stat. 7 Anne, c. 20, the former settlement was to be preferred in equity—is applicable in principle to a case like the present occurring in Bombay, where since the 1st of January 1865 registration of certain documents has been compulsory.

Upon the same principle, an estate in the hands of a subsequent purchaser or mortgagee with notice of a prior defective mortgage has been held to be bound by it. Thus in a case where a person lent money on a surrender of copyholds which became void for want of presentment, and afterwards another person purchased the same lands from the mortgagor with notice of the prior surrender, and took a surrender and was admitted, the court decreed the subsequent purchaser either to pay the mortgagee his money or to surrender to him the legal estate: *Jennings* v. *Moore* (*l*). So a purchaser or mortgagee of the legal estate with notice of an equitable mortgage by deposit of title-deeds will be held a trustee for the equitable mortgagee to the amount of his charge: *Birch* v. *Ellames* (*m*), *Hiern* v. *Mill* (*n*). So a purchaser having notice of an equitable lien for unpaid purchase-money would be bound by it: *Mackreth* v. *Symmons* (*o*), *Grant* v. *Mills* (*p*).

To these may be added the statement of Lord St. Leonards in his Law of Vendors and Purchasers (13th edn., 1857, p. 599), that a purchaser with notice of a prior unregistered incumbrance is bound by it.

(*k*) 2 Wh. & Tud. L. Ca. in Eq. 28 (3rd ed.).
(*l*) 2 Vernon 609. (*m*) 2 Anstr. 427. (*n*) 13 Ves. 114.
(*o*) 15 Ves. 329. (*p*) 2 V. & B. 306.

The case in the Privy Council which I have already cited, *Varden Seth Sam* v. *Luckpathy Royjee Lallah* (*q*), is, I think, a direct authority upon the question whether the doctrine of notice is applicable in India. There both the third and the last defendants pleaded in effect that they were *bonâ fide* purchasers for value without notice; but they did not prove that defence, though the plaintiff charged notice and collusion with the first defendant.

Lord Kingsdown, in delivering their Lordships' judgment on that part of the case, said (p. 322): "The question to be considered is whether the third and sixth defendants respectively possessed the land free from that lien, whatever its nature. As one who owns property subject to a charge can in general convey no title higher or more free than his own, it lies always on a succeeding owner to make out a case to defeat such prior charge. Let it be conceded that a purchaser for value *bonâ fide* and without notice of this charge, whether legal or equitable, would have had in these courts an equity superior to that of the plaintiff, still such innocent purchase must be not merely asserted, but proved in the cause, and this case furnishes no such proof.

"To give effect to the legal estate as against a prior equitable title would be an adoption of the English law; and to adopt it, and yet reject its qualifications and restrictions, would be scarcely consistent with justice. The law in India has not enabled a purchaser of land to look only to the apparent title on the collector's books, or the presumed title of the owner in possession. It is beyond the province of a court of justice to effect by decision a change so important as that which is involved in the principle of this decision."

And if the authority of a court in India be required to show that the doctrine of notice is applicable in this country where there is a contest between the priority of a registered deed over an unregistered deed of earlier date, I would refer to a recent decision by Glover and Mitter, JJ., on the 29th of November 1869, in the High Court at Calcutta, in *Gouree*

(*q*) 9 Moo. Ind. App. 303.

1870.

JIVANDA'S KESHAVJI v. FRA'MJI NA'NA'BHA'I.

Kant Roy v. *Gridhur Roy* (*r*) (a case which had not, I think, been reported before the concluding hearing in the present case), in which those Judges held that where a person bought an estate *bonâ fide* without any notice or knowledge of any previous sale of the property, and registered his purchase-deed under Act XVI. of 1864, his registered deed would have priority over an unregistered deed of anterior date, *but* if he bought knowing that the property had been previously sold to another party who had not registered, his deed would not be entitled to priority. . . .

The doctrine of notice is clearly part of the law administered by the High Court of Bombay in cases arising, as the present one did, within its ordinary original jurisdiction. And if the question of notice be immaterial, the language of Sir Barnes Peacock, C.J., in the case already quoted from 1 Bengal Law Reports, F. B. R., p. 80, would, I think, have been different.

In my researches upon this subject I have found two cases which are, in my opinion, well entitled to consideration. I refer to *Whitworth* v. *Gaugain* (*s*) and *Watts* v. *Porter* (*t*).

The last case was an action against a solicitor for negligently advancing the money of the female plaintiff on bad security, whereby it became lost to the plaintiff.

Lord Campbell, C.J., in delivering the judgment of the majority of the Court (Lord Campbell, C.J., Wightman and Crompton, JJ.,) on the motion for a new trial on the ground of misdirection, said (p. 751): "The defendant's counsel mainly relied upon the great case of *Whitworth* v. *Gaugain* (*u*), which was decided by that very eminent Judge V. C. Wigram, was affirmed on appeal by Lord Chancellor Cottenham, and was approved of by Lord St. Leonards when Lord Chancellor of Ireland. To the authority of that case we implicitly bow, and we entirely concur in the reasoning on which the decision proceeded. An equitable mortgagee of lands who has completed his equitable title is to be preferred

(*r*) 12 Calc. W. Rep. Civ. R., 456; 4 Beng. L. Rep., A. J. 8.
(*s*) 1 Phill. 728. (*t*) 3 E. & B. 743.

to a creditor of the mortgagor who *without* notice of the equitable mortgage has subsequently thereto recovered judgment against the mortgagor, and obtained actual possession of the lands by writ of elegit. There certain bankers, in consideration of an existing debt and of a further advance of money to a customer, obtained from him a deposit of all the title-deeds of certain freehold and copyhold lands of which he was seised, with a written memorandum signed by him regularly charging the lands with payment of the whole debt and interest. Other creditors subsequently recovered judgments against him, and, under Sec. 13 of Stat. 1 & 2 Vict., c. 110, sued out elegits under which the Sheriff delivered to them the whole of the lands. The bankers having filed a bill in Chancery praying that they might be declared to have an equitable mortgage on the lands, and to be entitled to priority over the elegits and judgments, they prevailed. But why? Because they would have been preferred to the judgment creditors if, at the time when the judgments were recovered, the person against whom the judgments were recovered 'had, by writing under his hand, agreed to charge' the lands with the amount of the judgment debts. The elegits were allowed to have the same operation, and no more. But there was no lâches on the part of the equitable mortgagees, and before the judgments were recovered their equitable title was perfect. Wigram, V.C., considered that the memorandum, coupled with the debt and the deposit of the title-deeds, 'created as perfect an equitable charge as intention and act can possibly create;' that from that time the mortgagor became trustee for the mortgagees, and that, under an execution against him on judgments subsequently obtained, the judgment-creditors could not take for their own benefit that which was in truth the property of the *cestui que trusts*. Lord Cottenham, in affirming the decree, observed that 'by the equitable mortgage the plaintiffs acquired a special lien upon the property,' and that they had as strong an interest as if a mortgage had been executed. Proceeding on the ground that the title of the equitable mortgagees was com-

(*u*) 1 Phill. 729.

1870.

JIVANDA'S KESHAVJI v. FRA'MJI NA'NA'BHA'I.

plete, he held that they must have been preferred to the judgment creditors independently of the statute; and that, although under the statute the judgments operated as a charge upon all the lands, it must be taken as a charge subsequent to the charge before created by the equitable mortgage. Indeed, such effect is given to a perfected equitable mortgage that in *Casberd* v. *Attorney General* (*v*) it was allowed to prevail against an extent at the suit of the Crown."

The principle of these two cases applies, I think, here, because, to once more borrow the language of Lord Kingsdown in the Madras case already cited (*w*): "In this case there is an express contract for a security on the lands, to which, no law invalidating it, effect must be given between the parties themselves." * * *

Mávji Prágji had, in my opinion, on the 31st of October 1864, a lien or charge on the property created in his favour by Devji Keshavji, the owner in law and in equity of the fee simple. By the indenture of 17th February 1869 Mávji Prágji conveyed all his rights to the plaintiff. The defendant by his mortgage of the 28th of August 1866 took the property subject to the charge created in favour of Mávji Prágji, and has, so far as I can discover, no real defence to this suit.

I, accordingly, record a finding on the issues as follows:— On the second (as amended), third, fifth, sixth, and seventh for the plaintiff—first and fourth immaterial, and no finding thereon; and pass a decree, in the terms of the prayer of the plaint, in favour of the plaintiff, with costs. *

Decree for the plaintiff with costs.

Attorneys for the plaintiff: *C. E. & F. Stanger Leathes.*

Attorneys for the defendant: *Macfarlane & Skipsey.*

NOTE.—An appeal from the above decision was presented by the defendant, but was abandoned by him before argument.

(*v*) 6 Price 411. (*w*) 9 Moo. Ind. App. 322.