it had been of a sufficient character to prevent the bar of limitation, had not been presented in sufficient time for that purpose.

It is as well to refer to our Circular Order at page 72 of the Circular Order Book, which provides that "when an estate yielding a periodical payment is attached, it is not necessary to file a fresh *darkhast* for each payment." This regards the execution of the decree as continuable under the original attachment, if the estate attached be one yielding a periodical payment.

For these reasons we reverse the order of the Subordinate Judge of the 27th February 1875, as we are of opinion that the decree is not barred by the law of limitation, inasmuch as the application of the 19th June 1872 gave to the plaintiffs a fresh terminus whence time began to run, and the period of three years from that terminus had not expired when the present application of the 24th July 1874 was presented. The prayer of the *darkhast* of that date should, therefore, be complied with, and execution accordingly must issue against the property named therein. The defendants must pay to the plaintiffs the costs of that application in the Court below, and of the appeal therein to this Court.

Order reversed.

[APPELLATE CIVIL.]

Before Mr. Justice West and Mr. Justice Pinhey.

LALUBHA'I SURCHAND (ORIGINAL PLAINTIFF), APPELLANT *v.* BA'I AMRIT AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.* August 17.

Hindu law—Sale—Possession—Notice—Registration.

Delivery of possession of the property sold is, under the Hindu law, essential to complete the title of the vendee against a third party purchasing with possession from the same vendor without notice of the prior transaction.

The rule prevails as between competing conveyances, both of which have been registered.

Authorities and Hindu law texts on the subject reviewed.

THIS was a special appeal from the decision of Satyendranath Tagore, Judge of the district of Ahmedabad, confirming the decree of the Subordinate Judge of Ahmedabad.

* Special Appeal No. 107 of 1877.

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The material facts of the case are as follows:—

The first two defendants, Bái Amrit and her husband, sold a house belonging to them to the plaintiff, Lalubhái, for Rs. 191 on the 2nd of July 1868, and, having received Rs. 41 out of this sum as part payment, executed to him a deed of sale. Later, in the same day, they received a better offer for their house from the third defendant, Táráchand, which they accepted, and, having received from him the full amount of the purchase-money, executed to him also a deed of sale, and put him into possession.

Subsequently the plaintiff tendered to Amrit and her husband the balance of his purchase-money, but they refused to receive it.

Both Lalubhái and Táráchand duly registered their deeds; but the former not until 26th July 1872, while the latter registered his five days after its execution, on 7th July 1868.

The plaintiff, Lalubhái, in 1873 brought this suit, relying on the prior sale to himself, against Amrit and her husband, and the subsequent purchaser Táráchand, and prayed to be put into possession of the house.

The defendants, Amrit and her husband, denied the execution of the plaintiff's deed, and asserted that the house, which really belonged to Amrit alone, had been sold *bonâ fide* by her to the third defendant, Táráchand. Táráchand answered that the plaintiff's deed was a fabrication, and that, even if it were genuine, he being in possession, it was inoperative as against him.

The Subordinate Judge of Ahmedabad found the plaintiff's deed not proved, and rejected his claim.

The Judge, Mr. Tagore, in appeal found both the deeds proved; but confirmed the decree of the Subordinate Judge, on the ground that Táráchand had no notice of the prior sale, and being in possession, could not be ousted by the plaintiff, who was only entitled to a refund of the portion of the purchase money paid by him.

Shánátrám Náráyán for the special appellant, the plaintiff:—The District Judge, in arriving at his decision as to the *bona fides* of Táráchand's deed, laid this burden of proof on the wrong

party. Táráchand pleads a purchase for valuable consideration without notice of the plaintiff's earlier deed; the burden of proving want of information and good faith on his own part in making his subsequent purchase, should, therefore, have been thrown upon him.

The fact of Táráchand's deed being executed on the same day as that of the plaintiff, gives rise to a presumption that Táráchand and Amrit colluded to defraud the plaintiff.

The registration of the plaintiff's deed cured any defect which may have existed in the plaintiff's title from his not being put in possession. By section 47 of Act XX. of 1866 the deed, after it was registered, operated to exclude Táráchand from the moment of its execution. Táráchand, therefore, took nothing by his subsequent purchase.

The circumstance of Táráchand being in possession, makes no difference, as delivery of possession is not, according to Hindu law, essential to the validity of a sale of immoveable property.

Pándurang Balibhadra, for Amrit, denied the execution of the plaintiff's deed.

Bahiravnáth Mangesh for Táráchand:—The District Judge was right in requiring the plaintiff to prove that Táráchand had notice.

As to the presumption of fraud, none such arises, and the Judge has found, as a fact, that Táráchand had no notice.

Both deeds being registered, the question must be decided irrespective of registration.

Possession is necessary to the validity of a sale. The defendant Táráchand's deed being accompanied by possession must prevail: *Hormusjee Mánekjee* v. *Pándoorung Tookdeo*,(1) *Rutunbhartee* v. *Kisunbhartee*,(2) *Durgá* v. *Hurtá*,(3) *Bálárám Nemchand* v. *Appá Dulu*,(4) *Selam Sheikh* v. *Baidonáth Ghatak*,(5) *Káchu* v. *Káchoba*.(6)

(1) 3 Morr. S. D. A. Rep. 27.
(2) 4 Morr. S. D. A. Rep. 44.
(3) 7 Harr. S. D. A. Rep. 342.
(4) 9 Bom. H. C. Rep. 121.
(5) 3 Beng. L. R. 312 A. C. J.
(6) 10 Bom. H. C. Rep. 491.

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Shántárám in reply, in support of his contention that possession was not necessary, cited the following cases:—*Rágho Bugdájee* v. *Vittoo Máhádjee*,(1) over-ruling *Hormusjee* v. *Pandoorung*,(2) *Nároo Huree* v. *Konheir Munoher*,(3) *Nágubái* v. *Motigir*,(4) *Bhukan* v. *Bháiji*,(5) *Girdhar Parjárám* v. *Dáji Dulabhrám*,(6) *Prán-krishna Dey* v. *Biswambhar Sen*,(7) *Gungáhurry* v. *Rágubram*,(8) *Lokenáth Ghose* v. *Jugobundhoo Roy*.(9) He also cited the following texts:—

Mit., Ch. III., S. 3, pl. 5. Mac. H. L. 203.
Ibid. S. 5, pl. 4. do. 213.
Ibid. S. 6, pl. 4. do. 218.
Institutes of Narada, ch. IV., Jolly's Trans., pages 24 and 25.
Mayukha, ch. IX., pl. 6.
Virmitrodaya, 1 Cal. ed. 1875, 207, line 10.
Ibid. do. 208, line 6.

The judgment of the Court was delivered by

WEST, J.:—The facts found in this case are that Lalubhái Surchand agreed with Bái Amrit for the purchase from her of a house. He paid a portion of the purchase-money, rather less than one-fourth, and a sale-deed in his favour was executed by Amrit and her husband Ranchod Manor. This was dated 2nd July 1868; but, pending payment in full, possession was not delivered to Lalubhái, and on the same date a second conveyance for valuable consideration was made by Amrit and Ranchod to Tárá-chand, who received immediate possession. Amrit could then no longer give effect to her contract with Lalubhái, and she declined to receive the remainder of his purchase-money when he tendered it. Both deeds have been registered, and Lalubhái, charging Bái Amrit and Táráchand with fraud, seeks now to enforce the completion of the transaction with him by a delivery into his possession of the house that he purchased. The accusation of fraud is retorted by the defendants; but, on the facts found by the lower Court, we must hold that the only knavery

(1) 8 Harr. S. D. A. Rep. 229.
(2) 3 Morr. S. D. A. Rep. 27.
(3) 8 Harr. S. D. A. Rep. 289.
(4) 1 Bom. H. C. Rep. 5.
(5) 1 Bom. H. C. Rep. 19.
(6) 7 Bom. H. C. Rep. 4 A. C. J.
(7) 2 Beng. L. R. 207 A. C. J.
(8) 14 Beng. L. R. 307.
(9) I. L. R. 1 Calc. 297.

in the case was that practised by Bái Amrit in selling the same property twice over. The District Judge, as to Lalubhái's deed, sees "no reasons to think that the document was a forged one," and, on the other hand, "there is no evidence that defendant Tárachand purchased with notice of the previous sale to plaintiff."

With reference to this last statement of the District Judge, it has been urged by Mr. Shántárám, for the appellant Lalubhái, that the defendant Tárachand, pleading a purchase for valuable consideration without notice of the contract with the plaintiff, or what in substance amounted to and has been treated as such a plea, was bound to prove want of information and good faith on his own part in making the purchase. In Gresley's Law of Evidence, p. 388, however, we find the principle "*ei incumbit probatio qui dicit, non ei qui negat*"(1) laid down as determining the burden of proof equally in equity proceedings as in trials at Common Law, and as an illustration it is said: "If, for instance, an answer states a purchase for a valuable consideration without notice, and they go into evidence, the plaintiff will have to prove the notice." (*Eyre* v. *Dolphin* (2).) In the note to *Jones* v. *Thomas* (3) it is said: "In all cases of a plea of purchase .... notice must be denied though not charged by the bill ..... since all the defendant has to do is to prove his plea, for the defendant is not to prove a negative, viz., that he had no notice." And the reason for this is given in Fisher on Mortgage, section 1177, p. 637, 2nd. ed.:—"Notice must be denied, though it be not charged by the bill, for the denial ought to appear on the pleadings that there may be an opportunity of proving it." In section 1104, p. 598, the general rule is stated that "the *onus* lies on a person who claims priority over another, on the ground that he took with notice of an earlier security, to prove that he had such notice;" and in section 1179, p. 639, it is said that "the evidence of a single witness will not suffice to establish notice, either actual or constructive, against a positive, plain, and precise denial by the answer, where the credit is equal." The purchaser pleading absence of notice is "held strictly to proof

(1) The *onus* of proof lies on him who asserts, and not on him who denies.

(2) 2 B. & B. 290, 303.

(3) 3 P. Wms. 243.

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of the payment" (*Ibid.* s. 1180) that being an affirmative matter; but when he has thus far established his good faith, it devolves on the opposite party to prove notice or the circumstances from which the Court may infer a knowledge or means of knowledge of the previous transaction.

It has been urged that in the present case the mere circumstance of Táráchand's having bought immediately after Lalubhái is in itself so calculated to arouse suspicion that, in the absence of positive proof of want of notice on his part, a presumption arises and must prevail that he acted in collusion with Bái Amrit in order to defraud Lalubhái. The law, however, does not so readily raise a presumption of fraud. The District Judge, indeed, has found that "the transaction on which the plaintiff (Lalubhái) relies, is not wholly free from suspicion; it is also unfortunately true that much of the evidence adduced by him is manifestly false and unreliable," so that if mere suspicion is to weigh against the transaction of Bái Amrit with the one or the other of her vendees, Lalubhái could not gain by this addition to accepted legal principles. The circumstances, so far as he believed them proved by the evidence, attending each transaction were for the District Judge to weigh, and weighing them he has arrived at the conclusion that Táráchand purchased without "notice of the previous sale" to Lalubhái.

But Lalubhái's purchase was, at least, "previous" to that of Táráchand,—previous so far as the execution of the sale-deed went, and on this it has been contended that, as after the transaction with Lalubhái nothing was left to Bái Amrit which she could dispose of, so Táráchand took nothing by his conveyance. The delivery of possession to him makes, it is urged, no difference when once the fact has been arrived at, of an earlier sale to Lalubhái. In the first part of the Mitakshara Vyavahara Kanda translated by Sir W. Macnaghten, [1] it is said [2] "a person is entitled to mortgage, give or sell his own property, but he has no proprietary right over things already mortgaged, given or sold."

[1] Mac. H. L. p. 203.

[2] स्वयमेव ह्याधेयन्देयं विक्रेयंच भवति, न चा हितस्य दत्तस्य विक्रीतस्य वा स्वत्वमस्ति. (*Ibid.* f. 12, p. 1, l. 9.)

At page 213 it is said [1] "a title is weightier evidence than possession, provided that possession is unconfirmed by hereditary succession;" and again at page 218 [2] "a title, therefore, without corporeal acceptance ..... is weaker than a title accompanied by it. ..... But such is the case only when of these two the priority is undistinguishable; but when it is ascertained which is first in point of date and which posterior, then the simple prior title affords the stronger evidence." These are the strongest passages that have been cited to us, and they certainly afford a powerful *primâ facie* support to Lalubhái's contention. As to the last of them, however, Vijnyaneshwara proposes an alternative construction of the Smritis in this sense:—(1). A title by itself is better than short possession by itself. (2). Possession with three descents cast prevails over a mere documentary title. (3). A title with a possession for less than the period of prescription though but a slight possession prevails over a title unaccompanied by possession. The decision on the third of the cases here put, is supported by a reference to Narada, and, if it correctly represents the Hindu law, it supports the judgment of the District Court in favour of the defendant Táráchand. He has a title and possession under it, while Lalubhái has not, and has never had possession under his title.

As to this, however, it is argued that Táráchand has not any real title at all. Bái Amrit's rights had already vested in Lalubhái when she affected to convey the house to his rival. The effect of admitting this view, supposing the rule (3) applies to the present case at all, would be to deprive it of its operation in the only cases in which it could be of use. As between two titles *per se* the better is the earlier according to the often-quoted

[1] पूर्वेषां पित्रादीनां त्रयाणां क्रमः, पूर्वक्रमः तेनागतोयो भोगस्तस्माद्विना आगमोऽभ्यधिकः. (*Ibid.* f. 14, p. 1, l. 11.)

[2] फलोपभोगलक्षण कायिक स्वीकार विकल आगमो दुर्बलो भवति तत्सहितादागमाभावात्, एतच्च द्वयोः पूर्वापरकालापरिज्ञाने. पूर्वापरकालज्ञानेतु विगुणोपि पूर्व कालागम एव बलीयानिति. (Mit. Vyav. f. 14, p. 2, l. 14.)

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maxim of Yajnavalkia [1]—"In the case of a pledge, a gift, or a sale, the prior contract has the greater force"—Yajna. II. 23 (Coleb. Dig., b. II., ch. II., sec. I., t. 28); and thus when the comparative dates had been once ascertained, possession would for the earlier deed be a needless, for the later an ineffectual corroboration. The true sense of the rule is obviously this, that he who holds by what the Roman law called a *justus titulus* or *justa causa*, that is, a title *primâ facie* capable of constituting ownership, shall from his possession derive a confirmation of that title such as to give it effect for its proper purpose against any other title not accompanied by possession. So taking it, the passages cited from the same sage, Narada, at an earlier part of the Mitakshara [2] (Macn. H. L., page 212) unite with it to form a perfectly consistent theory. In Jolly's Translation, page 24, the passages are rendered:—"Where possession exists, but no title whatever exists, there a title but not possession alone can confer proprietary rights." See to the same effect Manu VIII., 200: "A title having been substantiated, the possession becomes valid; it remains invalid without a proved title." That is, although "possession is more decisive than documentary and oral testimony" (Jolly's Narada, page 23, corrected), yet it must be supported by a title *primâ facie* effectual. The title, too, must have been acquired under circumstances indicative of good faith; a fraudulent purchase is regarded as a theft (Brihaspati in Coleb. Dig., b. II., ch. II., sec. II., t. 57; Manu VIII. 165), and fraud vitiates every transaction. Where one in possession stands on such possession alone, he is to be regarded as a thief [3] (*Ib.* p. 24), unless the possession has come to him through three descents, when, according to Narada (*Ib.* p. 25), an originally unlawful possession acquires legality, or, as Vijnyaneshwara prefers to put it, raises the presumption that a title exists, though it cannot be produced (Macn. H. L. 213).

(1) आधौ प्रतिग्रहे क्रीते पूर्वा तु बलवत्तरा. (*Ibid.* f. 11, p. 2, l. 7.)

(2) आगमेन विशुद्धेन भोगोयाति प्रमाणताम् अविशुद्धागमोभोगः प्रामाण्यं नैवगच्छतीति. (*Ibid.* f. 13, p. 2, l. 12.)

(3) भोगश्चैवलतोयस्तु क्रीतं येनागमंक्वचित् भोगच्छलापदेशेनाविज्ञेय स तु तस्कर इति. (Mit. Vyav. f. 13, p. 2, l. 14.)

But though Vijnyaneshwara gives the construction of the Smritis on which we have been remarking as an admissible alternative, it is plain that he did not himself prefer it. For the purposes of his discussion he insists repeatedly on the superiority of an earlier title once proved over a later one, though corroborated by actual possession. The questions, then, arise, of what particular contests he has in view; how far the principles he advocated necessarily govern, or are meant to govern, such a case as the one now before us; and which of the different methods of interpretation is the more in harmony with the ancient writings accepted as authoritative, or has been by its general acceptance adopted into the customary law.

The discussion in the Mitakshara (Macn. H. L. 199, &c.) is by way of exegesis or commentary on the following two slokas of Yajnavalkya:—

"In all disputes, where property is concerned, the last act is of greater force except in cases of pledge, acceptance, and sale, when the first act is of greater force;"(1)

and

"If one sees his land in the possession of another and say nothing, it is lost after twenty years; moveables after ten years,"(2) Yajn. II., 23, 24.

The first of these is plainly as to the preference to be given to legal acts in virtue of their relative priority. The second is as plainly a rule of prescription. As to the former, Vijnyaneshwara sets himself the question—"To which of the two acts will the greater weight attach, when each party adduces evidence undistinguishable in point of preference, the one asserting a prior and the other a posterior claim(3) (Macn. H. L. 199); and the instances he adduces are meant to show that a later transaction between the

(1) सर्वेष्वर्थविवादेषु बलवत्युत्तरा क्रिया। आधौ प्रतिग्रहे क्रीते पूर्वातु बलवत्तरा (*Ibid.* f. 11. p. 2, l. 2, 7.)

(2) पश्यतो ब्रुवतोहानि भूमेर्विंशति वार्षिकी। परेणभुज्यमानायाः धनस्य दशवार्षिकी. (*Ibid.* f. 11, p. 2, l. 11.)

(3) उभयत्र, प्रमाणसद्भावे प्रमाणगत बलाबलविवेके चा सति पूर्वापरयोः कार्ययोः कस्य बलीयस्त्वम्. (*Ibid*, f. 11, p. 2, l. 1.)

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same parties supported by similar evidence supersedes an earlier one, while exceptionally (as he calls it) the earlier of two contracts made with different parties in the case of a gift, sale, or pledge, prevails over the later. He has in view only contracts supported by evidence regarded as of equal weight. Of the "legal proofs described as writings, witnesses, and possession" (Yajn. II. 22, Narada on Evidence 2 Jolly, p. 23), Narada *(loc. cit.)* says that "the first is superior to the second, but possession is more decisive than the other two." Where, therefore, there is possession fortifying one of two titles, otherwise equal, save in point of date of origin, the "evidence" is no longer "undistinguishable in point of preference," and Vijnyaneshwara's remarks would not, but for what follows under the succeeding sloka, apply to such a case. In afterwards commenting, indeed, on the text of Yajn. (II. 60) "A mortgage with possession (or acceptance) is complete," Vijnyaneshwara, as referred to in 2 Borra. 151 and Bellasis 60, says of the two kinds of mortgages, *gopya* (=for deposit) and *bhogya* (=usufructuary), that "these are complete by possession and enjoyment and not merely by writing, (oral) evidence, or the intention of the parties.[1] [Priority of possession with (*i.e.*, accompanying) these is valid, without them it is invalid]" These last words in the translation seem to be meant as the substance of a passage of Narada which with the continuation of the commentary on the Mitakshara is as follows :—

"As Narada says 'A pledge is said to be of two kinds, moveable and immoveable. Both are valid when there is actual enjoyment, not otherwise'"[2] (see Jolly's Translation, p. 31).

"The purport of this is 'In the matter of a pledge, gift, and purchase, the prior act prevails;' such is the declaration. [But] the first act resulting in possession is to be deemed the more effectual, the act not accompanied by acceptance though prior is

[1] आधेः स्वीकरणात्सिद्धिः ...। आधिर्गोप्यस्य भोग्यस्य च स्वीकरणादुपभोगादाधि ग्रहणसिद्धिः, नसाक्षिलिखनमात्रेण नाप्युद्देशमात्रेण। (*Ibid.* f. 24, p. 2, l. 14.)

[2] आधिस्तु द्विविधः प्रोक्तो जंगमः स्थावरस्तथा, सिद्धिरस्यो भयस्यापि भोगोयद्यस्ति नान्यथेति ॥. (Mit. Vyav. f. 24, p. 2, l. 15.)

not deemed effectual."[1] We know that in the case of mortgages, an apparent title acquired in good faith from an owner left in possession, and accompanied by a transfer of the possession, has always, in this part of India, prevailed over an earlier mortgage without possession, except where a local custom has modified the general law; and the three cases of mortgage, sale, and gift are placed by the Smriti on exactly the same footing. In the case of mortgages as of sales, some commentators besides Vijnyaneshwara (Mitak in Macn. H. L. 200, 203) have argued that the first mortgage deprives the second of validity, as a second is forbidden under a penalty to the mortgagor (Colcb. Dig., b. 1, ch. III., t. 129, Comm.); but this has not prevented the acceptance of the doctrine, that possession is essential to the mortgagee's real right in the property as distinguished from his contractual right with reference to it against the person of the mortgagor.

In commenting on the second of the texts which we have quoted, Vijnyaneshwara (Macn. H. L. 201 s. s.) proceeds boldly to set aside its obvious meaning. He says that the owner is by twenty years' adverse possession deprived only of the profits of the property. He says that mere possession is not amongst the eight recognized means of acquiring property, and he cites Narada and Katyayana to show that mere possession without a title creates no property in the thing possessed. The former quotation (Jolly, p. 24) we have already discussed. It is so far from having the effect which Vijnyaneshwara seeks to draw from it, that Narada says distinctly (Jolly, p. 23): "If a man foolishly suffers his property to be enjoyed by strangers, it will become those strangers' own through the effect of possession, although the proprietor is known to be alive.

"Whatever property a proprietor sees with his own eyes being enjoyed by strangers, without for ten years asserting his rights, may not be recovered by him."

Katyayana again says that partition of property must be presumed after an actual separation of brethren for ten years, and

[1] अस्य च फलम्। आधौ प्रतिग्रहे क्रीते पूर्वातु बलवत्तरेति या स्वीकारान्ताक्रिया सा पूर्वा बलवती, स्वीकार रहिता तु पूर्वापि न बलवतीति। (*Ibid.* f. 24, p. 2, l. 16.)

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this is referred by the Smriti Chandrika (Transl., p. 241) to the rules of prescription of Yajnavalkya himself. When, therefore, Katyayana says that "in the possession of cattle, male or female slaves, &c., there is no validity either for the unlawful taker or his son"[1] (Macn. H. L. 202), this cannot without a gross perversion be twisted into a denial of the general rule of prescription which it is plain Katyayana accepted. Vijnyaneshwara, indeed, himself quotes a passage of Katyayana which is identical in sense with the rule of Narada (Mitak. Macn. H. L. 213).

Manu is next cited, and his rule (Manu VIII., 147) being identical with Narada's or differing (VIII., 148) from it only by allowing fifteen years instead of ten for the assertion of the ousted proprietor's right, Vijnyaneshwara is forced to admit that the claimant cannot make any effectual answer to the possessor's plea. He has to fall back on the king's duty to administer justice honestly, a duty defined by Yajnavalkya (II., 1) as quoted by the Commentator himself (Macn. H. L., p. 135): "Let the monarch free from anger and cupidity.....adjudicate according to the Dharma Sastras."[2] The Sastras seem in this matter to be uniformly opposed to the Commentator. The other passage on the kings' judicial duty cited in the Mitak. (Macn. H. L. 183) is at Yajn. II., 19: "Let the king, rejecting subtleties (or rather perhaps sophistries or artifices, *chhala*, as in Manu VIII., 49 (Stenzler *die taüschung vertilgend*) try suits on their merits; but even merits avail not where proof fails,"[3] and then in sloka 27: "Title prevails over (mere) possession unless ancestral, but (itself) has no force where there is no possession" (or enjoyment)[4] (Stenzler *"Aber selbst erwerb hat keine kraft wenn gar kein genuss da ist"*), so that, however good the title, the Court must not adjudicate in

[1] नोपभोगे बलं कार्यमाहर्त्री तत्सुतेन, वा पशुस्त्रीपुरुषादीनामिती. (*Ibid.* f. 12, p. 1, l. 5.)

[2] व्यवहारान्नृपःपश्येत् .....धर्मशास्त्रानुसरिण क्रोध लोभविवर्जितः. (*Ibid.* f. 1, p. 1, l. 4.)

[3] छलं निरस्य भूतेन व्यवहारान्नयेन्नृप : भूतमप्यनुपन्यस्तं हीयते व्यवहारतः. (*Ibid.* f. 9, p. 1, l. 9.)

[4] आगमो ऽभ्यधिको भोगाद्विना पूर्वक्रमागतात्. आगमेपीबलं नैव भुक्तिः स्तोकापि यत्नतो. (Mit. Vyav. f. 13, p. 2, l. 11 & 14, p. 2, l. 7.)

favour of it, unless it is thus made proof in the sense of the Hindu lawyers.

It is in the course of this discussion of the law of prescription that Vijnyaneshwara says that the preference accorded to the earlier of two mortgages, gifts, or sales by way of exception, is not to be understood as implying "the greater validity of the posterior act in a case of this description, provided that in this instance of landed property there have been twenty and in that of personal property ten years' possession, because in such acts (mortgages and the like) no subsequent transactions can really take place. A person is entitled to mortgage, give or sell his own property, but he has no proprietary right over things already mortgaged, given or sold." (1) The effect of possession in these instances being probably a familiar case when Vijnyaneshwara wrote, he saw that it would be brought to bear against his argument on the narrow operation of prescription, and he anticipates the objection by denying that it has a sound legal basis. As we have seen, however, possession has unquestionably been received as a ground of preference in the case of mortgages even by Vijnyaneshwara himself, and the forced and distorted character of the argument into which the passage we are now considering is introduced, deprives it of the respect otherwise due to it as an utterance of the author of the Mitakshara. His own Rishi Yajnavalkya, on the other hand, says: "Title is of no avail without some slight possession"—Yaj. II., 27. Narada says more emphatically: "What a man is not possessed of, that is not his own, even though there be written proof and even though witnesses be living. This is specially the case with immoveables" (Jolly's Trans., p. 23). Vijnyaneshwara (Macn. H. L. 217) himself quotes Katyayana to the effect that "where there is not the least possession there a title is not weighty." (2) This he then paraphrases: "With what-

(1) नचैतन्मन्तव्यम् । आधिप्रतिग्रह क्रयेषुपूर्वस्याः क्रियायाः प्राबल्या पवादेन भूमिविषये विंशतिवर्षोप भोगयुक्तायाः धनविषये दशवर्षोप भोगयुक्ताया उत्तरस्याः क्रियायाःप्राबल्य मनेनोच्यत इति । यतस्तेषूत्तरैव क्रियातत्व तो नोपपद्यते । स्वयमेवह्याधे यन्देयं विक्रेयं च भवती । न चाहितस्य दत्तस्य विक्रीतस्यवास्वत्वमास्ति. (*Ibid.* f. 12, p. 1, l. 7 *et seq.*)

(2) आगमेपि बलंनैव भुक्तिस्तोकापि यत्नना. (*Ibid.* f. 14, p. 2, l. 7.)

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soever title there is not the least occupancy, in that title there is no sufficient weight." (1) He then discusses the essentials of gift and acceptance, and admits that in the case of land, acceptance involves some little possession; otherwise the gift, sale, or other transfer is not complete. He might have quoted his own Rishi again. "The acceptance of a gift should be public, especially of immoveable property" (2) (Yajn. II., 176); but omitting this he goes on to assert, that where the priority of the admittedly incomplete transfer is ascertained "it affords the stronger evidence." "Stronger evidence" of what we may enquire, and the answer must be "of an inchoate as against a complete conveyance." It is plain, we think, that Vijnyaneshwara in his endeavour to give effect to a principle of abstract justice, not subject to those conditions of time and the practical needs of society which had been recognized as the natural basis of a law of prescription by the Rishis themselves, was led into a position which could not be defended without a series of the most arbitrary constructions of the texts. In the course of his argument he found that the generally received doctrine on possession in cases of competing securities was inconsistent with his theory, and so he proceeds to explain it away. He has not dealt with the case of rival vendees, one in and one out of possession, except under the influence of this endeavour to support a foregone conclusion; and that he felt the weakness of his own reasoning, is apparent from his immediately going on (Macn. H. L., 219) to admit that "the interpretation may be" that which we have in an earlier part of this judgment shown to be probably the correct one, one which sets aside Vijnyaneshwara's unpractical refinements in favour of the plain intention of the Smritis. At an earlier part of his disquisition (Macn. H. L., p. 199) Vijnyaneshwara quotes a passage of Katyayana or Brihaspati, in which it is said that neither witnesses nor ordeals avail against possession in establishing the right to an easement. He does not try to reconcile this with his general principle, and yet it is obvious that the earlier title without possession or quasi possession might in such

(1) यस्मिन्नागमे स्वल्पापि भुक्तिर्नो नास्तितस्मिन्नागमेवलं संपूर्ण नैवास्ति. (*Ibid.* f. 14, p. 2, l. 8.)

(2) प्रतिग्रहःप्रकाशःस्यात् स्थावरस्य विशेषतः. (*Ibid.* f. 69, p. 1, l. 10.)

cases conflict with a later title accompanied by possession, and according to the Smriti be defeated by it. But what is most conclusive against his argument in favour of bare title, is that he himself distinctly abandons it in the passage we have already quoted on the subject of mortgages.

The doctrine of the necessity of a transfer of possession to complete a conveyance of ownership, to convert the right *ad rem* to a right *in re*, however harshly it would bear on particular persons where a different system has been established, is that which has been received into most systems of law, at least in their earlier stages of development. Its obvious convenience as a check on frauds and contentions has preserved it in the modern Roman law, even if this was not the source in which it originated—"*Traditionibus et usucapionibus dominia rerum non nudis pactis transferuntur*[1]" Co. lib. II., t. 3, s. 20; and this although "*emptio et venditio contrahitur cum de pretio convenerit quamvis nondum pretium numeratum sit*" [2]—Gaius III., 139 and although "*Nemo plus juris ad alium transferre potest quam ipse habet*[3]—D., l.50, t. 17, s. 54. As between the vendor and vendee the sale was perfected, the obligation of the contract was incurred; but the *dominium* of the land sold could not pass without a delivery for that purpose. In the modern French law a mere bargain transfers the property, but this has caused inconveniences which have necessitated the enactment in recent years (A. D. 1855) of a new law subordinating the proprietorship to real rights duly acquired prior to its registration or the transcription of the title. The effect of this has been, with regard to immoveables, to put a restrictive construction on the words of the Code Civil, Art. 1583: "*la propriété est acquise de droit à l'acheteur à l'ègard du vendeur, des qu'on est convenu de la chose et du prix.*" [4] An obligation rests on the vendor from that moment, but as regards third parties the

(1) Dominion (or ownership) over things is transferred by tradition (delivery) and usucapion, not by bare contracts.

(2) The bargain of purchase and sale takes place when an agreement about the price is concluded, though the price (money) itself may not yet have been paid.

(3) Nobody can convey to another more right than he himself possesses.

(4) The property passes according to law to the purchaser from the vendor, from the time they are agreed about the thing and the price.

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right *in re* is not constituted until the public act takes place. Blackstone, too, (vol. 2., p. 9) describes delivery of possession as an original requisite of a transfer of ownership: "The voluntary dereliction of the owner and delivering the possession to another individual amount to a transfer of the property.....the consent expressed by the conveyance gives Titius a good right against me, and possession or occupancy confirms the right against all the world beside." This may seem opposed to some of our familiar notions on the English law of contracts; but that it is not quite incongruous with a correct theory, may be inferred from the famous argument of Serjeant Manning in his note to *Bailey* v. *Culverwell*, (1) that a bargain and sale confers only a personal right, and does not transfer the property without delivery of possession. This is not received law, but the property that passes is still not absolute; the unpaid vendor has rights which enable him under circumstances to resume his *dominium* down to the moment that the *dominium* of the purchaser has been finally acquired along with the possession of the thing purchased. Bracton (b. II., f. 62) says distinctly: *sine traditione non transferuntur rerum dominia;* (2) see also per Sir T. Plumer, as quoted in 2 Wh. & Tud. 726, 3rd edn.

Without dwelling further on such analogies as these which might be greatly extended, we think it enough to say that they form cumulative testimony against the position that Vijnyaneshwara took up in opposition to the principles of his acknowledged masters on the particular subject that we are considering. But, then, the question follows, of how far he has been followed by other acknowledged authorities and by the customary law of this Presidency and especially of Guzerat. The Viramitrodaya merely echoes the Mitakshara on this as on most other points. The Vyavahara Mayukha (ch. II., sec. 2) accepts in part the Mitakshara doctrine as to prescription, but without adopting its rejection of possession, even long-continued, as fortifying a title. Nilakantha rejects the twenty years' prescription as itself conferring a title except to the mesne profits. As to the prescription arising from three descents, this, he says, must be supported by some colour of title. But as to possession supplementing a title

(1) 2 M. & R. 568.

(2) Without tradition (delivery) the dominion over things is not transferred.

as against a title not supported by possession, he quotes only the passage of Narada (Jolly, page 24) which we have already discussed. He apparently had not this particular competition present to his mind, for he does not dwell on it, but proceeds immediately to discuss the rules of prescription. He quotes Vyasa,[1] that "possession is five-fold, titled, long, continuous, uninterrupted, and known to the adverse party;" but as to the title which gives effect to possession for three generations, he says the possession may be "without a good title proper for attainment of property." What his opinion may have been as to an apparently good title supported by possession as against a prior naked title, he does not say; but if from beginning with the passage from Narada he is to be understood as adopting Narada's doctrine, he must be held to dissent from Vijnyaneshwara's favourite view, and to adopt the alternative one propounded on the authority of Narada by Vijnyaneshwara himself. In treating of the proof of easements, Nilkantha (Stokes, H. L. B. 25; Vyav. May., ch. I., sec. II., pl. 3) says that possession is superior to either documents or witnesses, which is more directly in contradiction to Vijnyaneshwara's principle of the inefficacy of possession than the Smriti as quoted by Vijnyaneshwara himself. As to mortgages, Nilkantha, though he accepts (Stokes, H. L. B. P. 31) the passages of Narada on which the Mitakshara relies, as preventing ownership arising from a dishonest or untitled possession, still does not find in them the same obstacle as his predecessor to assigning to a pledge with possession the preference over a pledge without possession (St[illegible]. L. B. 114). Should both creditors seek possession [illegible] same moment, their rights are pronounced equal. In the case of a double hypothecation, the earlier act is to prevail. Nilkantha seems to take Katyayana's text as applying to bare hypothecation: Jagannatha in Colebrooke's Digest (b. 1, ch. III., t. 128, Comm.) makes it apply to the case where both creditors have had possession. In either case, possession completes a right which would otherwise be but imperfect as against third parties.

[1] सागमो दीर्घकालश्चाविच्छेदोपरवोज्झितः । प्रत्यर्थिसन्निधानश्च परिभोगोपिपंञ्चधेति (Mit. Vyav., f. 13, p. 2, l. 16.)

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From his treatment of these topics it is clear that Nilkantha did not adopt in its integrity the Mitakshara doctrine that under all circumstances the prior act must prevail in cases of gift, sale, and mortgage; and it may reasonably be concluded that, in quoting Narada's text on the efficacy of possession plus a title, Nilkantha intended to adopt the general doctrine on that subject of the Smriti from which the quotation was made.

Of the cases that have been decided on the law of sale at this side of India, the earliest that we have found reported, is that of *Nursing Bhánd* v. *Sunkurdás*.[1] There a vendee had executed a *satekhat* and paid earnest money; the remainder of the purchase-money was to be paid on the registration of a formal deed of sale. The vendee refused to complete. The sastris and the Court held that the vendor's right in the property was still untouched, because neither had the term expired, the money been paid, *nor the buyer's ownership commenced.* In the case of *Lallá Chooneelál* v. *Sawáchand Namedás*,[2] which was disposed of in 1835, the Privy Council held that the making of a *satekhat* so bound the property that the vendee could "demand a specific performance of the contract and the execution of such further assurances as might be deemed necessary to invest him with a complete legal title," although the vendee had not obtained possession and had not set up any claim until about a year after the attachment of the property in execution of a decree against the vendor. There is not in the judgment any discussion of the Hindu law; and not having in our library vol. III. of the Privy Council Cases to which reference is made in 1 Morle[illegible]Digest, 106, we are unable to say whether it was even discusse[illegible]nd by [illegible]argument. But, so far as appears in the judgment, their Lordships merely applied the principle that after a contract of sale, though not completed by a conveyance, equity protects the land purchased from a vendee against a judgment-creditor's elegit (see *Benham* v. *Keane* (3) and the cases there cited). This is, of course, in no way decisive against the right of a purchaser without notice and in possession under a legal title, against whom equity gives no assistance to the holder of the prior equitable right. In the case of *Sibchunder*

[1] 1 Borr. S. D. A. Rep. 445. [2] 5 Cal. W. R. 111 P. C.

[3] 31 L. J. Ch. 129.

Ghose v. *Rasikchunder Neoghy*, (1) Sir L. Peel says: "The parties claiming under the judgment take not by contract or conveyance, nor have any agreed lien on the lands in suit. If they have a lien, it is by virtue of the *lex fori* and not of their personal law: it is not by virtue of the judgment but by virtue merely of the delivery of the writ of execution to the sheriff, and this is not by virtue of the Hindu law but of the *lex fori* merely; but by that law the deposit of the title-deeds gives a prior equity, and though the sale under the execution might give the legal estate, assuming the pledge to be invalid by Hindu law, yet as that purchase was after notice of the charge, it gave the judgment-creditor no priority." The dispute was between a judgment-creditor, who had purchased with notice in execution through an agent or trustee, and a prior mortgagee without possession; and it is plain that the position of the former claimant was, by reference to a general principle, supposed to be incorporated in the Law of Procedure, broadly distinguished from that of the *bonâ fide* purchaser without notice from an owner still in possession and transferring possession to the purchaser.

The reported decisions in recent years have, for the most part, turned on the effect of possession upon the validity, as against third parties, of a mortgage. In *Kundoojee* v. *Bállájee* (2) the opinion of the sastri was adopted, who said "that possession gives a deed of subsequent date undoubted preference over one of a prior date but without possession." In *Rambuggut* v. *Sudánundráo* (3) the sastri of the Sadr Court gave a similar opinion, but the case seems to have been finally disposed of on the ground of the later deed's having been registered. In *Gopál Sudásiv* v. *Dinkar Abájee* (4) preference was given by the sastri and the Court to a deed of sale accompanied by possession over a prior mortgage without possession. As there was no doubt in that case as to the respective dates of the two transactions, it involved the adoption of the alternative interpretation proposed by Vijnyaneshwara instead of that more favoured by him, that "the simple prior title affords the stronger evidence" (Macn. H. L. 219). The sastri's

(1) 1 Fult. 36; see p. 61.
(2) Bell. S. D. A. Rep. 5.
(3) Bell. S. D. A. Rep. 9.
(4) Bell. S. D. A. Rep. 58.

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answer rests, as we have already seen, on a passage of the Mitakshara itself.

The next case that occurs is that of *Hormusjee* v. *Pándoorung*.[1] It might, perhaps, be a matter of some difficulty to reconcile this with the decision of the Privy Council to which we have lately referred, as it apparently places the attaching creditor in as good a position as a purchaser for value without notice; but the Court say distinctly: "The sale according to Hindu law would not be complete without possession being given," and reject the claim founded on the inchoate purchase. In *Rutunbharthee* v. *Kisunbharthee*[2] the appellant and respondent appear to have claimed under deeds of gift rather than by sale for valuable consideration from one Gyanbharthee. The respondent's deed was the earlier in date and was registered; but the Court held that the appellant's possession, acquired when the property had been attached under a decree against Gyanbharthee, gave his title precedence over the respondent's earlier one without possession. The case, as we have said, appears to us, from the report, to be one of competing deeds of gift; but no argument has been addressed to us on this point, and the language of the judgment is quite general—"The Court are of opinion that the alienation to Kisunbhartee without possession cannot be upheld by the Hindu law against Rutunbhartee's title with possession."

This was in 1857. The case of *Durgá* v. *Hurtá*,[3] which followed in 1860, was one of a prior purchaser without possession against a judgment creditor, who, having sold the property in execution, had himself become the purchaser. The Joint Judge in regular appeal held "that the Hindu law does not make possession necessary for a good title as proprietor, though it does for a title as mortgagee. Under the Hindu law a proprietary title under a deed of purchase is as good without possession as with it;" but the judgment of the Sadr Court was as follows:—"The preliminary question, then, for the Court's decision is whether or not Durgá's (the judgment-creditor's) purchase with

(1) 3 Morr. S. D. A. Rep. 27. (2) 4 Morr. S. D. A. Rep. 44.
(3) 7 Harr. S. D. A. Rep. 342.

possession takes precedence of Hurtá's purchase without possession, and, on reference to the sastri, they find that it does."

So far, whatever other objections might be raised against the decisions of the late Sadr Court, they seem to have maintained pretty consistently, under the advice of the sastris, that, for the creation of a real right generally available against a third party, a transfer of possession was essential according to the Hindu law. In *Rágho Bugdájee* v. *Vittoo*,[1] however, a different view was taken. The Court say: "Having referred the first two objections to the sastri of the Court, he has answered that, according to the Sastras, possession is not essential to the validity of a sale, neither is proof of full payment of the purchase-money, the latter being matter of arrangement between the vendor and purchaser." The case was one of a purchaser without possession seeking to raise an attachment, and it might be said that, on account of the distinction between a creditor and an actual purchaser for value, the decision is of little weight for a case of competing conveyances, but it is not certain that this distinction was recognized by the Sadr Court. It would be useful to know in what terms the questions were proposed to the sastri; but the reference is not preserved, so that it is no longer possible to say whether or not he understood that his opinion was called for on a case identical in substance with *Durgá* v. *Hurtá*,[2] and whether he assigned any reasons for giving an inconsistent interpretation of the law. In the absence of any information it seems almost safer to conclude that he meant to pronounce only on the validity of the sale as between the purchaser and vendor. In this sense the transaction was, no doubt, valid; indeed, there are texts (see Narada, Jolly's Transl., p. 59; Vyav. Mayukha, ch. IX., pl. 1; Stokes H. L. B. 133; Brihasp. Coleb. Dig., b. II., c. IV, t. 5 compd. with t. 17 Comm.) frequently cited, which say that a thing once even promised is inalienable except to the promisee. But if the sastri intended to say that delivery of possession was a wholly insignificant circumstance, he was in such direct contradiction to the Smritis and the commentaries as well as to previous responses, that without further authority it would not be at all safe to rely on his *dictum*. What is more important, though

(1) 8 Harr. S. D. A. Rep. 229. (2) 7 Harr. S. D. A. Rep. 342.

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but cursorily touched on in the report, is that the purchaser's conveyance having been registered, acquired, according to Act XIX. of 1843, a preference over any unregistered title. According to *Rámbuggut* v. *Sudánundráo* (1) the purchaser with a registered conveyance must have been preferred, even though his deed were subsequent in date to his opponent's title. It is reasonable to suppose, too, that in laying the case before the sastri so important a circumstance as registration was not omitted. If it was included, then the sastri may very well have applied to the case the principles applicable to a transaction authenticated by the presence of public officers. These, as may be seen from the commentary on Texts 35, 36, 37 of Colebrooke's Digest., b. II., ch. II., sec. II., give a considerable advantage to the purchase so fortified, even though the sale would otherwise be deemed invalid. In his commentary on bk. II., ch. IV., s. II., t. 28, Jagannatha says: "Contracts of sale, mortgage, and the like must necessarily be made in the presence of the king's officers, and should be recorded by them."

The decision in *Bugdájee* v. *Vittoo* (2) was followed in *Nároo Hurree* v. *Wamnájee Konher*. (3) In overruling the decision in *Hormusjee* v. *Pándoorung* the (4) Judges make no reference to the case of *Durgá* v. *Hurtá*, (5) or to the earlier one of *Rutunbhartee* v. *Kisunbhartee*, (6) both of which were subsequent to *Hormusjee* v. *Pándoorung*. Perhaps they had overlooked these cases, whose authority, at any rate, can hardly be said to have been destroyed by a judgment which touched them only through being expressed in terms more general than was necessary for the adjudication in hand. If we take the decision as purposely omitting the discussion of these cases, because the case was distinguishable from them in the same way as *Hormusjee* v. *Pándoorung*, their authority remained wholly unaffected as to contests between rival vendees. The case was again between a purchaser and a judgment-creditor, and the Court say that the decision in *Hormusjee* v. *Pándoorung*, to which we have referred, is overruled by *Bugdájee* v. *Vittoo*. (7

(1) Bell. S. D. A. Rep. 9.
(2) 8 Harr. S. D. A. Rep. 229.
(3) 8 Harr. S. D. A. Rep. 289.
(4) 3 Morr. S. D. A. Rep. 27.
(5) 7 Harr. S. D. A. Rep. 342.
(6) 4 Morr. S. D. A. Rep. 44.
(7) 8 Harr. S. D. A. Rep. 229.

No reference is made to the fact of registration in the latter case. No consciousness is shown of the cases of *Rutunbhartee* v. *Kisunbhartee* and *Durgá* v. *Hurta*. This brings us to the end of the cases in the late Sadr Courts. The judgments, as reported, are as little informing as can well be conceived. They do not attempt to develope a rational theory out of the utterances of the native authorities, or to reconcile the apparent contradictions of the sastris. The conflicting answers obtained from these officers, were the whole records before us, would probably be found to illustrate the maxim *Prudens quæstio est dimidium scientiæ*;[1] but, taken as they stand, they leave on the mind a puzzling impression of uncertainty and of insufficient investigation of the subjects proposed for inquiry.

The first case in the reports of this Court is in no way more instructive. This is *Nágubái* v. *Motigir Guru*.[2] The plaintiff sued for possession of a house sold to her without possession. By whom it was sold, under what circumstances, how and when the defendants had come into possession, whether as successors, as seems likely, to the original vendor, as donees or as vendees with or without notice of a prior sale, on all these points the report is silent. The Court say: "A sale of property may be valid without possession." How far, against whom, and under what circumstances, that validity exists, is not stated, nor can it be gathered from the report. If the doctrine really held by the Court at that time is to be gathered from the case next reported, it did not necessarily affect the relations between ordinary rival vendees from the same vendor. This was the case of *Bhukan* v. *Bháiji*[3] decided in the same month as *Nágubái* v. *Motigir*.[4] In this case, Bhukan, a prior purchaser of property sold in execution, was sued by the purchaser at the auction for possession. How he could be sued for possession unless he had obtained possession, it is not easy to understand; but in the lower Courts judgment was given against him, because his "deed of sale was invalid, not having been followed by possession." The High Court, however, reversed this, holding "that by Hindu law a sale of immoveable property is valid, though not followed by possession; and as in

(1) Skilful inquiry is half knowledge.
(2) 1 Bom. H. C. Rep. 5.
(3) 1 Bom. H. C. Rep. 19.
(4) 1 Bom. H. C. Rep. 5.

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this case the sheriff's sale extended only to such right, title, and interest as Jorá might possess in the property in dispute, and this had already vested in Bhukan, Bháiji took nothing by his purchase from the sheriff." The Judges seem here to have been influenced by the opinion on which several more recent cases have been decided, that "the right, title, and interest" of a judgment-debtor, disposed of in execution, means not necessarily all that he could himself effectively convey, but his proprietary rights minus all equitable claims that could be enforced against him in respect of the property sold. As the Privy Council in *Lállá Chooneelál* v. *Saváechand* (1) had made the attaching creditor subject to the judgment-dobtor's obligation, so now the purchaser in execution was placed in a similar position. This was directly opposed to *Durgá* v. *Hurtá*; (2) but the case arose under a different law of procedure, with a different description of the property offered for sale. So far as the expressions of the Court are strictly judicial, they may be understood as disposing of the case on a principle which does not affect the ordinary relations of rival vendees, one in and the other out of possession—a principle most distinctly set forth in *Mathurádás* v. *Káliá* (3) —"The purchaser at an auction sale in execution of a decree buys the right, title, and interest of the debtor, whatever that may be, burdened with all valid liens created by him. The precedent followed by the District Judge, therefore, does not apply, as it refers to private sales."

The precedent here referred to, is that of *Ganpat* v. *Khandu*.(4) In this a prior mortgage without possession was not allowed to prevail against a subsequent sale with possession. The real or supposed equitable limitation of the execution-purchaser's rights, which prevented his gaining in *Mathurádás* v. *Káliá*(5) the advantage accorded to a purchaser in the ordinary course in *Ganpat* v. *Khandu*(6) was equally applicable to the case of *Bhukan* v. *Bháiji*,(7) and must have governed the decision of that case, whatever view might have been held as to the rights of ordinary purchasers *inter se*.

(1) 5 Cal. W. R. 111 P. C.
(2) 7 Harr. S. D. A. Rep. 342.
(3) 7 Bom. H. C. Rep. 24 A. C. J.
(4) 4 Bom. H. C. Rep. 69 A. C. J.
(5) 7 Bom. H. C. Rep. 24 A. C. J.
(6) 4 Bom. H. C. Rep. 69 A. C. J.
(7) 1 Bom. H. C. Rep. 19 A. C. J.

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Girdhar Parjárám v. *Dáji*[1] is a case in which a vendee sued to recover property encroached on by a neighbour before his purchase. As the case was actually disposed of on the ground that the plaintiff had failed by production of a sale-deed to prove what were the precise boundaries of his purchase, that part of the judgment which is referred to in the head-note was, in strictness, extra-judicial. The judgment, however, begins thus: "Although, according to Hindu law, transfer of possession is not essentially necessary to give validity to a sale of immoveable property, yet it is essential that the vendor should have possession at the date of the sale." "Essential" to what, we may inquire: to a right against the vendor? or a right against all persons? These questions are answered in the judgment by saying that the vendee could recover damages from the vendor, and that he acquired "a right to sue for the land of which the vendor had been dispossessed." This, however, from the context must mean a right to sue, not the encroaching neighbour, but the vendor if he should recover possession, to make him complete the transfer, as in *Nanábhái* v. *Tukárám*;[2] and thus the result comes out that, in the opinion of the Court, there might be a perfectly valid right, enforceable according to his capacity against the vendor, in respect of the property sold, which still was no right *in re* enforceable against a third party. No texts of the Hindu law have been brought to our notice, nor are we aware of any by which the inefficacy of a sale by an owner dispossessed can be placed on any other ground than the impossibility of completing the transaction by a transfer of possession. This transfer is "essential" as against a third party in every case; it is "not essentially necessary" against the vendor himself in any. It was on this view of the case that we in 1873 disposed of *Káchu Bayáji* v. *Káchobá Vithobá*.[3] It is not apparently quite reconcileable with the case of *Krishnáji* v. *Govind*,[4] where a mortgagee from A suing on an alleged violent dispossession of himself by B, but found never to have been in possession, was held capable of suing on his mortgagor's title within twelve years of his expulsion by the defendant; but the same principle was applied in *Govindá* v. *Rávji*.[5] There the

(1) 7 Bom. H. C. Rep. 4 A. C. J. (2) Printed judgments for 1873, p. 186.
(3) 10 Bom. H. C. Rep. 491. (4) 9 Bom. H. C. Rep. 275.
(5) S. A. 306 of 1876, p. 274 of printed judgments of 1876, not reported.

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Court say: "We quite agree with the Judge that transfer of possession is not essentially necessary to the validity of a sale of immoveable property. But this case, it appears to us, should be disposed of on other considerations. Both parties are innocent purchasers, and as such have an equal claim to the assistance of the Court; but the defendant having got into possession without notice of the prior sale, it appears that this Court, in accordance with principles of equity, should not interpose to disarm him, but should leave the matter as it stands." There is some little danger of misapprehension in adopting the language employed by Courts of equity in England, where there is or was a double system of Courts, in this country where there is but one; but if the substance of this judgment be compared with Vijnyaneswara's *dictum* (Macn. H. L. 203)—"A person.....has no proprietary right over things already mortgaged, given, or sold"—it obviously constitutes a rejection of it, except in the sense subsequently adopted by Vijnyaneswara himself:—"The first act resulting in possession, not an act, though prior, unaccompanied by acceptance, is to be deemed effectual." If the owner by a mere contract had divested himself of the *dominium* over his property, none could have remained to him to form the subject of a new transfer to the defendant. His permissive occupation under the plaintiff, when the latter had become complete owner, would make no difference, since this would rank, as against a third party such as the defendant, simply as the possession of the plaintiff himself—*Sakálchand Saváechand* v. *Dáyábhái Ichháchand*,[1] Col. Dig., bk. II., c. IV., t. 56, Comm. It repeats the general formula—"transfer of possession is not essentially necessary to the validity of a sale," but practically explains it as applicable only between the vendor and purchaser; as inapplicable between a prior purchaser on a naked contract and a subsequent purchaser with possession.

It is singular that in this series of decisions it is only the last which is distinctly a case between rival vendees free from any complication with the law of gifts, of mortgages, or of execution. In *Kullo* v. *Rámji* [2] the learned Judges say: "Verupax never

[1] 4 Bom. H. C. Rep. 71 A. C. J.

[2] Decided on the 9th September 1872; see printed judgments for 1872.

had possession, and, therefore, under Hindu law he was not in a position to sell the land to the plaintiff;" but it may be objected that there was a registered conveyance to the later purchaser, who must, therefore, have succeeded, even if the vendor had had possession, seeing that it had not been transferred to the plaintiff, who, consequently, had to stand upon his deed alone. The position of the attaching creditor has, in the decisions of the Sadr Adálat, been regarded in a very different view from that adopted by the Privy Council and the High Court; but, regarding him and the purchaser at an execution sale in the light of purchasers for value, the Sadr Court, we find, arrived, for reasons not reported, at directly opposite conclusions. In the case of mortgages it is admitted that the Hindu law makes a change of possession essential to their completeness, though on *Krishnáji* v. *Govind* (1) an opposite contention might possibly be founded; but it is said that the law being essentially different in the case of sales, the decisions on the one class of cases are not in any way applicable to the other. In *Ratunbhartee* v. *Kisunbhartee*(2) and perhaps in *Nágubái* v. *Motigir* (3) the decision may have turned on some peculiarity, if such there be, of the law of donation. In *Káchu* v. *Káchobá* (4) we said that "the texts cited" in *Harjivan* v. *Náran Haribhái*(5) "make a transfer of possession equally necessary to the completion of a sale as of a gift." If that is so, and if the cases that have arisen on the law of mortgage are not referrible to some principles different from those which govern sales, the decisions passed on the one class of disputes furnish important analogies, at least, for dealing with the others. It is worth while, therefore, to examine the question of their connection, or want of connection, with some care.

In *Harjivan* v. *Naran Haribhái* a donee sued to recover possession from the tenant of his donor. The tenant set up a permanent tenancy and a payment of rent to the donor after the date of the deed, which he said was a fabrication. In special appeal, Sir Richard Couch, C. J., said: "The question which we have to determine is, whether the Judge was right in holding that the gift was

(1) 9 Bom. H. C. Rep. 275.
(2) 4 Morr. S. D. A. 44.
(3) 1 Bom. H. C. Rep. 5.
(4) 10 Bom. H. C. Rep. 491; see p. 493.
(5) Bom. H. C. Rep. 31 A. C. J.

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not complete without delivery, and we are of opinion that he was;" and (in the conclusion of his judgment) "without possession or receipt of rent by the donee, the gift in this case was not complete." This was, it seems to us, an extreme case. The donee is told that the gift to him is invalid, because the tenant will not attorn to him. We are not aware that the Hindu law thus makes the capacity of a landlord or of a receiver of quit-rent to make a gift of his interest in the property dependent on the assent of the tenant in physical possession. The learned Judges in *Venku* v. *Jivu*[1] throw out, indeed, an opinion that the presence of a mortgagee in possession would so prevent delivery to the purchaser that no sale by the mortgagor could be complete; but this does not seem to rest on any recognized authority, though certainly contended for by some lawyers. In his commentary on Colebrooke's Digest, bk. I., ch. III., t. 134, Jagannatha says that the text is an answer to one who should hastily affirm that a pledge is absolutely invalid for want of possession, without neglect on the part of the pledgee, and the same argument is extended by him to the case of a gift. Colebrooke (Dig., bk. II., ch. IV., t. 18) says, as translated, that "a pledge must be disposed of by the law of pledges or subject to redemption," and the liberty thus allowed to the owner is not made dependent on the assent of the actual possessor, the mortgagee. If it were so, the sale in execution, subject to the mortgage approved by the sastri and by Colebrooke and Ellis at 2 Strange 461, could not be made, except with permission of the mortgagee. See also 2 Macn. P. and P. 307, where the right to sell an equity of redemption is fully supported by the sastri and the Vivada Chintamani, pp. 76 and 78 of the translation, which is still more clearly to the same effect. The difficulty to the Hindu lawyers, indeed, seems to have been in determining whether, as the mortgagor's ownership still subsists, his subsequent sale does not avoid the mortgage (see Col. Dig., bk. II., ch. IV., t. 28 and Comm.) The case of *Giriápá* v. *Narsápá*,[2] as explained in *Hari Rámchandra* v. *Máhádáji Vishnu*,[3] shows that possession by a tenant is equivalent to im-

(1) Sp. Ap. 500 of 1871, not reported, decided on the 11th of March 1872; see printed judgments for 1872.

(2) Morr. Sel. Dec. Pt. I., p. 96. S. A. 9972.

(3) Bom. H. C. Rep. 50 A. C. J.; see p. 54.

mediate possession by a mortgagee. In *Sákalchand* v. *Dayábhaí* (1) it was held that the decision of the Munsif in favour of a donee ought to be affirmed if it were found that the resisting tenant had taken possession by the permission of the donor. A physical delivery of possession was wanting in this case as in the preceding one, but the possession of the tenant must have been regarded as that of the landlord, so that a mere intimation to him of the landlord's having transferred his right, effected a change of the possession as to the person on whose account it was held. In *Káchu* v. *Káchoba*(2) it is stated that, in accordance with the received practice, the judgment is not intended to affect the right of a mortgagor to deal with what is commonly called his equity of redemption; and there is no reason, that we know of, why notice of an assignment of a landlord's right should not be as effectual as notice of an assignment of an equity of redemption. The transfer of the physical detention is unnecessary and impracticable in the one case as in the other, because it is rightly held by the tenant or mortgagee in possession.

Taking the texts, however, which are quoted in support of the general principle, that "a gift is not complete without delivery:" in *Harjivan* v. *Náran*, (3) the first in order, is an extract from the Mitakshara (Macn. H. L. 218) on which we have already commented at some length. If the able argument addressed to us by Mr. Shántárám is sound, the passage is governed alike as to gift and as to sale by what follows: "But such is the case only when of these two the priority is undistinguishable." If mere priority is the governing principle, possession cannot be, either for sales or gifts. By rejecting the qualification, as they might properly do, the learned Judges left the rule as to the necessity of possession equally applicable to sales as to gifts.

The next passage is from the Vyavahara Mayukha, ch. IX., pl. 6. It states what gifts may not be resumed, and it includes amongst these the price of things sold and wages paid, showing that "gift" like "give" was not used solely for gratuitous benefits. The text is, of course, cited to prove the necessity of delivery and acceptance to the irrevocability of the transactions enumerated.

(1) 4 Bom. H. C. Rep. 70 A. C. J. (2) 10 Bom. H. C. Rep. 491; see p. 494.
(3) 4 Bom. H. C. Rep. 31 A. C. J.

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The next quotation is from Jagannatha's Comment., Col. Dig., bk. II., ch. IV., t. 2. It says that "the term used by Manu (in speaking of subtraction of gift) denotes payment or delivery," which again involves the wider sense of "gift."

Then follows an extract from Brihaspati, which merely implies that a gift of what one is at liberty to bestow must be made effectual by actual delivery. The purpose of the whole passage is to distinguish what a man may from what he may not give away, not to determine the effect of possession.

The extract from Yajnavalkya, next cited, says that acceptance should be public. The context refers this directly to a gift in directing a wise man (like the passage from Brihaspati) to carry out his promise, but the formalities prescribed in the text next quoted in Colebrooke's Digest apply to conveyances for value equally as to deeds of gift.

The last passage referred to, is from Jagannatha's Comm. on t. 56 of b. II., ch. IV. of Colebrooke's Digest. It goes to show that, in Jagannatha's opinion, a gift made by a man, in consideration that the donee will perform the last duties for the donor, requires an entry into possession and a performance of the donor's purpose to make it effectual.

If, setting aside the preconceptions which beset those brought up in the midst of modern life, we look back to the earlier sources of the Hindu law, we find that the sale of land is not contemplated as possible, or is regarded as sacrilegious. This was by no means peculiar to the Hindus, as may be seen by a reference to many passages in the classical authors. The inseparableness of the family lands from the family to which they belonged, was a favourite notion, indeed, almost throughout antiquity, both with the populace and with philosophers. In India it was connected with the recognized function of property as the support of religious rites beneficial to the family, as well as with the revenue system by which the king was largely interested in the land, so much so that Strabo supposed him to be the sole proprietor; and that his superior ownership is insisted on by the modern Jagannatha, who reconciles it with private property by setting

this down as of a subsidiary kind. The difficulties thus placed in the way of alienation, fostered the natural attachment to the soil they had tilled, which the Hindus shared with other races of men, and which still makes them, in general, greatly prefer a mortgage or a lease with a fine to a sale. In Manu VIII., 245 ss., while the elaborate rules for the settlement of boundaries and the exemption of them from the general law of prescription indicate the sacred importance attached to them, no rules whatever are to be found regulating sales of land. A gift of land, however, is at the same time extolled (ch. IV., sl. 230), the sense of which is that the donor of land obtains the fruit of a gift of land as in Vyav. May., ch. IV., s. 1, pl. 8, the special religious merit of a "bhûdán," though even this—a gift to Brahmans—is by the secular-minded Narada (II., XVII., 46) made subject to the king's permission. The rules of sale in Yajnavalkya (II., 254 ss.) are obviously meant for transactions in moveables, and the old passage cited by Vijnyaneshwara at Mitak., ch. I., s. 1, pl. 32—"In regard to the immoveable estate sale is not allowed, it may be mortgaged by consent of the persons interested"(1)—points to a state of things anterior to that when Narada (see Jolly's Transl., p. 70) included both moveable and immoveable property in things vendible, and when Brihaspati (Vyav. May., ch. II., s. 1, pl. 2) described a deed of purchase of "a house, field, or the like." Passages pointing to the inalienability and even to the impartibility of ancestral property in ancient times may be found in the Smriti Chandrika, chap. VII., para. 44, etc.

A sale being thus disapproved and a gift approved (Manu. IV. 235), it was natural that, as sales became necessary, the fiction of a gift should still be preserved in the ceremonies attending them. "If a sale must be made," says Vijnyaneshwara, "it should be conducted for the transfer of immoveable property in the form of

(1) स्थावरे विक्रयोनास्ति कुर्यादाधिमनुज्ञयेति. (Mit. Vyav. f. 47, p. 1, l. 3.) See the note of Mr. Ellis at 2 Strange H. L. 461. In Attica, where the sale of land was hardly possible in the earlier times, hypothecation, according to Sir W. Jones (Essay on Bailments), originated. It was indicated in each case by a pillar erected on the property; and, to clear the way for his further legislation Solon caused these tokens of general insolvency to be thrown down (Grote's Hist. of Greece, vol. 3, page 100).

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a gift, delivering with it gold and water."[1] This is part of the series of forms prescribed by the text (Coleb. Dig., b. II., c. IV., t. 33) already referred to (land is conveyed by six formalities, &c.), and shows that it is as applicable to sales as to gifts—sales being, in fact, included in gifts of land as viewed by the Hindu law. In the Smritis cited in Coleb. Dig., b. I., ch. III., t. 133, 134, gifts, sales, and mortgages are put on precisely the same footing with regard to the effect of possession; and, in commenting on the former, Jagannatha says: "There is no difference in the divestiture of property by gift and sale." In the comment on b. II., ch. IV., t. 17, he says: "'Sold' is employed in the text of Narada in the comprehensive sense of given or otherwise aliened," and on b. II., ch. IV., t. 28, he quotes Raghunandana to the effect that "the word 'sell' also denotes gift annulling property," just as Chandeshwara, quoted in t. 8, says that "'give,' having a secondary sense, without losing its literal meaning, comprehends sale and the like." Extracts of this kind might be multiplied showing that, for the purpose of divesting an owner of property, gift and sale stand on precisely the same footing, and are subject to the same conditions. Sir T. Strange (H. L., vol. I., 24) speaks of "gift embracing ..... every species of conveyance and charge;" and as "possession is, at least, equally necessary in the case of a gift as of a pledge" (*per* Seton, J., in *Sibchunder* v. *Russickchunder*,[2] so it seems equally necessary to the completion of a transfer by sale as by gift in our sense of those words.[3]

[1] विक्रयेपि कर्तव्ये स हिरण्य मुदकंदत्वा दानरूपेण स्थावर विक्रयं कुर्यादिति (*Ibid.* f. 47, p. 1, l. 5). See *Chassan Symbolique de Droit*, 96, quoting *Reyscher Symb. des Germ. Rechts* 45.

[2] Fulton 40.

[3] Gift and sale were assimilated in the development of the English Common Law, though to an end exactly the reverse. In *Wortes* v. *Clifton*, Lord Coke says: "The civil law is that a gift of goods is not good without delivery, but it is otherwise in our law"—Rolle Rep. 61. In commenting on this, Lord Blackburn (Contract of Sale, 197) says: "It does not seem to me that the word 'done' (*donum*) in law French does import *primâ facie* that the transaction was gratuitous." The word "gift" that is was made to include a sale; and that, conversely, a mere parol gift in the proper sense, even without delivery, confers a property subject to retraction by the donor, appears from the note (d) to 2 Wms. Saunders, 476.

It seems to us, then, that we are justified in adopting the conclusion of so eminent an authority as Mr. Ellis (Mirási Papers, p. 205) who says "that by the old law, though land might be temporarily transferred by mortgage or permanently by gift, it could not be sold, (but) that according to the interpretations of the commentators ..... the sale of it is allowed, the word *danam*=donation being construed to signify any act of divestiture." Instead of disguising his gift under the form of a sale, the Hindu was constrained by his law to conduct his sale with the ceremonies of a gift.(1) The delivery and acceptance of possession, therefore, which, where they are possible, have been held essential to a transfer by gift, must be equally essential to the completion of a sale in the removal of the *dominium* from the vendor to the vendee.

There is a case in which at 2 Borr. 561 the sastris say that a gift in Krishnarpan is valid, though possession be retained by the donor. For this opinion, however, they cite only Mitak., chap I., sec I., pl. 8, which says that acceptance of a gift is a recognized mode of acquisition for a Brahmin, and a passage, whereby, according to the Brihat Parijat, "if the donor should not think upon what he has given and the donee should not demand it, they both go to hell, the giver and also the receiver." This relates to the binding obligation to deliver what has been promised—(see Narada, Jolly's Transl., p. 59, quoted Vyav. May., ch. IX., pl. 2), and is an emphatic condemnation of any neglect of the duty inculcated in Manu IV., 235, and the Smritis quoted (Coleb. Dig., b. II. ch. IV., t. 41) by which the donor's spiritual welfare might seriously suffer. So far the promissor is bound (Coleb. Dig., b. II., ch. IV., t. 16, 17 Comm.), and, except for things idly promised, the heir is deemed responsible (Vyav. May., chap. V., sec. IV., pl. 15 and chap. IX. pl. 10); but this responsibility, like that of the original promissor, is not a right in the property promised. If it were, the property would be equally bound in the hands of the heirs for the former owner's debts, which also the heirs are enjoined to pay (Vyav. May., ch. V., s. 4, pl. 14). But as to these no right *in re* is vested in the creditors against the property of the deceased. It is not so

(1) No sale of immoveable property can be effected without the formalities of donation, Coleb. Dig., b. V., ch. VII., t. 390, *note*.

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hypothecated as to prevent the heirs disposing of it—*Jamiyatrám* v. *Parbhudás*;[1] neither, therefore, is the bare promise of the deceased, unaccompanied by an actual delivery of possession, more than a moral obligation on his successor. It is placed by Jagannatha (Coleb. Dig., b. II., ch. IV., t. 46, Comm.) as at the highest on the footing of a debt. The gift, therefore, in the case in Borradaile, as in so many other instances of contract, is to be considered valid only as creating what Harita calls "a debt of conscience" in the donor and his representatives, not an ownership in the thing promised available against third parties.

In our remarks on the case of *Rágho Bugdájee* v. *Vittoo* [2] we have pointed out that, even according to the received principle of the Hindu law, the registration of an assurance may be deemed to give it a scope of validity which it would not otherwise have. In *Hari Rámchandra* v. *Máhádáji*, [3] it is said, after a review of the precedents, "that in the Konkan the registration of a mortgage without possession cures any defect or imperfection which arose from the non-completion of the transaction by delivery of possession;" and Melvill, J., in commenting on this in *Itchárám* v. *Ráiji*,[4] says: "If one kind of notice be sufficient to satisfy the rule of Hindu law, why should not another kind of notice? I conceive that the true principle is that laid down in *Gopál* v. *Krishnáppá*,[5] and that the present case comes under the class of constructive frauds." As regards this last case, it is to be observed that the sale took place when a decree had already been made, giving effect to the mortgagee's lien on the property. This converted his right against the person into a right *in re*, and of this he could not be deprived by any act of his mortgagor. As to the case of *Hari Rámchandra* v. *Máhádáji*, the object of the various ceremonies prescribed for the transfer of land, though probably they originated from quite different causes, is now recognized by the Hindu lawyers to be mainly the publicity of the transaction. In Coleb. Dig., bk. V, ch. VII., t. 390, Comm., Misra is quoted to the effect that "the assent (or acknowledgment) of townsmen, of heirs, and of kindred, is required for the publicity of the gift."

(1) 9 Bom. H. C. Rep. 116. (2) 8 Harr. S. D. A. Rep. 229.
(3) 8 Bom. H. C. Rep. 50 A. C. J.; see p. 54.
(4) 11 Bom. H. C. Rep. 41; see p. 43. (5) 7 Bom. H. C. Rep. 60 A. C. J.

Further on Jagannatha says :—"There is no objection to the admission of any other ceremony as well as the delivery of gold and water in the case of sale;" and, finally, "sale (*i. e.*, the contract) is incontestably effected by a simple act of volition, but formality is ordained for the sake of proof,"—proof, that is, in the sense of preappointed evidence or an indication having a conclusive or special effect. That a symbolical delivery will, in the appropriate cases, suffice, appears from the note of Mr. Ellis in 2 Strange H. L. 468. Where, therefore, there has been a public avowal of a sale, gift, or mortgage by registration, the transfer appears to be completed. The change of ownership proclaimed to all, perfects a right available against all; in other words, a real right instead of one "*in personam.*" The effect of notice of a prior contract to the individual purchaser or incumbrancer seems to rest on a somewhat different principle. In such a case there has not, unless the requisites have been fulfilled, been a complete transfer of the real right; but the second contractor, taking with notice of the prior dealing, is not allowed, as we have seen, by the Hindu, any more than by the English, law to profit by his share in the vendor's fraud. Although, therefore, the conveyance to him may have been completed, he is subject to the rule exemplified in *Potter* v. *Sanders*, (1) and may be compelled to re-convey to the prior vendee. But the necessity, according to the English system, for this re-conveyance, shows that the first vendee, however strong his abstract right so as to justify the action of equity "*in personam*" for his benefit, has not a real right in the property; that has passed to the second vendee by the conveyance, to which, by statute, is fictitiously annexed a transfer of the possession.

It appears to us, upon a consideration of the very few cases directly in point, and of the much larger number affording analogies for the determination of the question now before us, which are presented by the reports of the late Sadr Court and of the High Court of Bombay, that the weight of authority preponderates greatly in favour of the necessity of a transfer of possession, as the necessary complement of a contract, in order to effect an absolute change of ownership by sale. The transfer of possession

(1) 6 Hare 1.

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may be replaced by registration or by a decree giving notice to all of the change; but, in the absence of some such public indication, the only right acquired by a vendee, as by a mortgagee or donee, is one of an equitable character enforceable only against the vendor and those taking under him with notice, not against purchasers or sub-purchasers in possession without notice, whose legal title, fully acquired, cannot be cancelled by the Courts, on the ground of dishonest or unconscionable means having been used in acquiring it.

Not many cases from the other presidencies have been referred to in argument. In *Pránkrishná Dey* v. *Biswámbhar Sen*[1] it was held that a lessee from a claimant of lands, held by persons denying his title, might sue those persons for possession under his lease. The Court say: "The lease gave to the plaintiff a right of possession, assuming that the lessors had a right of possession but were not in possession." The operation of the Hindu law is not recognized or alluded to in the judgment. It merely brings into India the English action of ejectment without its historical justification, or the safeguards, such as they were, which the practice of the Courts had thrown round that proceeding in the country of its origin. The fictions of the demise to the nominal plaintiff, his assumed entry, his ouster by the casual ejector, all rest on the necessity, under the older common law, of an actual possession by the owner to enable him to make a good demise. It was by the 'consent rule' that the person actually in possession being forced to admit a string of falsehoods as the condition of being allowed to defend his right, was brought face to face with the real claimant on the ground of the title set up by the latter. And, after all, as is said in Cole on Ejectment, p. 77, "As a general rule a judgment in ejectment does not conclude the title .....an unsuccessful claimant may immediately commence another ejectment in the same or another Court.....or a defendant, against whom a judgment has been obtained, may immediately commence an ejectment against the previous claimant or his tenant to recover back possession of the land.....Indeed, this is frequently done." In the case of *Pránkrishna Dey* v. *Biswámbhar Sen* the lessors appear to have sought, by means of

(1) 2 Beng. L. R. 207 A. C. J.

the lease, to procure an adjudication in their favour on a suit for an insignificant portion which they might afterwards employ in suing for an extensive property. If the first lessee failed, another one might be set up, and the holders of the estate be involved in an endless series of harassing contests. The Hindu law affords no warrant, that we know of, for such a course as this. As the ground of a complaint against a defendant, a plaintiff may properly say: "He has forcibly seized my land" [1] (Mitak., sec. II., pl. 4; Macn., H. L. 142) but not, so far as appears, "He holds land contrary to the right of another who has proposed to transfer that right to me." The Hindu law requires the plaintiff to show that he has been "aggrieved" or "injured" (Mitak., Macn. H. L. 141, 151), and the person injured is he who has been dispossessed, not he who has bought from A, land in the adverse possession of B. Under the Code of Civil Procedure it might be said that the lessor being made a co-plaintiff, the question of right as between him and the defendant or the defendant's lessors might be finally determined; but, in the judgment we are considering, it is laid down that "the Court cannot compel a man to become a plaintiff against his will." A competent critic says "that persons sensitive to the harmonies of jurisprudence will lament that, instead of cleansing, improving, and simplifying the true proprietary actions, we sacrificed them all to the possessory action of ejectment, thus basing our whole system of land recovery upon legal fiction."—(Maine's Anc. Law, 3rd ed., p. 292.) Our Code of Procedure, not contemplating such a case, has made no provisions, such as exist in England, for checking repeated actions of ejectment by payment of costs of past suits, and giving security for those of the proposed suit. A series of paupers might be set up as plaintiffs, and the defendant thus litigated out of his means without any effectual remedy. As, therefore, the parting with a portion of his estate by a pretended owner out of possession really involves the same principle, as to the right acquired, as the sale of his whole interest, we prefer, in so far as it bears on the question before us, to adhere to the ruling of this Court in the case of *Harjivan* v. *Naran*

[1] क्षेत्रादिकं ममापहरतीति (Mit. Vyav. f. 2, p. 2, 1. 2.)

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Haribhai (1) which has been followed in several subsequent cases of sale, such as S. A. 528 of 1873 and S. A. 534 of 1873, as well as in *Káchu* v. *Káchobá*.(2) If, indeed, the vendor may be joined like a perverse or an intriguing trustee, even against his will, as co-plaintiff with his vendee, the case is considerably altered; but the possibility of this, as we have seen, is denied. The case of *Bikán Singh* v. *Mussámut Parbutty Kooer* (3) points the other way. The distinction drawn in that case, however, between a vendor who has never got possession as unable to convey a title that can be sued on, and a vendor once in possession but ousted, who it is said can make such a title, rests on considerations which do not appear to us to have any great force in the sphere of Hindu law. In *Tárá Soonduree* v. *The Court of Wards* (4) Sir R. Couch, C.J., construed the principles laid down by the Privy Council, in the cases to which we shall presently refer, as an "express authority" against the maintenance of a suit by a vendee deriving title from a claimant of a moiety out of possession at the time of the transaction against the person in possession, as the latter and those under whom he claimed were no parties to the deed. This is to the same effect as *Káchu* v. *Káchobá*, (5) elsewhere referred to in this judgment. The principle is reaffirmed by the same learned Judge in *Bishonáth Dey* v. *Chunder Mohun Dutt*.(6)

The second Calcutta case, relied on for the appellant, is that of *Gungáhurry Nundee* v. *Rághubrám*. (7) In that case a purchaser from an ousted member of a joint Hindu family sued the other members for possession, and it was held that possession by the vendor was not necessary to make the sale perfect, as, according to Markby, J., "the general rule has been adopted in India that in the case of purchase and sale the ownership is acquired by the purchaser, though the transaction has not been followed by delivery," and that "delivery is not generally necessary for a transfer of ownership." On the observations of the Privy Coun-

(1) 4 Bom. H, C. Rep. 31 A. C. J. (2) 10 Bom. H. C. Rep. 491.
(3) 22 Calc. W. R. 99 Civ. Rul.
(4) 20 Calc. W. R. 446 Civ. Rul.; see p. 448. (5) 10 Bom H. C. Rep. 491.
(6) 23 Calc. W. R. 165 Civ. Rul. (7) 14 Beng. L. R. 307.

cil in *Rájá Sáhib Perhlád Sein* v. *Báboo Budhoo Sing* (1) the learned Judge remarks: "It cannot be denied that the doubt, here expressed, goes to the full extent of raising the question whether '*in any case*' the ownership could be acquired without delivery. Nor can it be for a moment contested that these observations are unimpeachable in theory," but he considers that they have been "displaced to a very large extent"....." by legislation or recognized practice." This was the question for decision; but the learned Judge was correct in saying that their Lordships' judgment did not necessarily involve the proposition that delivery was in all cases necessary to a transfer of property. Their remarks amounted only to a *dictum* on a point raised and maturely considered in the case, though not the one on which its decision turned. The same may be said of the adoption of these remarks in *Ránee Bhobosoondree Dasseah* v. *Issurchunder Dutt.* (2) The remarks in each case, though not decisive of the cause, were on a point pertinent to the controversy, and claim the respect due to all expressions proceeding from the highest tribunal.

In his observation that the remarks of the Privy Council have been displaced by a "recognized practice," Markby, J., cannot, we suppose, have meant "judicially recognized," for he says shortly afterwards: "This is the first time the Court has been called upon directly to decide this question." In his judgment in *Sálim Shaikh* v. *Boidonáth Ghuttuck* (3) the learned Judge had quoted the Mitakshara—"With whatsoever title there is not the least occupancy, in that title there is no sufficient weight" (Macn. H. L. 217)—in support of the efficacy against a subsequent registered grant of land of a prior oral grant accompanied by posses-

(1) 12 Moore I. A. 275:—"They (the Judges of the Sadr Court) seem to have ruled that the effect of the execution of a bill of sale by a Hindu vendor is, to use the phraseology of English law, to pass an estate irrespectively of actual delivery of possession; giving to the instrument the effect of a conveyance operating by the Statute of Uses. Whether such a conclusion would be warranted in any case, is, in their Lordships' opinion, very questionable. It is certainly not supported by the two cases cited in the judgment under review (*Gopichurn Kurr* v. *Koroonú Dásee* and *Surbonárain Singh* v. *Máhárájj Singh*), in both of which actual possession seems to have passed from the vendor to the purchaser. To support it, the execution of the bill of sale must be treated as a constructive transfer of possession. But how can there be any such transfer, actual or constructive, upon a contract under which the vendor sells that of which he has not possession, and to which he may never establish a title?" (See pp. 306 and 307.)

(2) 11 Beng L. R. 36. (3) 12 Calc. W. R. 217 Civ. Rul.

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sion where one unaccompanied by possession would fail. Nor could he have meant any custom established in the case, as there is no reference to such a thing in the arguments or elsewhere in the judgment itself. How the practice, therefore, was "recognized," we cannot see. The "legislation" to which the learned Judge refers, is the Indian Registration Act. That registration supplies a defect of possession, we think, is true; but that it follows as a consequence that a written contract at once changes the ownership, we cannot perceive. The Act was, we think, framed to meet the cases both of contracts creating an obligation and conveyances transferring ownership, not to alter or affect the general law, except so far as this was involved in the preference given by its provisions to registered documents over unregistered ones. "It is true," the learned Judge says, "that a certain advantage is given to a purchaser who has obtained delivery, but that does not show that such a purchaser had this advantage independently of the Act. It rather points the other way." The truth, however, is, that such a purchaser *had* this advantage—the learned Judge's previous judgment, lately referred to, proves this, as does also, in this Court, *Fakirápp*a v. *Chinápp*a, S. A. 313 of 1871—and the Act only confirmed it. There was no such provision in the prior Registration Acts XVI. of 1864 and XX. of 1866; and under the former of these it was at one time held (see *Gooroo Dáss Daw* v. *Kooshoom Koomáree* [1] as it had been in one or two cases under Act XIX. of 1843, that a subsequent deed registered took priority over a previous one unregistered, even when accompanied by possession. The hardship of this, however, and the insecurity which it created being recognized, it was afterwards ruled [2] that an unregistered and even an oral title completed by possession could not be displaced by a subsequent registered title without possession. In Act VIII. of 1871 a registered document still takes effect against an unregistered one *per se*, but the rulings of the Courts are adopted in the sense that an oral agreement is made available against a registered title where the former is accompanied by possession. It is not express-

(1) 9 Calc. W. R. 547 Civ. Rul.

(2) 10 Calc. W. R. 65 Civ. Rul.; 3 Beng. L. R. 312 A. C. J.; 9 Bom. H. C. R. 121; *Ib.* 147; 12 Calc. W. R. 217 Civ. Rul., per Markby, J

ed that the same effect is to be allowed to an unregistered written as to an oral agreement; but in the case of *Kirtychunder* v. *Rájchunder*,(1) Sir R. Couch, C.J., puts them on the same footing. He thinks that the Legislature intended to adopt the rules recognized by the Courts. As, therefore, the purchaser in possession had the advantage independently of the Act, the argument drawn from the contrary supposition, that every Hindu contract for land was meant to operate like a conveyance under the Statute of Uses, appears to us to be seriously undermined.

Mitter, J., in the same case maintains the same proposition. The learned Judge thinks "there is no provision in the Sastras which can be quoted in support of the contrary doctrine," and he relies in support of his own view on those passages of the Mitakshara and of Narada which we have already discussed. Neither he nor his learned colleague make any reference to that quotation from the latter by the Mitakshara in an opposite sense to which we have lately referred. But both he and Markby, J., make a reserve in favour of the purchaser in possession. The latter says: "It may also, when a question arises as to which of two honest purchasers has the better title, be important to consider who has got possession." While Mitter, J., thinks that although the title of a purchaser "without delivery of possession is complete," yet "the holder of it labours under certain disadvantages as against a person who acquires a title accompanied by possession." These reserves cover the case with which we have now to deal; but we may observe that if the former of two contracts is, as the learned Judges maintain, a complete conveyance, there can be no competition, in the sense intended, of a better and a worse title determined by possession. There can be but one title, which, forthwith creating absolute ownership in the purchaser, leaves to the vendor no other title better or worse than he can confer; the second pretended purchaser cannot "acquire a title" except from the first. Vijnyaneshwara's reasoning on this point is irrefragable when once the premise is granted, which the learned Judges concede, that the mere contract constitutes for the purchaser a right *in re*.

(1) 22 Calc. W. R. 273 Civ. Rul.

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The learned Judges support their decision by an argument drawn from the Statute law, which does not appear to us, with deference, to have at all the force which they apparently ascribe to it. It is that the Registration Act and the Code of Civil Procedure contemplate a state of the law in which the mere contract creates a title, and, therefore, as we undersand, that this must needs have been the law generally in India. As we understand the matter, a new law innovates no more than is necessary for its own proper operation, and this is especially the case with laws like those as to forms and procedure of a purely positive character. The mere circumstance that they would work more harmoniously with one system than another, is not a reason for implying a repeal of the latter, supposing it to have been the previously subsisting law, unless there be an actual repugnancy. Here the Registration Act gives to certain documents a special advantage, but is not meant, we apprehend, to modify the general law of sale any further. The Code of Civil Procedure confers some special advantages on purchasers in execution, without which they could hardly realize what they had bought. So in England, under Statute 27 and 28 Vic., c. 112, a judgment-creditor who has to go to an equity Court to get his charge established, acquires advantages counterbalanced by disadvantages from the alteration made by that statute in the law of procedure (see *Hatton* v. *Haywood*,[1] *Beckett* v. *Buckley*[2]) without any further general disturbance of the law. The Code of Civil Procedure, though it stands in the way of a particular class of benami transactions, does not affect their general legality—*Mussumat Buhuns Kowur* v. *Lálla Buhooree Lall.*[3] The new law justifies such decisions as those in *Govind* v. *Govinda.*[4] They are necessary to give full effect to the particular provisions of the law which they apply, and which have so far superseded the older law. On the same principle the Courts permit a judgment-creditor of a member of a joint Hindu family, and the purchaser of his rights in execution, to avail themselves of the whole right, title, and interest which the law assigns to them. Under the pressure of a course of decisions this Court has even allowed to the purchaser of an undivided share from a co-parcener

(1) L. R. 9 Ch. Ap. 229.
(2) L. R. 17 Eq. 435.
(3) 14 Moore I. A. 496.
(4) I. L. R. 1 Bom. 500.

a suit against the other co-parceners for partition, which the Hindu law would not have permitted; but, viewed as touching the operation of Hindu law within its proper province, these and similar modifications are to be regarded as anomalous, exceptional provisions, admitted on special grounds, and the rule applies *Quod contra rationem juris receptum est, non est producendum ad consequentia.*[1]

The case of *Gungáhurry* v. *Rághubrám*[2] is referred to approvingly by Mitter, J., in the subsequent case of *Nittyánund* v. *Shámá Churn.*[3] Ainslie, J., rested his judgment on *Bikán Singh* v. *Mussámat Párbutty.*[4] But the ground, taken three days afterwards, in *Bishonáth Dey* v. *Chunder Mohun Dutt*[5] by Sir Richard Couch, Chief Justice, as established by the Privy Council, appears to us, if admitted, to deprive both the other cases of authority.

The case of *Lokenáth Ghose* v. *Jugobundhoo Roy*[6] rules that a *patnidár* out of possession may grant a *dar-patni*, on which the *dar-patnidár* may sue the adverse holders for possession. The judgment is based chiefly on *Gungáhurry* v. *Rághubrám*[7] which we have just discussed, but that of *Pránkrishná Dey* v. *Biswambar Sen*[8] would seem to furnish a closer analogy. What we have said on that case applies equally to *Lokenáth* v. *Jugobundhoo.*[9] "In none of the cases relied on by the appellant," says L. Jackson, J., "has it been held that a transfer of property, of which the transferor is not at the time of such transfer in possession, would be *ipso facto* void." Not "*ipso facto* void" according to the views expressed in *Girdhar* v. *Dáji*,[10] as it would constitute an obligation on the transferor, but inefficacious to convey any right of action against a person holding adversely to him.

The effect of these cases is not, in our opinion, to show that the tendency of this Court's views on the same class of questions has been founded on any obvious error or misconception of the Hindu authorities. The numerous cases under the Registration Acts

(1) What is admitted against the reason (general theory) of the law, is not to be extended to its (logical) consequences.
(2) 14 Beng. L.R. 307
(3) 23 Calc. W. R. 163 Civ. Rul.
(4) 22 Calc. W. R. 99 Civ. Rul.
(5) 23 Calc. W.R. 165 Civ. Rul.
(6) I. L. R. 1 Calc. 297.
(7) 14 Beng. L. R. 307.
(8) 22 Beng. L. R. 207 A. C. J.
(9) I. L. R. 1 Calc. 297.
(10) 7 Bom. H. C. Rep. 4 A. C. J.

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cited with approval in *Bálárám* v. *Appá*,[1] assigned to possession a differentiating effect in perfecting a title otherwise defective, so as to guard it against subsequent registered transactions, which is, in our opinion, quite inconsistent with delivery's being a merely nugatory ceremony, adding nothing to the bare agreement. In so far as the Calcutta judgments rest on usage, which is explicitly made a ground for the two latter of them, it is enough to say that the custom of Bengal and of Bombay differs on so important a point as the necessity of possession to constitute a complete mortgage or gift, and it has not been shown to us that a sale of land in this presidency stands on a different footing, through established usage, from the other two contracts with which the ancient authorities link it.

We have seen that, under section 50 of the Registration Act VIII. of 1871, a registered document "takes effect" against an unregistered one relating to the same property. By section 48 it "takes effect" against an oral agreement "unless where the agreement ... ... has been accompanied or followed by delivery of possession." This saving has been recognized at Calcutta as extending to unregistered written agreements accompanied by possession obtained under them, so as to afford a public indication of the transfer of rights, though in *Bálárám* v. *Appá*[2] the learned Chief Justice of this Court preferred to reserve the question until a necessity should arise for disposing of it. But the questions remain—(1) of whether the agreement, even unregistered, which is thus fortified, is meant to prevail against the registered title if, though the sale and delivery are prior to the registration, they are subsequent to the execution of the registered instrument; (2) of what is the position in such a case of the holder under a registered instrument against a claimant under one of prior execution registered but without possession?

As to the first of these questions, it is plain, we think, that the words "take effect" have the same meaning in section 48 as in section 50. As used in the latter, they can operate only by depriving unregistered instruments of efficacy in so far as this

(1) 9 Bom. H. C. Rep. 121. (2) 9 Bom. H. C. Rep. 121; see p. 146.

would interfere with the efficacy according to its true intent of the registered document—and only instruments of prior date could, *per se*, have this effect. It would not have needed any special legislative enactment to provide that an earlier registered document should prevail against a later one unregistered. So, therefore, we think that the preference accorded in Act XX. of 1866, section 48, to registered contracts over oral ones, was meant to refer—could refer practically—only to prior oral contracts, and that the provision in Act VIII. of 1871, section 48, is to be referred to the same point of time. All registered instruments take effect against oral agreements except where these have been carried out by a delivery of possession, and have thus effected a change of ownership, before the execution of the registered instrument; from which time, as provided in section 47, it begins to operate, and, therefore, so far as may be necessary for its operation, extinguishes any inconsistent contract. The registered instrument, in fact, takes effect as if registered on the day of its execution, and no bare title which has not then ripened into complete ownership can subsequently do so, except subject to the registered instrument. The first question, then, we should answer in the negative.

In the second question the competition is no longer between a registered and an unregistered title. Both are registered. Sections 48 and 50 of the Registration Act, therefore, do not operate. What is left is section 47, under which "a registered instrument shall operate from the time from which it would have commenced to operate if no registration thereof had been required or made." The priority as between two instruments, such as those in the present case, is thus referred to their time of operation, apart from the Registration Act. They "operate," too, apart from the extinctive properties conferred on each of them by sections 48, 50 as against unregistered instruments. It seems to us that they must be weighed against each other according to the Hindu law, by which, except as modified by express legislation, it is admitted that the rights of the parties are to be governed. Applying this standard, however, the circumstance that Táráchand at once got possession under his deed of sale, while Lalubhái did not, appears to us, for the reasons we have given at such length, to have com-

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pleted his title, while his antagonist's remained imperfect. Both instruments were executed on the same day; and under different circumstances we might have to discuss whether the analogy of the Registration Acts, which admit fractions of days in determining the priorities of instruments according to the time of registration, applies in India to the execution of the instruments; but as it is we need not enter on that question.

We may add that as Lalubhái had paid by way of earnest only a sum less than one-fourth of the full purchase-money, and as land (as pressed on us for the appellant) is included amongst things vendible, and is, therefore, subject to the ordinary rules relating to vendible commodities, that rule applies to the present case which is stated by Narada (Jolly's Translation, p. 71):—"He who sells a commodity to one man and delivers it to another, shall pay double the price, and a fine." Manu allows a rescission of a bargain within ten days, (see Coleb. Dig., b. III., ch. III., t. 23 and Comm.,) and the texts of Yajn., *Ib.*, t. 32, 35, afford a basis for the passage of the Mitakshara quoted by the sastris in the Broach case at 1 Borr. 447, 2nd. ed. They state the rule thus:—"There is a rule that when ten days have expired ... the thing bought cannot be returned; but it relates to purchases paid for ..... It is declared in the Sastra with respect to earnest that, if refusal originates with the purchaser, he shall lose whatever he has advanced as earnest, and if with the seller, that he shall pay to the buyer double the value of what he has received as earnest." If this be taken as the law of Guzerat, Lalubhái's remedy is against Bái Amrit alone. The Smritis provide for an enforced delivery where the property remains in the possession of the vendor, but not where it has passed away from him to an honest purchaser. In such a case the remedy is a personal action for double the price or the earnest money.

It is not disputed, we believe, that an oral gift or sale of land, assented to by the donee or vendee, constitutes, according to Hindu law, a valid contract made effectual as a change of ownership by delivery of possession (see *per* Sir M. Westropp, C.J., in *Bálárám* v. *Appá* (1) and the authorities). The word "*agama*"

(1) 9 Bom. H. C. Rep. at p. 128.

(=title) on which the comments of the Mitakshara depend, and which is used by Manu (VIII., 200) as well as by Yajnavalkya (II., 27) does not necessarily mean a documentary title; indeed, Stenzler translates it "*erwerb*" (acquisition). It is on this term and the relation it expresses that, according to the Hindu law, the equal efficacy of the oral as of the documentary transaction would be placed, although, for the purposes of evidence, writings are superior to oral testimony (Narada—Jolly's Translation, pp. 23, 32), and for some purposes essential (Mitakshara in Macn. H. L. 198). But the contract, being in any way once established, is binding as between the parties. If, then, "*agama*," arising from an oral agreement, requires a delivery of possession, or something equivalent, to complete it, or develope it into a real right of ownership in the vendee, so also must the "*agama*" arising from a written contract. In each case it is an act resulting in possession "that is effectual;" an act not accompanied by possession "is not deemed effectual." It appears to us, then, that, on the whole, a full investigation of the authorities, so far as they are accessible to us, tends to confirm the rule laid down by Sir T. Strange (H. L., vol. I., 31) half a century ago, "the rule requiring that there should be *juris et seisinæ conjunctio*;[1] ..... it being laid down that occupancy alone is not sufficient to constitute a right without a title, and that the production of a title will not suffice, unsupported by occupancy, a right resulting only from the union of both." We think, therefore, that the judgment appealed from, was right, and we confirm the decree of the District Court with costs.

Decree affirmed.

(1) Combination of right and seisin.