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addition to the cases mentioned in it, the observations of the Court in *Tilakchand Hindumal* v. *Jitamal Sudaram* (1) as to the reason for upholding a promise to pay a debt barred by the Law of Limitation, may be referred to.

Having come to the opinion that the plaintiff is not prevented by the Indian Limitation Act, 1871, section 20 (*a*), from maintaining a substantive action on the new notes (exhibits 3 and 4), his right to bring such an action being recognized by section 25, clause 3, of the Indian Contract Act, which is the later enactment, we must reverse the decree of the Subordinate Judge, and remand this cause for a new trial on the merits.

Decree reversed.

(1) 10 Bom. H. C. Rep. 206 ; see pp. 214, 215.

[APPELLATE CIVIL.]

Before Sir M. R. Westropp, Knt., Chief Justice, and Mr. Justice West.

BA'PUJI APA'JI (ORIGINAL PLAINTIFF), APPELLANT *v.* SENA'VARA'JI MA'RVA'DI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.* November 29.

Gahan lahan mortgage—Mortgage convertible into a sale—Redemption—Alienation of land—Sale.

Where the grantor executed to the grantee a document reciting a mortgage by the former to the latter of certain lands for Rs. 125, on which Rs. 200 were then due from the grantor to the grantee, and containing an agreement that the grantee should pay Rs. 75 to another creditor of the grantor, and purporting, in consideration of Rs. 275 so made up, absolutely to sell and convey the mortgaged lands to the grantee, and the grantee executed to the grantor a document of the same date reciting the sale of the mortgaged lands by the grantor to the grantee for the consideration of Rs. 275, and covenanting that the grantee should reconvey to the grantor the lands, the subject of the grant, if the grantor should repay to the grantee the sum of Rs. 275 within a certain period, and providing that, in case of default in such payment within such period, the covenant for reconveyance should become null,

Held that the transaction was a sale and not a mortgage, and that, consequently, the grantor had no right to redeem the lands after the expiration of the period so fixed for the payment of Rs. 275 by the grantor to the grantee, there being no evidence or allegation that, at the date of the execution of the two documents, Rs.

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275 were an insufficient consideration for the sale of the lands, nor any stipulation that the grantee should account for the rents and profits received by him, or that the grantor should pay interest on the Rs. 275, nor anything to show that the grantor remained in possession after the execution of the two documents, or that subsequently to that time any advances were made by the grantee to the grantor on the security of the lands, nor anything in either document which pointed to a right on the part of the grantee to recover from the grantor the sum of Rs. 275, or any part of it, before, at, or after the period named for the repurchase.

The law as laid down in *Rámji* v. *Chinto* (1 Bom. H. C. Rep. 199), viz., once a mortgage always a mortgage, is still in force, in the Presidency of Bombay, with regard to mortgages containing clauses of conditional sale, whether executed before or after 1858.

The ancient law and usage of the country respecting *gahan lahan* mortgages, and generally the alienation of immoveable property, discussed.

THIS was a suit brought in the Court of the Subordinate Judge at Pen for the redemption of certain lands, alleged by the plaintiff to have been mortgaged by his predecessors in title to the predecessors in title of the defendants, but which the defendants contended had in 1858 been absolutely sold to their ancestor by the plaintiff's ancestors in consideration of a sum of money then due by the latter to the former on a mortgage of the same lands, and a further sum to be paid by the defendants' ancestor to another creditor of the plaintiff's ancestors. The Subordinate Judge, being of opinion that the transaction in 1858 was a sale and not a mortgage, dismissed the suit with costs, and this decree was affirmed on appeal by W. Wedderburn, Acting Judge of the District of Thána. From his decree the plaintiff preferred this special appeal.

Shántárám Náráyán for the appellant.

M. C. Apté for the respondents.

The facts are stated and the authorities fully considered in the following judgment of the Court, delivered by

WESTROPP, C.J. :—The transaction, the subject of the present suit for redemption, is comprised in two documents, identical in date, which documents must, we think, be taken together in order to ascertain the nature of the contract between the parties. The date of each is the 12th Jeth sud Shakh 1780 (23rd June, A.D. 1858). Of these documents, one (exhibit 18) executed by the plaintiff's ancestors (the grantors) to the person whom the de-

fendants represent (the grantee), recites a mortgage (dated 7th Magh sud Shakh 1776, (24th January, A.D. 1855) of the lands in question (consisting of upwards of ten *bighas*) by the former to the latter for Rs. 125, on which mortgage the parties agreed that there were, on the 12th Jeth sud Shakh 1780 (23rd June 1858) Rs. 200 due by the grantors to the grantee.

This deed (Exhibit 18) further contained an agreement between the parties to it that the grantee should pay to Lakma Raghoji, a Marvadi, Rs. 75, which were due to him by the grantors, and described the whole consideration for this deed as Rs. 275, and then proceeded thus:—"For this (*i. e.* Rs. 275), this land, which we had formerly mortgaged, and which was registered, &c., we have sold to you of our own free will." The details of the land were then stated. "This we have sold to you of our free will and pleasure, do you pay the Government dues of this land from next year, and do you enjoy this land from generation to generation. We have no claim whatever left to this land. You should take *kabulayets* (agreements) from the tenants to whom this land has been let. Should they decline to give them, we will compel them to give them. The produce, whatever it be, you should take. Should any one attempt to set up a claim to this land we will answer him, and, should you suffer any loss in that respect, we will make good the same. And next year we will petition the Government to transfer the land to your name. Should the land be found to be more or less at the next *jamábandi*, the same shall be at your risk. So also should the Government dues be more or less, you shall pay the same; we give to you the muniment of title, the deed of gift, under which we obtained the land in gift. But, after the transfer of the land to your name, we will take back the original, and give you a copy under our signature. And, after our purpose is accomplished, we will again make over to you the original deed of gift. If there be any bonds or ledger accounts in respect of former debts in the name of us two or our junior relative, the same will be invalid."

The fact that the grantee paid, according to the stipulation in that document, the sum of Rs. 75 to Lakma Raghoji on account of the grantors, has not been disputed.

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The other document (exhibit 14), dated the 12th Jeth-sud, Shakh 1780 (23rd June, A.D. 1858), and upon which the plaintiff grounded this suit, purported to be executed by the grantee of exhibit 18 to the plaintiff's said ancestors, the grantors of exhibit 18, and runs thus:—"I have given to you Rs. 275 Company's currency, and having purchased your rice lands, containing, &c., on the 12th Jeth-sud 1780 (23rd June 1858), took in writing a deed of sale on that day. As to that, should you bring and pay the said Rs. 275 from the month of Magh 1781 to the 13th Vaishak-vad 178 , [the document is here torn where the fourth figure ought to be] I will accept it (the money) and restore to you your land, and transfer it to your name in the Government records. Should you not pay the money according to the above conditions in the month of Vaishak, this *chithi* (writing) becomes null. Should I not take the money in the appointed time, and should you thereby have to stamp this *chithi*, I will make good the expense that will be incurred for that. Jeth-sud, 12 Shakh 1780."

A question as to the validity of the stamping of this last-mentioned document has been raised, but it is not necessary for us to decide it. It has been found as a fact, by both of the Courts below, that neither the plaintiff nor his ancestors paid or tendered the sum of Rs. 275 previously to the 13 Vaishak-vad 1789, which was the latest time that could have been specified in exhibit 14 in the portion of it which is now torn, and it is not denied that this suit was not brought until after the time named for repayment had elapsed. But it is contended that the two documents, of the 12th Jeth-sud, 1780, constitute a mortgage and not a sale with a condition to repurchase; and that this suit for redemption, having been brought in A.D. 1872, and, therefore, within sixty years from the date of those documents, is, according to Act XIV. of 1859, s. 1, cl. 15, sustainable.

The date of the transaction being the 23rd June 1858, it becomes necessary, with respect to certain important observations of their Lordships of the Privy Council in *Thumbasawmy Mudelly* v. *Mahomed Hossáin Rowthen*, [1] decided in 1875, to resolve whether we should approach the consideration of this case from the point of view

[1] L. R. 2 Ind. Ap. 255; S. C. I. L. R. 1 Mad. 1.

that the doctrine laid down in 1864 by three of the former Judges of this Court in *Ramji* v. *Chinto*, (1) and ever since uniformly followed here, (2) is that which regulates the law of redemption in this Presidency. If it do not, and if the law as laid down for Madras in *Pattabhiramier* v. *Vencatarow Naicken*, (3) prevails now in Bombay, the decision of this case would be a very simple matter, and it would be sufficient to say that, whether or not the transaction of the 12th Jeth sud Shakh 1780 (23rd June 1858) was in the first instance a mortgage, the plaintiff's suit for redemption must fail, because the time named, within which the plaintiff might have re-acquired the land by payment of the sum of Rs. 275, had elapsed before suit brought. In *Pattabhiramier* v. *Vencatarow Naicken*, (4) Lord Chelmsford, in delivering the judgment of the Privy Council in 1870, said :—"What is known in the law of England as the 'equity of redemption' depends on the doctrine established by Courts of Equity, that the time stipulated in the mortgage deed is not of the essence of the contract. Such a doctrine was unknown to the ancient law of India; and if it could have been introduced by the decisions of the Courts of the East India Company, their Lordships can find no such course of decision. In fact, the weight of authority seems to be the other way. *It must not then be supposed that, in allowing this appeal, their Lordships design to disturb any rule of property established by judicial decisions so as to form part of the Law of the Forum, wherever such may prevail, or to affect any title founded thereon.*" In 1872, in *Shankarbhai* v. *Kassibhai*, (5) it became necessary for this Court to consider whether the decision in *Pattabhiramier* v. *Vencatarow Naicken* (6) rendered it necessary that the course pursued in *Rámji* v. *Chinto* (7) should be abandoned, and a Full Bench of three Judges sat for the purpose. That Court, having regard to the concluding sentence in the passage just quoted from the judgment of Lord Chelmsford, and to the fact that, from August 1864 down to May 1872, a period of about eight years, the doctrine of *Rámji* v. *Chinto* (8) had been uniformly followed in this Presidency in a multitude of cases, arrived, without hesitation, at the con-

(1) 1 Bom. H. C. Rep. 199.
(2) 9 Bom. H. C. Rep. 69, 79.
(3) 13 Moore I. A. 560.
(4) 13 Moore I. A. 560.
(5) 9 Bom. H. C. Rep. 69.
(6) 13 Moore I. A. 560.
(7) 1 Bom. H. C. Rep. 199.
(8) 1 Bom. H. C. Rep. 199.

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clusion that their Lordships of the Privy Council did not desire or intend that the decision in *Pattabhiramier* v. *Vencatarow Naicken*,(1) which case had been pending in the Privy Council for about ten years, and which went from the Presidency of Madras, should have the effect of overturning the practice so firmly established in the mofussil of this Presidency, and which had always prevailed in the island of Bombay. On the same day a Full Bench of four Judges, in *Krishnáji* v. *Rávji*,(2) and in two other cases mentioned in the note to the report of that case,(3) came to the same decision. We do not gather from the judgment of the Privy Council in the subsequent Madras case of *Thumbasawmy Mudelly* v. *Mahomed Hossain Rowthen* (4) that this Court misunderstood the concluding sentence in the passage of the judgment of Lord Chelmsford which we have quoted. In *Thumbasawmy Mudelly* v. *Mahomed Hossain Rowthen*,(5) their Lordships, after adverting to the cases, said:—"The state of the authorities being such as has been described, it may obviously become a question with this Committee in future cases whether they will follow the decision in 13th Moore (*Pattabhiramier* v. *Vencatarow Naicken*), which appears to them based upon sound principles, or the new course of decision that has sprung up at Madras and Bombay, which appears to them to have been *in its origin* radically unsound. On a stale claim to redeem a mortgage, and dispossess a mortgagee, who had, before 1858, acquired an absolute title, there would be strong reasons for adopting the former course. In the case of a security executed since 1858, there would be strong reasons for recognizing and giving effect to the Madras authorities, with reference to which the parties might be supposed to have contracted. *Their Lordships abstain from expressing any opinion upon this question until the necessity for determining it shall arise.* They deem it right, however, to observe that this state of the law is eminently unsatisfactory, and one which seems to call for the interposition of the Legislature. An act affirming the right of the mortgagor to redeem until foreclosure by a judicial proceeding, and giving to the mortgagee the means of obtaining such a foreclosure, with

(1) 13 Moore I. A. 560. (2) 9 Bom. H. C. Rep. 79. (3) At p. 83.
(4) L. R. 2 Ind. Ap. 255; S. C. I. L. R. 1 Mad 1.
(5) L. R. 2 Ind. Ap. 241, 255; S. C. I. L. R. 1 Mad. 1.

a reservation in favour of mortgagees whose titles, under the law as understood before 1858, had become absolute before a date to be fixed by the Act, would probably settle the law without injustice to any party." In Madras the system of permitting redemption was adopted in 1858, and in Bombay the decision in *Rámji* v. *Chinto* [1] was made in 1864. The observations of Lord Chelmsford guarding against the supposition of any design on the part of their Lordships of Her Majesty's Privy Council to disturb any established course of decisions, were general, and took no distinction between mortgage transactions in Madras before 1858 and in Bombay before 1864, on the one hand, and mortgage transactions of later date on the other; and they were accepted as general by this Court, when, in 1872, it became necessary for it, in the cases already mentioned, to consider the scope of the judgment in *Pattabhiramier* v. *Vencatarow Naicken*.[2] That case was heard *ex parte* in the Privy Council,—a fact which appeared to this Court to have probably been a special reason for the cautious reservation in the judgment given on behalf of their Lordships by Lord Chelmsford. *Rámji* v. *Chinto*, [3] and the subsequent Bombay decisions were not then brought to their attention, and under all the circumstances we do not perceive how the Judges of this Court could have interpreted that reservation otherwise than they did.

The decision in *Thumbasawmy Mudelly* v. *Mahomed Hossain Rowthen*,[4] in which case the observations upon *Rámji* v. *Chinto*,[5] which we have quoted, were made, was, in fact, that the deed was a mortgage and not a conditional sale, and accordingly the mortgagors were permitted to redeem. Those observations were fairly elicited by the turn which the argument of counsel took, but were not absolutely indispensable to the decision, as the nature of the decree made shows. Again, it must be remembered that the case came from Madras, and the Madras law only was the actual subject for determination. Finally, their Lordships, while intimating that there were strong reasons in favour of allowing redemption where the mortgages with clauses of conditional sale

(1) 1 Bom. H. C. Rep. 199. (2) 13 Moore I. A. 560.
(3) 1 Bom. H. C. Rep. 199. (4) L. R. 2 Ind. Ap. 241; S. C. I. L. R. 1 Mad. I.
(5) 1 Bom. H. C. Rep. 199.

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bear date subsequently to 1858, and of refusing redemption where the mortgages were anterior to 1858, expressly, as we have seen, abstained from giving any opinion on that question until the necessity for determining it should arise. In this state of facts we must regard the law as laid down for this Presidency by former Judges of this Court in *Rámji* v. *Chinto* (1) as in force. That case, although reflected upon, has not been overruled. It has, in this Presidency, been uniformly followed, and having been adopted by Full Bench decisions of this Court, which bind it and all Courts subordinate to it, must, we think, govern mortgages with clauses of conditional sale, executed either before or after 1858 or 1864, until the contrary be expressly ruled by the Privy Council or ordained by the Legislature. Special regard should be had to the terms which this Court has, with reference to improvements, repairs, &c., made by mortgagees in possession, imposed upon mortgagors seeking redemption in cases in which it would be equitable to recoup mortgagees for expenses thus incurred.(2)

Mr. Macpherson's treatise on mortgages is written only with reference to Bengal and the N. W. Provinces. It, consequently, is seldom referred to here, and has but little bearing upon the law or usage as to mortgages in this Presidency, of which that learned writer had not any experience. He speaks (p. 11, 2nd edition) of the *bye bil wufa*—a term almost wholly unknown here to mortgagors and mortgagees; * and of the *kut kubala*—also unknown here in the sense of "conditional sale," that in which he employs it. Literally, *kut kubala* signifies a written agreement, and would not here be understood as having the technical sense of "conditional sale." The term here usually applied to contracts, which undoubtedly are, in their inception at least, mortgages, but which contain a clause of conditional sale if the mortgage debt be not paid within a given time, is *gahan lahan*.

In *Shankarbhai* v. *Kassibhai* (3) it was said, with reference to *Rámji* v. *Chinto*, (4) that "the recognition of the right to re-

(1) 1 Bom. H. C. Rep. 199. (2) See 9 Bom. H. C. Rep., pp. 72, 73.

* The only instance known of a mortgage having been so denominated in this Presidency is in *Mancharsa* v. *Kamrunisa* (5 Bom. H.C.R., 109 A.C.J.). The mortgagor there, being a Mussulman, probably imported the phrase from the other side of India, and did so with a slight variation.

(3) 9 Bom. H. C. Rep. 72. (4) 1 Bom. H. C. Rep. 199.

deem" (in *gahan lahan* mortgages, where the time fixed for the sale to become absolute had expired,) "was, having regard to the previous decisions of the Sadr Adálut, perhaps somewhat a strong measure," and that remark was justified, inasmuch as there had been several decisions of the Sadr Adálut which had given a strict operation to the clause of conditional sale contained in *gahan lahan* mortgages. *Rámji* v. *Chinto*, (1) therefore, must be viewed as, to a certain extent, a breach of the venerable rule *stare decisis*, and in that respect to be regretted; but it was not intended by the remark in *Shankarbhai* v. *Kassibhai*, (2) to intimate any opinion that those decisions of the Sadr Adálut were in conformity with the usage of the people of this Presidency as to such mortgages, which usage the Sadr Adálut was bound to follow, or, in default of usage, "equity and good conscience." (3) In *Rámji* v. *Chinto* (4) it was said:—"It does not appear that there is any law, or usage having the force of law, among Hindus, justifying such a departure from the established rule of the English Courts of Equity, which is, besides, manifestly 'a rule of good conscience'." The Court was there speaking of the usage of this Presidency, and the circumstance should not be overlooked that the members of that Court associated with Sir Joseph Arnould, himself an able Judge, were a Hindu gentleman and a European member of the Civil Service, both of extensive experience in the mofussal of this Presidency. Not only is there not any reason for believing that the Courts of justice, or Nyadesh, which existed here anterior to British rule, treated such mortgages as irredeemable, after the time fixed had expired, or enforced them as effective sales; but there is strong ground for believing that those mortgages never were so regarded by the people at large. Instances were, and still are, of frequent occurrence in which, after the time fixed for the payment of such mortgages had elapsed, and, according to the terms of the *gahan lahan* clause, the mortgage had, ostensibly, become converted into a sale, the mortgagee made to the mortgagor further advances on the property the subject of the mortgage, and, as a general rule, the

(1) 1 Bom. H. C. Rep. 199. (2) 9 Bom. H. C. Rep. 72.
(3) Bom. Reg. II. of 1800, Sec. 14; Bom. Reg. IV. of 1827, Sec. 6.
(4) 1 Bom. H. C. Rep. 199.

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mortgage money is far below the value of the land, and would be wholly inadequate for its fair purchase. We do not know of any instance in which a suit, in British Courts, to foreclose *gahan lahan* mortgages has been rejected, and it is within the knowledge of the Judges of the present Division Bench that decrees for foreclosure and sale in such suits have been made, in which decrees a reasonable time (generally six months) has been given to the mortgagors to redeem. Although the High Court in *Rámji* v. *Chinto* (1) were guilty of an infraction of the maxim *stare decisis*, we believe the original innovation upon a well-settled and most beneficial usage was that of the Sadr Adálut, and that the Judges who decided *Rámji* v. *Chinto* reverted to the generally-understood construction of *gahan lahan* mortgages.

The reluctance of the people of this country to sell their immoveable property may be traced back for a long period. It is strongly manifested in chapter I, section 1, pl. 32 of the Mitakshara, which approves of mortgages, but reprobates sales, without absolutely pronouncing them to be invalid, adding that "if a sale must be made it should be conducted, for the transfer of immoveable property, in the form of a gift, delivering with it gold and water," as Mr. Colebrooke states, "to ratify the donation." The Rishi Usanas went so far as to enumerate land amongst those species of property which are impartible. His Smriti to that effect is quoted by Vijnyanesvara in the Mitakshara, chapter I., section 4, pl. 26, and by Devanda Bhatta in the Smriti Chandrika, chapter VII., pl. 44. Devanda Bhatta, however, says that this text is to be overlooked and partition made. Usanas, however, did not stand alone in his doctrine. Prajapati also treated land as indivisible. His text is quoted by Devanda Bhatta (Smr. Chand., chapter VII., pl. 49), as laying down that "no one is competent even to make a partition of the inheritance descended from ancestors. It is simply to be enjoyed; *there can be no gift or sale of the same.*" Against this may be placed what the same Smriti writer is quoted by Devanda Bhatta (pl. 47) as saying in favour of partition of houses and land. We are not to be understood as treating these texts of the Rishis denouncing partition of immoveable property as of any present operative force. We merely refer to them as showing how

(1) 1 Bom. H. C. Rep. 199.

deep-seated in remote times was the antipathy of Hindus to aught even approaching an alienation of land. Mr. Steele, in his Law of Caste and Custom in the Deccan, p. 78, 1st ed., pl. 81 (p. 72, 2nd ed.) says :—"There is no limit, to the right of ownership of (immoveable) property pledged, by lapse of time; heirs of the original pledger may always claim it on repayment of the debt and interest." And, so far as regards usufructuary pledges, of which the *gahan lahan* mortgage on land is one, he is supported by an ancient text of the Rishi Vyasa, who, distinguishing between usufructuary and other pledges, says :—"But a pledge to be used of which the term has elapsed, the debtor shall only recover on then paying from other funds the exact amount of the principal;"(1) and also by a text from Narada, who, speaking of pledges generally, says that they are not lost to the owner through their being possessed by a stranger; (2) and Yajnyavalkya similarly favours pledges.(3) Subsequently, however, at p. 80, pl. 86 (p. 74, 2nd ed.,) of his book, Mr. Steele says that "after Smarte Karl (Kale), the period beyond which recollection does not extend, viz., 100 years, he (the mortgagor) loses his ownership in the property." In this also he is supported by Narada,(4) who, it must be remembered, represents a more modern phase of doctrine than the Smriti writers, Usanas, Prajapati, and Yajnyavalkya, above quoted.

In the country under Mahratta rule, as the greater part of this Presidency was, the ryot, who was a landed proprietor, was generally known as a *mirásdár*, and his holding as *mirás*.(5) In that portion of the able report of the commission for inquiring into the causes of the recent riots in the Deccan which describes "the condition of the ryot as regards his relation to the money-lender when British rule commenced" (Chapter III., p. 27), it is said: "There was a considerable burden of debt, and many of the ryots were living in dependence upon the sáukar (money-lender), delivering to him their produce, and drawing upon him for necessaries. The ryots' property did not offer security for large amounts; his cattle and the yearly produce of his land being the lender's secu-

(1) I. Dig. Bk. I., ch. 3, pl. cxvi, 2nd. cl. (2) Jolly's trans. of Narada, p. 24, pl. 9.
(3) I. Dig. Bk. I. pl. cxiii, cxiv. (4) Jolly's trans. p. 25 pl. 18.
(5) See Deccan Commission's Report, Chap. III., pp. 28, 30, paras. 43, 45.

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rity, the mortgage of mirás land was rather a means by which the sáukar got a firmer hold upon the produce than upon the land itself, *for immoveable property was not sold for debt*, and the mirás title would have no value for a non-agricultural landlord." And, again, "the creditor received little or no assistance from the State in recovering debts, but had great licence in private methods of compulsion." What those private methods were, is previously described at p. 26, thus:—"The usual and recognized method for recovery of debt was for the sáukar to send a mohosul (muhassil), that is, a servant whose maintenance had to be paid by the debtor, or to place a servant in 'dharna' at his door, which is the process called tuquaza (tagada, or takaza) by Mr. Chaplin, or to confine the debtor in his house, or otherwise subject him to severer measures."(1) Those severer measures are detailed by Mr. Mountstuart Elphinstone. Describing takaza he says: "Though it strictly means only denouncing, it is here employed for everything from simple importunity up to placing a guard over a man, preventing his eating, tying him neck and heels, or making him stand on one leg with a heavy stone on his head under a vertical sun."(2) Captain Grant's Report of 30th April 1819(3) shows that such was the mode of enforcing payment of debts. Mr. Chaplin, in his report of the 20th June 1819,(4) said, with reference to the enforcement of decrees: "The person cast seldom had his property sold; but he was compelled to submit to much personal violence, amounting to a degree of torture, &c." There were, in fact, very few regular courts.(5) Mr. Chaplin, in his report of the 20th August 1822, para. 112, says: "In the commentaries of Hindu law it is said that land can be conveyed by the formal assent of the townspeople; but it is also declared that the permission of the king, if not his express assignation, is necessary to give validity to the alienation. This rule seems to be recognized by most Hindu law authorities, and it would, in my opinion, be superfluous to cite facts to prove that it is the established usage." And, again, n para. 121, he says that the mirásdárs "seldom alienate the mirás right except in case of urgent necessity."

(1) See *also* Wilson's Glossary, pp. 138, 502.
(2) 4 Revenue Selections 193, Report of 25th Oct. 1819.
(3) *Ibid* p. 228 (4) *Ibid.* p. 260. (5) *Ibid.* p. 262.

Of Central India, where, as well as in this Presidency, the Mitakshara is held in great repute, Sir John Malcolm, in vol. II., p. 75 of his work on that country, observes that "The cultivators are chiefly of the hereditary class, and have not only a right to till the ground, but, if in distress, can mortgage it; and to take it from them, under any circumstances, is deemed the extreme of tyranny."

Notwithstanding this general reluctance to sell, sales were, to some extent, made and carried into effect anterior to British rule; but (generally speaking) those were from the commencement of the transaction intended to be sales, and not contracts which, in their inception, were mere securities for money lent. Such sales were made of immoveable property, as well of superior as of inferior classes of tenure, and have been subsequently, and still are, supported by the British Courts when not restricted by special legislation [1] (see *Krishnárávv.Rangrávv* [2] and the cases and authorities there collected, and *Vyakunta Bápuji* v. *The Government of Bombay* [3]) and when not prohibited by the common law or usage of the country [4] or by some special law affecting the parties. Our reports are full of cases in which private sales of immoveable property, which were complete, have been supported.

Taking, then, *Rámji* v. *Chinto* [5] to be law in this Presidency, and that, accordingly, the rule is, once a mortgage always a mortgage, it becomes necessary to consider whether the transaction of the 12th Jeth-sud, Shak 1780 (23rd June 1858), comprised in exhibits 18 and 14, ever was a mortgage. If the transaction were, *in its inception*, really intended by the parties to be a mortgage, the mere circumstance that the condition for re-purchase is contained in a separate instrument, could not prevent the grantors from having the right now to redeem. The question is—did there, after the execution of exhibits 18 and 14, remain any debt

(1) Such *ex. gr.* as Bom. Reg. XVI. of 1827, s. XXI. cls. 1 and 2.

(2) 4 Bom. H. C. Rep. 1 A. C. J.

(3) 12 Bom. H. C. Rep., Appx., pp. 50, 71, 100, 171, and, in addition to the references to vol. 4 of Revenue Selections given there in note (*g*), p. 71, *see* pp. 411, 651, and 179 of that vol. of Rev. Sel.

(4) *Ex. gr.* as in the case of *Jagirs*. *Hari Rámchandra* v. *Nárávan Ráo*, Reg. Ap. 39 of 1872, (decided on review 13th June 1877). Printed judgments of 1877, p. 121.

(5) 1 Bom. H. C. Rep. 199.

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due from the grantors of exhibit 18 to the grantee of that instrument; or, in other words, could the grantee have enforced repayment of the sum of Rs. 275 by the grantors? In *Goodman* v. *Grierson*, (1) which was a suit for redemption, Lord Manners, C., said: "The fair criterion, by which the Court is to decide whether this deed be a mortgage or not, I apprehend to be this. Are the remedies mutual and reciprocal? Has the defendant all the remedies a mortgagee is entitled to? I conceive he has not. Suppose, for instance, the defendants (mortgagees) to file a bill of foreclosure. By the practice of this Court (Irish Court of Chancery), the decree is for a sale of the mortgaged premises, if they be not redeemed within the time limited by the course of the Court: suppose the sale to take place, and the produce to be insufficient to discharge the £1,000 and costs, how is the deficiency to be raised? What remedy could the defendants then have? If it were a mortgage, he, in that case, might proceed on his covenant or bond, upon the implied assumpsit; but how could any action be maintained in this case, when the defendants have taken the conveyance, not as a security, but expressly in lieu and satisfaction of the portion of £1,000? This appears to me decisive to show that the transaction between these parties was not that of a mortgage, but a conditional sale; for, if the defendants have not all the remedies of a mortgagee, why am I, contrary to the express provisions of this deed, to hold it to be a mortgage, and to extend the condition beyond the limit agreed upon by the parties to this deed? There would be much hardship and inconvenience to the one party; and there appears to me to be no substantial ground to entitle the other to relief." His Lordship referred to a note (No. 96) by Mr. Butler to his edition of Coke upon Littleton, 205*a*, where, in considering what constitutes a mortgage, Mr. Butler says: "No particular words or form of conveyance are necessary for this purpose. It may be laid down as a general rule, and subject to very few exceptions, that wherever a conveyance or assignment of an estate is originally intended as a security for money, whether this intention appear from the deed itself or by any other instrument, it is always considered in equity as a mortgage and redeemable; even though there is an express agreement

(1) 2 B. & B. 279.

of the parties that it shall not be redeemable, or that the right of redemption shall be confined to a particular time, or to a particular description of persons." After referring to numerous decisions in support of those views, Mr. Butler continues thus:—"In many of these cases the Courts have found it necessary, not only to apply their general principles, but to determine the fact, whether the conveyance was intended as an absolute sale, or as a security for the money. If the money paid by the grantee was not a fair price for the absolute purchase of the estate conveyed to him; if he was not let into the immediate possession of the estate; if, instead of receiving the rents for his own benefit, he accounted for them to the grantor, and only retained the amount of the interest; or, if the expense of preparing the deed of conveyance was borne by the grantor, each of these circumstances has been considered by the Courts as tending to prove that the conveyance was intended to be merely pignorititious. It seems, however, to be settled, 1st, that a *bonâ fide* purchaser of an estate or interest will not be considered a mortgagee on account of a right to purchase being given to the vendor, though at an advanced price: *Verner* v. *Winstanley*; (1) and, 2ndly, that where the mortgagee, or trustee for him, is authorized to sell, if the money be not paid at a particular time, he may make a good title to a purchaser, though the mortgagor do not join in the conveyance. *Clay* v. *Sharpe*." (2)

Applying this doctrine to the present case (but not by any means asserting that Mr. Butler's enumeration of the indications that a transaction is a mortgage and not a sale is exhaustive), we find neither evidence nor allegation that Rs. 275 were, at the date of exhibits 18 and 14, an insufficient consideration for the sale of the land. Further, we do not find any stipulation that the grantee should account for the rents and profits during his possession, or for payment of interest by the grantors on the sum of Rs. 275, either before, at, or after the expiration of the time fixed within which the lands might be repurchased by the grantors. Had there been any such stipulation, it might have aided us in arriving at the conclusion that the transaction was the creation of a debt,

(1) 2 Sch. & Lef. 393.

(2) Chan. M. T. 1802, reported by Mr. Sugden in his Law of Vendors, 4th ed., App. No. XIII.

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and not a sale. A mere stipulation, however, (unaccompanied by any other indication that the transaction was a mortgage) that, should the repurchase take place, the original purchase-money shall be repaid with interest, has been held by Lord Cottenham, overruling Shadwell, V.C., insufficient to stamp a case as one of mortgage and not of sale: *Williams* v. *Owen*.[1] Again, there is nought to show that the grantors remained in possession after the execution of exhibits 18 and 14, or that, subsequently to that time, any advances were made by the grantee to them on the security of the land. There is not in either of these documents anything which points to a right on the part of the grantee to recover from the grantors the sum of Rs. 275, or any part of it, either before, at, or after the period named for the repurchase. In short, we do not find any one of the usual indicia which might lead the Court to the opinion that the transaction was a mortgage and not a sale. In *Verner* v. *Winstanley*,[2] and in *Murphy* v. *Taylor*,[3] there were collateral bonds which vitiated the transactions there as sales, and showed that the parties all along contemplated the subsistence of a debt. We have nothing of that kind in this case. It strongly resembles *Ensworth* v. *Griffith*.[4] There the relation of mortgagor and mortgagee had once existed, and the mortgagor, in consideration of the mortgage debt, and of a further sum paid, released the equity of redemption, and at the same time the mortgagee signed an agreement to reconvey the premises upon payment of the two sums within one year. A bill for redemption, brought in the Court of Exchequer, was dismissed, and the dismissal was affirmed by the House of Lords. In *Williams* v. *Owen*,[5] already mentioned, and which, in respect of the circumstance as to interest which I have stated was a stronger case in favour of the grantors than the present, Lord Cottenham said:—"That this Court will treat a transaction as a mortgage, although it was made so as to bear the appearance of an absolute sale, if it appear that the parties intended it to be a mortgage, is, no doubt, true; but it is equally clear, that if the parties intended an absolute sale, a contemporaneous agreement for a repurchase, not acted upon, will

(1) 5 Myl. & Cr. 303. (2) 2 Sch. & Lef. 393. (3) 1 Ir. Ch. Rep. 92.
(4) 5 Bro. P. C. 184. (5) 5 Myl. & Cr. 303; *see* p. 306.

not, of itself, entitle the vendor to redeem;" and he expressed his approbation of Lord Manners' doctrine in *Goodman* v. *Grierson*, (1) and eventually said:—"If the transaction was a mortgage, there must have been a debt; but how could Owen have compelled payment? It appears also that he, as purchaser, paid for the conveyance, and was, at all events, to be at liberty to keep the rents."

So recently as the 4th July last, in Regular Appeal 23 of 1877, (2) a Division Bench of this Court acted on the principle laid down by Lord Manners in *Goodman* v. *Grierson*, (3) where the grantee under a deed had no remedy to recover as a debt the consideration money for the deed, which we held to be a sale, liable, on a contingency which did not happen, to be converted into a mortgage, and not, like *Rámji* v. *Chinto*, (4) and *Shankarbhai* v. *Kassibhai*, (5) and the cases collected in it, which were instances of mortgages liable in terms to be converted into sales.

We see no ground for supposing that the defendants, or the persons whom they represent, had, from the 12th Jeth-sud, Shak 1780, the date of exhibits 18 and 14, any right to sue for or recover the sum of Rs. 275 (the consideration for exhibit 18), or any part of it; we must, therefore, hold the transaction of that date to have been a sale and not a mortgage, and that the plaintiff's suit to redeem was rightly dismissed. On these grounds we affirm the decree of the District Judge, with costs of the special appeal.

We have consulted our brothers Melvill and Pinhey as to the views expressed in this judgment, and are authorized by them to say that they concur in those views.

Decree affirmed.

(1) 2 B. & B. 279. (2) *Subábhat* v. *Vasudevbhat*, I. L. R. 2 Bom. 113.
(3) 2 B. & B. 279. (4) 1 Bom. H. C. Rep. 199.
(5) 9 Bom. H. C. Rep. 69.