ORIGINAL CIVIL.

(67)

Before Sir M. R. Westropp, Kt., Chief Justice, and Mr. Justice Green.

1877
July 28 *and*
August 4,
11, 18.

GANPAT PANDURANG (ONE OF THE ORIGINAL DEFENDANTS), APPELLANT, *v.* ADARJI DA DABHAI (ORIGINAL PLAINTIFF), RESPONDENT.*

Registration—Act VIII of 1871, *Section* 17—*Assignment of mortgage—Extrinsic evidence—Evidence Act* (*I of* 1872), *Section* 91—*Title to sue—Amendment of plait—Limitation—Act IX of* 1871, *Section* 22; *and Schedule II, Clauses* 132, 144, 145, 149—*Power of attorney—Foreclosure—Interest—Damdupat.*

An equitable mortgage by deposit of title-deeds was created on 15th August 1862. In March 1873 the mortgagee P. D. executed an assignment of all his property and of all debts due to him, and all the securities therefor, to the plaintiff. The assignment also contained a power of attorney from the mortgagee to the plaintiff, "in the name of the said P. D., his executors, &c., but for the sole sue and benefit of the said Adarji Dadabhai (the plaintiff), to ask, demand, sue for, recover and receive of and from all and every the person or persons liable in that behalf all and every *(inter alia)* the sum and sums of money and debts hereby assigned or intended so to be or any of them or any part of any of them, to hold the same unto and to the sue and behoof of the said Adarji Dadabhai, his executors, &c." Some days after the execution of the assignment, the title-deeds, which had been deposited in 1862 with the mortgagee, were handed to the plaintiff, in accordance with the terms of an agreement to that effect contained in the assignment. The deed of assignment was not registered. On 13th August 1874 the plaintiff, as the assignee of the equitable mortgage, sued for foreclosure. The Court of first instance held that, as an assignment, the deed required registration, and that not being registered it could not be received in evidence; that under section 91 of the Evidence Act of (I of 1872) no evidence, other than that contained in the document itself, could be given to prove the fact of the assignment, and that, therefore, the plaintiff had failed to show a title to sue as assignee of the equitable mortgage. The Court, however, permitted an amendment of the plaint by which the plaintiff was described as suing "in his own name and as the constituted attorney of P. D.," and then allowed the deed of assignment to be put in as evidence of the power thereby conferred on the plaintiff to sue for and recover all debts due to P. D., and, therefore, to maintain the present suit in respect of the equitable mortgage.

In appeal—

Held that if the suit were regarded as the suit of P. D., the power of attorney contained in the deed did not enable the plaintiff to maintain the suit for P. D., in asmuch as it purported to enable the plaintiff to recover the debts mentioned in the deed on his own account only, and not on account of P. D.; and, on the other hand, if the suit were regarded as that of the plaintiff, the Court, by treating the power in the deed as enabling him to recover on his own account, virtually gave to that power the full effect of an assignment, and for that purpose such

* Suit No. 392 of 1874.

an assignment, whether legal or equitable, should be registered under sections 17 and 49 of Act VIII of 1871.

The Court, however, being of opinion that there had not been any delibrate intention, on the part of the parties to the deed, to evade the law of registraton, granted the plaintiff an adjournment of the case, in order to complete his title as an equitable mortgagee by obtaining, registering and putting in evidence a fresh assignment to himself from P. D.

Held, also, the period of limitation prescribed for a suit for foreclosure by the Limitation Act (VIII of 1871) is either twelve years under article 132, or sixty years under article 149 of Schedule II of that Act.

Held, also, that the plaintiff could not recover interest to an amount exceeding the principal sum lent; the rule of *damdupat* being applicable in a case of a mortgage by a Hindu where no account of rents and profits is to be taken.

THIS was an appeal from a decree passed by Sir C. Sargent on the 15th March 1877 in favour of the plaintiff.

The plaintiff, Adargi Dadabhai, as assignee of one Pestanji Dinsha, sued on 13th August 1874 for foreclosure of an equitable mortgage created in 1862 by deposit of title-deeds. The defendants in the suit were three brothers, Vithoba, Govind and Ganpat. The plaintiff alleged that on the 9th July 1862 his assignor had advance to the defendants the sum of Rs. 4,000 on the security of their deeds, but that no writing was then executed, and that on 15th August 1862 a further advance of Rs. 3,000 was made on the same security, when the following document, in the form of a promissory note, was executed by on of the defendants:—"Received of Sorabji Jamsetji Batlivala, on account of my mother Parvatibai, the sum of Rs. 3,000 on further security of the title-deeds of the properties in Vithalvadi and Parel, which I promise to pay on demand which interest at the rate of one per cent. per month. Dated this 15th day of August 1862.—G. PANDURANG."

It may, for the purposes of this report, be taken for granted that Sorabji Jamsetji Batlivala was merely the nominee of the real mortgagee, Pestanji Dinsha, and that the words "on further security of," &c., must be read as equivalent to "as a further charge on the security of, &c."

In March 1873 Pestanji Dinsha executed to the plaintiff an assignment, in the common from, of all his property, debts and securities. This document, which was not registered, also con-

1877

GANPAT PANDURANG v. ADARJI DADABHAI.

tained an agreement, on the part of Pestanji Dinsha, to hand over to the plaintiff the title-deeds deposited with him by the defendants; and a power of attorney from Pestanji Dinsha to the plaintiff " in the name of the said Pestanji Dinsha, his executors, &c., but for the sole use and benefit of the said Adarji Dadabhai, to ask, demand, sue for, recover and receive of and from all and every the person or persons liable in that behalf all and every *(inter alia)* the sum and sums of money and debts hereby assigned or intended so to be or any of them or any part of any of them, to hold the same into and to the use and behoolf of the said Adarji Dadabhai, his executors, &c. A few days after the execution of this assignments the title-deeds were handed over to the plaintiff.

The defendants denied the loan of Rs. 4,000, denied the plaintiff's right to sue, and pleaded limitation.

At the hearing before Sargent, J., the first defendant did not appear, and the third appeared in person.

Latham and *Kirkpatrick* for the plaintiff.—An equitable mortgage can be created by a deposit of deeds without the execution of any document (*Kedarnath Dutt* v. *Shamloll Khettry*(1)), and in the same way a transfer of the equitable mortgage may be effected without a document by mere deposit of the deeds : *Russell* v. *Russell*, (2) 1 Seton on Decrees 447 (3rd ed.), *Mathews* v. *Wallwyn*, (3) *Ex parte Tuffnell*, (4) *Vaughan* v. *Vanderstegen*,(5) *Exparte Smith*,(6) *Ex parte Smith re Hildyard*.(7) The security passes by the assignment of the debt if there be any reference to the security : 1 Fisher on Mortgages 6, *Ex parte Smith*, (8) *Duffield* v. *Elues*.(9) Pestanji Dinsha was a trustee for the plaintiff, and he being merely a dry trustee, the plaintiff, as *cestui que trust*, is entitled to sue. The document of 15th August 1862 is a sufficient acknowledgment of the loan of Rs. 4,000, which is the only part of the plaintiff's claim that falls without the limit of twelve years from the date of the filing of the plaint.

(1) 11 Beng. L. R. 405.
(2) 1 Wh. & Tud. L. C. (4 ed.) 674 *in notis*.
(3) 4 Ves. 118.
4 4 Dea. & Ch. 29.
(5) 2 Drew. 289.
(6) 1 V. & B. 518.
(7) 11 L. J. (N. S.) Bankr. 16.
(8) 2 Dea. & Ch. 271.
(9) 1 Bligh. 497.

Purcell and *Inverarity* for the second defendant.—The assignment to the plaintiff, not being registered, cannot be received as evidence of his title to sue, nor can any other evidence be given of the transfer of the equitable mortgage to the plaintiff: Evidence Act I of 1872, section 91 ; Chitty on Contracts, p. 104 : *Somu Gurukkal* v. *Rangammal*(1) The document may be received as evidence of the assignment of debts, but not as evidence of the assignment of the security : Registration Act VIII of 1871, section 17, clause 2. It appears that it was not until after the execution of this document, and in consequence of it, that the deeds were handed to the plaintiff. This case, therefore, differs from *Kedarnath Dutt* v. *Shamloll Khettry*.(2) The other cases cited, of the transfer of an equitable mortgage by mere deposit, were all cases of sub-mortgage or second mortgage with the consent of the mortgagor. The present is not. If the plaint be now amended by making Pestanji Dinsha party, it will be barred: Limitation Act IX of 1871, sec. 22. It is, however, already barred ; for being a suit for foreclosure, which is nowhere specifically mentioned in Schedule II to Act IX of 1871, it must come under clause 118, and the six-years' limit applies. Even if the twelve-years' limit be applied, the claim to the Rs. 4,000, which was lent in July 1862, will be barred, unless a fresh stating point is given under section 20 of Act IX of 1871, but that section cannot apply to a suit for foreclosure. It is contended that the document of 15th August 1862 gives this fresh starting point, but this is no acknowledgment of "*the* debt or liability". It simply refers to some liability, leaving it doubtful what that is; and if evidence is necessary to explain this, then the writting ceases to be such as is contemplated by section 20. In any event, the claim for Rs. 4,000 is barred, and if the six-years' limit be applied under clause 118, the claim for Rs. 3,000 also.

It is not contended that a suit for foreclosure is not a suit for land; but only suit, whether for land or not, which does not come within one of the specified instances given in Schedule II to Act IX of 1871, must be governed by clause 118. Clause 145 applies only to a suit for possession of land where the possession of the defendant became adverse to the plaintiff. This cannot apply to

(1) 7 Mad. H. C. Rep. 13, (2) 11 Beng. L. R. 405.

1877

GANPAT PANDURANG v. ADARJI DADABHAI.

a suit for foreclosure, for a mortgagee in possession may sue for foreclosure.

Latham in reply.—First, as to the point of limitation. Clause 145 of Shedule II to the Limitation Act IX of 1871 applies to a suit for foreclosure. A foreclosure suit is a suit for possession. A mortgagee in possession suing for foreclosure is asking for a juridical possession to confirm him in his position. *Juneswar Dass* v. *Mahabeer Singh*,(1) which was decided on clause 12 of section 1 of Act XIV of 1859, (the clause of the old Act which corresponds to clause 145 of Schedule II to the present Act,) is an authority on this point. A foreclosure suit is in England considered a suit for land (1 Fisher on Mortgages, 374-375), and so also it has been held in India on the jurisdiction section of the Civil Procedure Code: *Bibee Jaun* v. *Meerza Mahomed Hadee*.(2) But if clause 145 of Schedule II of the Limitation Act does not apply to the present case, clause 132 does. If this section be applied, we shall have to show an acknowledgment to bring ourselves within time as to the Rs. 4,000. Such an acknowledgment is contained in the writing of 15th August 1862. The acknowledgment need not specify the particular liability Chitty on Contracts, 761-762. If a liability is acknowledged, oral evidence may be given to show what is the particular liability to which the acknowledgment refers : *Quincey* v. *Sharpe*.(3) Taking the words "on further security of" to mean "as a further charge on the security of," we have in the document of 15th August 1862 an unqualified admission of some existing liability, and then oral evidence may be given of what that liability is: *Dickenson* v. *Hatfield*,(4) *Dodson* v. *Mackey*,(5) *Spong* v. *Wright*.(6) It must be held that Surabji Jamsetji Batliwala is merely the nominee of the real creditor ; but, even if he were not, the acknowledgment need not be to the creditor himself.

Next, as to the point of registration. An equitable mortgage created by deposit of deeds can also be transferred by deposit of deeds. It is, therefore, immaterial whether or not there was an attempt to transfer the mortgage by a written instrument

(1) I. L. R. 1 Calc 163.
(2) 1 Ind. Jur. (N. S.) 40.
(3) L. R. 1 Ex. Div. 72.
(4) C. & P. 46.
(5) 8 A. & E. 225.
(6) 9 M. & W. 629.

The writing can be used to show the transfer of the debt, and this shows the reason for the deposit of the deeds. Section 91 of the Indian Evidence Act does not apply. *Kedarnath Dutt* v. *Shamloll Khettry*(1) is an authority in favour of our contention. In the present instance the document is not capable of registration, because it contains no description of the property. The assignment contains a power of attorney to the plaintiff to sue in the name of Pestanji Dinsha. The suit might, therefore, be amended by altering the description of the plaintiff, and making him sue as the attorney of Pestanji Dinsha, or an assignment might be ordered by Pestanji Dinsha now to perfect the title of the plaintiff.

Inverarity called the attention of the Court to *Wrixon* v. *Vize* (2) on the point that suit for foreclosure is not a suit to recover money charged upon land, and to *Howcutt* v. *Bonser* (3) upon the point of acknowledgment.

SARGENT, J.—This is a suit for the foreclosure of an equitable mortgage created by the defendants by the deposit of title-deeds, and, besides the usual prayer for the ordinary decree for foreclosure, the plaint contains a prayer for such further relief as the Court may think fit to grant. A preliminary objection has been taken on behalf of the defendant Ganpat, who alone appears by counsel, to the claim set up by the plaintiff, on the ground that the latter has shown no title to sue. The plaintiff sues as the assignee of the equitable mortgage originally made by the defendants to one Pestanji Dinsha, formerly an attorney of this Court, but now a prisoner in the jail at Ratnagiri. The assignment by Pestanji Dinsha, to the plaintiff, of this equitable mortgage was by an instrument in writing, and on behalf of the defendant it was contended that this writing, not being registered, could not be received as evidence of the assignment, and that the parties to the document having adopted that mode of evidencing the transaction, no other evidence could be given. This assignment by Pestanji Dinsha was executed by him during his trial here, and purports to be an assignment of all his property and of "all and every debts and debt, sums and sum of money due and owing to the

(1) 11 Beng. L. R. 405. (2) 3 Dr. & W. 104.

(3) 3 Exch. 491.

1877
GANPAT PANDURANG v. BDARJI DADABHAI.

said Pestanji Dinsha from any person or persons whomsoever, and also of all and every securities and security, &c." So far as that document operates as an assignment of the equitable mortgage, it purports to creat an interest in land of a value exceeding Rs. 100, and, therefore, the registration of it is compulsory under the Registration Act. It was said, however, on behalf of the plaintiff that this document was not the only evidence of the plaintiff's title, and that an equitable mortgage and its assignment might be evidenced merely by proof of delivery of the deeds. No doubt the assignment of an equitable mortgage can be shown by proof of the delivery of the deeds, since an equitable mortgage by deposit may be transferred by a transfer of the deeds; see Seton on Decrees, p. 447 (3rd ed.). But an important question in this case is, whether evidence of the deposit of the deeds by Pestanji Dinsha with the plaintiff can be used at all, having regard to the provisions of the Evidence Act (I of 1872, sec. 91) which forbids any other evidence than the document itself being used when once the terms of a contract have been reduced into writing. Now it was said on behalf of the plaintiff that this section need not apply to the present case, because the transfer of the equitable mortgage was effected independently of the document, and that being so, the document created no interest in land, and, therefore, need not be registered; and the case of *Kedarnath Dutt* v. *Shamloll Khettry*(1) was relied on as establishing that proposition. It appears from the report that the plaintiff in that case advanced his money, and the defendant deposited his title-deeds at the same time, and that after this the defendant executed to the plaintiff a document wherein he stated that he thereby deposited with the plaintiff, as a collateral security by way of equitable mortgage, the title-deeds of his property; and the Calcutta High Court held that the equitable mortgage was created by the agreement which was evidenced by the loan and the deposit. Couch, C. J., in delivering the judgment of the Appellate Court says: "The promissory note, whether given at the same time or some hours afterwards, in pursuance of the understanding between the parties, was evidence of the terms upon which the loan was made, viz., that the interest should be at the rate of 24 per cent. But as regards the contract

(1) 11 Beng. L. R. 405.

between the parties, if there had been no memorandum at all on the promissory note, there would have been a complete equitable mortgage. When we consider what the menorandum is, we find it is not the contract for the mortgage, not the agreement to give a mortgage, but nothing more than a statement by Woomachura Banerjee (the mortgagor) of the fact from which the agreement is inferred. It is an admission by him that he had deposited the deeds upon the advance of the money for which the promissory note was given. It is not by the memorndum that the Court takes the agreement for the mortgage to be proved, but by the deposit of the deeds, and this is no more than a piece of evidence showing the fact of the deposit which might be proved by any other evidence. The memorandum need not have been produced." The Court, therefore, " on the ground that this was not a writing which the parties had made as the evidence o their contract, but only a writing which was evidence of the fact from which the contract was to be inferred," held that the document did not need registration. In the present case, however, it would be difficult to hold that. Here I think that there is no doubt that this document is the mode which the parties selected to evidence their contract; and though the deeds were afterwards delivered, yet, coming after the execution of the assignment, such delivery was merely a delivery in pursuance of the terms contained in the document, and the present is, therefore, quite different from the Calcutta case. Under these circumstances, therefore, I think it is quite impossible to hold that the 91st section of the Indian Evidence Act does not preclude any other evidence of the assignment being given than the document itself, and this being unregistered is inadmissible, and the plaintiff, therefore, must fail to prove his title to sue as assignee of the equitable mortgage.

But this document, besides assigning to the plaintiff all the debts and securities due and belonging to Pestanji Dinsha, also contains a power of attorney in the usual words, authorizing the plaintiff, as the true and lawful attorney of Pestanji Dinsha, for him and in his name to ask, demand, receive, sue for and recover all such debts and securities. This power to sue for and recover confers on the plaintiff the right to adopt all measures necessary to recover moneys due to Pestanji Dinsha, and, therefore, though he

1877

GANPAT PANDURANG v. ADARJI DADABHAI,

may not sue himself in his own name in the present case, yet he can sue in Pestanji Dinsha's name as his attorney. Against this view Mr. Inverarity cited *Wrixon* v. *Vize*,(1) in which Lord St. Leonards stated it as his opinion that a bill of forcelosure was not a suit in equity for the recovery of the money charged upon the land, although it might lead to that result. Now, in the first place, it is to be remarked that this opinion is, apparently, opposed to that which Lord St. Leonards had previously expressed in the case of *Henry* v. *Smith*,(2) where he referred with approval to the decision in *Dearman* v. *Wyche*,(3) in which it was held that the object of a foreclosure suit really is the recovery of the money itself. In the next place it must be remembered that the opinion which Lord St. Leonards expressed in *Wrixon* v. *Vize*(4) was only an opinion with reference to the Stat. 3 & 4, Wm. IV, c. 27. What he says in this: "I cannot upon consideration take this view of the statute. I think that the statute provides a remedy for the recovery of the estate, and also a remedy for the recovery of the money; clearly so, when both are pursued, or when is pursued at law; and equally so, I think, when both the remedies are enforced, are only one of them is enforced in equity." That is only an opinion that a suit for foreclosure is not a suit for the recovery of money within the Stat. 3 & 4, Wm. IV, c. 27; but, of course, it is not intended to express any opinion as to whether a power of attorney to recover moneys due would not entitle the person to whom it is given to take all steps which may lead to that result, and a suit for foreclosure, no doubt, may lead to that result, as pointed out by Lord St. Leonards in that very case of *Wrixon* v. *Vize*;(5) for on the filing of the suit the defendant may pay the money, or, as is constantly done here in suits where the plaintiff prays for foreclosure, the Court may order the sale of the mortgaged property and payment out of the proceeds to the mortgagee of the amount of his claim. It was said that to amend the frame of the suit now by making the plaintiff sue as attorney for Pestanji Dinsha, would be to introduce a new plantiff, as to whom the period of limitation must be reckoned back from the date of the amendment, and that the suit would, consequently, be barred under the provisions

(1) 3 Dr. & W. 104.
(2) 2 Dr. & W. 381.
(3) 9 Sim. 570.
(4) 3 Dr. & W. 104.
(5) 3 Dr. & W. 104.

of the Limitation Act (IX of 1871). Now, when a party is added to the record, no doubt the suit, so far as he is concerned, is deemed to have been instituted at the time when he is so added.(1) But though, if this plaint were amended by altering the description of the plaintiff, and making him sue as the attorney of Pestanji Dinsha, there might nominally be a new suit, yet virtually it would still be the same. It would still be, in fact, the suit of this plaintiff. I should be of opinion that no new plaintiff had been introduced within the meaning of the Limitation Act. If, therefore, the plaintiff gives a formal undertaking to pay the costs of the suit, if given against him, the amendment may be made by describing the plaintiff as suing as the constituted attorney of Pestanji Dinsha.

[His Lordshhip then entered into a consideration of the evidence, on which he held that there was not sufficient proof to establish the loan of Rs. 4,000, and that to this extent the suit must fail. As to the loan of Rs. 3,000, his Lordship considered it to be sufficiently established, and held that the plaintiff was entitled to foreclose for that amount. The judgment then proceeded as follows—]

There was a question of limitation raised by Mr. Inverarity, who contended that the plaintiff's right to recover even the Rs. 3,000 was barred. He said that inasmuch as Schedule II of the Limitation Act (IX of 1871) contains no special provision for a suit for foreclosure, such a suit must, under clause 118, come within the six-years' limit; whereas at the date of the filing of this suit nearly twelve years had elapsed from the date of the advance of the Rs. 3,000 in 1862.

It is admitted that the suit was brought within twelve years from the date of the mortgage (15th August 1862), and, in my opinion, it falls either within article 132 of the Limitation Act IX of 1871, Schedule II (which corresponds, in General terms, with section 40 of Stat. 3 & 4, Wm. IV, c. 27, which V. C. Shadwell in *Dearman* v. *Wyche*(2) and V. C. Wigram in *Du Vigier* v. *Lee*(3) thought

(1) See on this point *Abdul Karim* v. *Manji*, I. L. R. 1 Bom. 295, dissenting from *Dayal Jairaz* v. *Khatav Ladha*, 12 Bom. H. C. Rep. 97; and *Chinnasami* v. *Gopalacharry* 7, Mad. H. C. Rep. 392.

(2) 9 Sim. 570.

(3) 2 Hare 326; see pp. 334, 335.

1877
GANPAT PANDURANG v. ADARJI DADABHAI.

applied to suits for foreclosure), or article 149 of Act IX of 1871, Schedule II (which provides for a mortgagee recovering the lands mortgaged, using the same language as in section 24 of Stat. 3 & 4, Wm. IV, c. 27, which Lord St. Leonards in *Wrixon* v. *Vize*(1) thought applicable to suit for foreclosure), and if either clause is applicable the suit is not barred. The latter clause, though somewhat unfortunately worded, would appaar to be the clause applicable to suits of this nature, as it is not probable that it was intended to make a distinction between suits for foreclosure and redemption, and article 148 clearly applies to suits for redemption, as appears from the language in the third column.

I am of opinion that the plaintiff is entitled, in the suit so amended as I have suggested, to a decree for foreclosure to the extent of Rs. 3,000 and interest at 12 per cent. per annum and costs; but I am in doubt as to the period for which he can recover interest. As to this, no argument was addressed to me by either party.

On a subsequent day his Lordship intimated that, on further consideration of the question, he was of opinion that the period of limitation applicable to a claim for interest in a foreclosure suit was twelve years, and the decree would, therefore, include interest at the rate above mentioned from 15th August 1862.

In accordance with his Lordship's suggestion, the plaintiff gave a formal undertaking to pay the costs of the suit of it should be decided against him, and the plaint was amended by describing the plaintiff as the attorney of Pestanji Dinsha. To avoid any objection being raised to the plaintiff's right to argue the question of registration with respect to the assignment in case of an appeal, the Judge, on the suggestion of the plaintiff's counsel, also allowed the plaintiff's name to be retained on the record as a plaintiff in his own right.

The defendant Ganpat Pandurang appealed, and the appeal was argued before Westropp, C.J., and Greer, J.

Macpherson and *Invaririty* for appellant.—The plaintiff here claims under a deed of assignment dated 17th March 1873, which assigns to him "all sums of money and debts due to

(1) 3 Dr. & W. 104, 120.

Pestanji Dinsha and all securities therefor." He sues an assignee, under that deed, to enforce an equitable mortgage. That deed is not registered. Sargent, J., held that registration was necessary, and that, under section 91 of the Indian Evidence Act, no other evidence of the assignment could be given. The plaintiff, therefore, failed to prove his title as assignee. The deep, however, also contained a power of attorney authorizing Adarji Dadabhai to sue in the name of Pestanji Dinsha and to recover for his own benefit all debts due to Pestanji Dinsha; and Sargent, J., allowed the plaint to be amended, with the effect (as we contend) of bringing in a new plaintiff, viz., Pestanji Dinsha, and changing the character of the suit. A suit by Pestanji Dinsha is now barred; section 22 of Limitation Act (VIII of 1871). The same plaintiff cannot sue for a debt in two capacities at the same time, *e.g.*, as an executor and in his individual capacity. We say the amendment is made too late. A plaintiff cannot get title after the plaint is filed: *Tonkin* v. *Lethbridge*,(1) *Pilkington* v. *Wignall*,(2) *Godfrey* v. *Tucker*,(3) *Attorney General* v. *The Corporation of Avon*,(4) *Beardmore* v. *Gregory*.(5)

Further, we contend that, under the terms of the power of attorney in the deed of assignment, the plaintiff cannot sue for foreclosure. He can only sue for a money decree, and the plaint does not ask for this. A suit for foreclosure is not a suit for money: *Wixon* v. *Vize*.(6) It is a suit for land. But if this power of attorney does authorize the plaintiff to bring this suit, it should have been registered, as it enables the plaintiff by a suit to affect land. [WESTROPP, C.J.—You argue that this being power of attorney to the plaintiff, enabling him to recover for his own benefit, it really operates as an assignment.] Yes, that is our contention. Again, this suit should have been brought within six years. There is no provision in the Limitation Act (VIII of 1871) for suits of this nature, and so they fall under article 118 of Schedule II. We do not dispute that a suit for foreclosure is a suit for land, but we say it is not one of the suits for land for which a period is specially limited by the Act, and, therefore, it falls under article

(1) Geo. Cooper's Rep. 43.
(2) 2 Madd. 240.
(3) 33 Bea. 280.
(4) 33 L. J. Ch. 172.
(5) 2 H. & M. 491. See p. 496.
(6) 3 Dru. & War. 104.

1877
GANPAT PANDURANG v. ADARJI DADABHAI.

118, Schedule II. Article 149 deals with suits for possession of land. A suit for foreclosure may *lead* to possession, but it is not a suit for possession. As to the nature of suits for foreclosure, *Prees* v. *Coke*,(1) *Prannath Roy Chawdray* v. *Rookea Begum*(2), v. *Ede*,(3) *Tuwell* v. *Slate Company*.(4) In the Court Fees Act (No. VII of 1870) a suit for possession is treated as different, from a suit for foreclosure. See section 7, cls. v and ix. As to the nature of the contract in an equitable mortgage, *James* v. *James*, (5) *Pryce* v. *Bury*.(6)

Lastly, we say that interest can only be given for three years. The document of the 15th Auguust 1862 does not make it a charge on the land, and article 61 of Schedule II of the limitation Act (VIII of 1871) applies.

Latham and *Kirkpatrick* for the respondent.—As to limitation: of this Court follows the authority of *Wrixon* v. *Vize*, (7) we shall be allowed twelve years under article 145 of the Limitation Act (VIII of 1871) or sixty years under article 149. Article 149 ii modelled upon Stat. 7, Wm. IV, and I, Vic., c. 28, and Lord St. Leonards considered this Act Applicable to suits for foreclosure: *Wrixon* v. *Vize*.(8) We find the word 'possession' in all the articles in Schedule II of the Limitation Act, and, therefore, in order to make the clauses intelligible we must give it a wide interpretation. It must sometimes mean a right to possession. If we cannot find a more appropriate clause in the schedule, article 145 will apply. It always down the general rule applicable to suits with respect to immoveable property, just as article 118 gives a general rule for suits relating to moveable property. A suit for foreclosure is in India regarded as a suit for land: *Bibee Jaun* v. *Meerza Mahomed Hadse*(9) *Cheet Gaundan* v. *Sunddaram Pillai*,(10) *Juneswar Dass* v. *Mahabeer Singh*. (11) It could never be intended that a mortgagee should, under article 149, have sixty years within which to sue for possession as a mere security, but be limited in suing for fareclosure to six years

(1) L. R. 6 Ch. 645.
(2) 7 Moore Ind. Ap. 323. See p. 355.
(3) L. R. 18 Eq. 118.
(4) L. R. 3 Ch. Div. 629.
(5) L. R. 16 Eq. 153.
(6) 2 Drewary, p. 41.
(7) 3 Dru. & War. 104.
(8) *Ibid.*
(9) 1 In. Jur. (N.S.) 40.
(10) 2 Mad. H. C. Rep. 51.
(11) I. L. R. 1 Calc. 163.

under article 118, or twelve years under article 132 or 145.

The procedure in India makes a suit for foreclosure a suit for possession. Even in England a foreclosure decree may give possession: Seton on Decrees, p. 449; *Price* v. *Carver;*(1) *James* v. *James.*(2) The defendant may avoid a decree of foreclosure by paying the amount due, but the nature of the decree remains the same. It is true that article 149 makes time begin to run at the date of payment of principle or interest, and in the present case there has been no payment. But it would be absurd to hold that time never begins to run where there has been no payment. The clause must refer to the creation of the mortgage, or, at the latest, the date of the last payment.

Assuming that this suit was brought in time, the question is, can the plaintiff sue? The assignment should have been registered; but we contend that, independently of the assignment, he got title by the delivery of the deeds. A deposit of deeds creates a mortgage although there may be a contemporaneous writing inadmissible, so also a transfer of deeds transfers the equitable mortgage: *Rusel* v. *Russel;*(3) Seton on Decrees, Vol. I, p. 447.

[GREEN, J.—Was not possession of the deeds taken under the deed of assignment?] Yes, but if possession gives title, that is not important, any more than non-registration of a preliminary agreement for a conveyance renders that conveyance invalid; *Vaughan* v. *Vanderstegan,*(4) *Exparte Smith,*(5) *Exparte Smith,* (6) *Hiern* v. *Mill,* (7) *Meek* v. *Bayles,* (8) *KedarnathDutt* v. *Shamloll,*(9) *Mahadaji* v. *Vyankaji.*(10)

With regard to the point of amendment: this is a strong case for exercise of this power of the Court. The defendants do not appeal on the facts. It is objected that the amendment gives two sets of plaintiff. A trustee and *cestui que trust* may be co-plaintiffs if there is no doubt as to where the legal estate lies: *Blake* v. *Done.*(11) If making Pestanji Dinsha a co-plaintiff now raises a question of limitation, he may be made a defendant.

(1) 3 M. & Cr. 161.
(2) L. R. 16 Eq. 153, note.
(3) 1 White & Tudor (4th ed.), 674.
(4) 2 Drewry 289.
(5) 1 V. & B. 518.
(6) 11 L.J. (N. S.) Bkpy 16.
(7) 13 Ves. 114.
(8) 31 L. J. Ch. 448.
(9) 11 Beng. L. R. 405.
(10) 1. L. R. 1 Bom. 197.
(11) 7. H. & N. 465.

1877

GANPAT PANDURANG v. BDARJI DADABHAI.

With regard to the amount of interest to be allowed, counsel referred to *Round* v. *Bell.*(1)

WESTROPP, C. J.—The power of attorney contained in the deed of the 17th March 1873 does not support to enable Adarji Dadabhai to recover for the benefit of Pestanji Dinsha; therefore the suit cannot be mentioned on behalf of the latter. That power of attorney purports to enable Adarji Dadabhai to recover for his own benefit; but to give it that effect would be, to all practical purposes, to treat it as an assignment. We think we cannot use this document for that purpose, inasmuch as it has not been registered. But, as we think that the omission to register was due to a misapprehension as to the requirements of the law, rather than to any intention to evade the Registration Act, we are of opinion that, under the circumstances of this case, we ought to grant the plaintiff an adjournment for four weeks, in order to enable him to procure from Pestanji Dinsha a fresh assignment, which must, of course, be registered.

A fresh assignment was obtained by Adarji Dadabhai from Pestanji Dinsha, registered and put in the evidence.

The following judgment of the Court of Appeal was subsequently delivered by

WESTROPP, C. J.—The suit, in which the present appeal has been made, was instituted by Adarji(*alias* Andarji) Dadabhai, as sole plaintiff on his own account, through Ghellabhai Dulabdas as his constituted attorney, for whom Ratansi Jamsetji Subedar was afterwards substituted (by way of amendment and on consent as plaintiff's constituted attorney.

The plaint alleged that Parvatibai, the widow of Pandurang Mankuji and mother of the three defendants, deposited, with the consent of her said three sons, by way of equitable mortgage, the title-deeds of certain immoveable property, situated at Vithalvadi and elsewhere in the island of Bombay, with Dinsha Jamsetji, the father-in-law of Pestanji Dinsha, to secure to Dinsha Jamsetji the sum of Rs. 4,000 at 12 per annum for interest. It further alleged that Pestanji Dinsha paid that amount to Din-

(1) 30 Bea. 121.

sha Jamsetji, who thereupon made over the said title-deeds to Pestanji Dinsha, by way of transfer of the equitable mortgage, together with a note, in receipt, for the said sum of Rs. 4,000 which was alleged to have been executed to Dinsha Jamsetji by the defendant Vithoba Pandurang on behalf of his mother Parvatibai.

It was further averred in the plaint that, subsequently, Parvatibai, with the consent of her said sons the three defendants, borrowed Rs. 3,000 from Pestanji Dinsha at 12 per cent. per annum (1 per cent. per annum) as a further charge, by way of equitable mortgage, on the immoveable property already mentioned, the title-deeds whereof were already in the lands of Pestanji Dinsha as aforesaid, and that the defendant Govind Pandurang, on behalf of his mother Parvatibai, then gave the following note, (which bears two dates), as a receipt, in respect of that sum of Rs. 3,000, to Sorabji Jamsetji Batliwala, who, it was not denied, was a mere trustee for Pestanji Dinsha :—

"*Bombay 5th September* 1862.

"Received of Sorabji Jamsetji Batlevala, on account of my mother Parvatibai, the sum of Rs. (3,000) three thousand on further security of the title-deeds of the properties in Vithalvadi and Parel, which I promise to pay on demand, with interest at the rate of 1 per cent. per month.—Dated this 15th day of August 1862.

(Signed) G. PANDURANGJI P."

This document bears various marks, but is in this suit marked as exhibit F. It was not registered, but did not need registration, as Act XVI of 1864 was not then law, and Bombay Regulation IX of 1827 and Acts I and XIX of 1843 related to the Mofussil only.

The plaintiff claimed to be entitled to the equitable mortgage for Rs. 4,000 and Rs. 3,000, respectively, under a deed of assignment dated 17th March 1873 (exhibit H), whereby Pestanji Dinsha, in consideration of Rs. 8,000, already advanced to him by the plaintiff, sold and assigned (*inter alia*) to the plaintiff "all and every the sum and sums of money and debts due and owing by

1877
GANPAT PANDURANG v. ADARJI DADABHI.

every person or persons whomsoever to the said Pestanji Dinsha on any account whatsoever, and all securities therefor, and all evidences and writings creating or evidencing the said debts, or every of them, together with full and absolute power in the name of the said Pestanji Dinsha, his executors, administrators and assigns, but for the sole use and benefit of the said Adarji Dadabhai (plaintiff), his executors, &c., to ask, demand, sue for, recover and receive of and from all and every the person or persons liable in that behalf, all and every (*inter alia*) the sum and sums of money and debts hereby assigned or intended so to be, or any of them or any part of any of them, *to hold* the same unto and to the use and behoof of the said Adarji Dadabhai, his executors, &c." Then followed, by Pestanji Dinsha, covenants for title, quiet enjoyment, and further assurance. That deed of assignment was not registered.

At the trial before Sir Charles Sargent, which occupied seven days, the plaintiff failed to establish that Parvatibai made to Dinsha Jamsetji the equitable mortgage for Rs. 4,000. As to that sum, accordingly, Sir C. Sargent decreed against him, and the plaintiff has not appealed. By the same decree, however, Sir C. Sargent declared the plaintiff entitled to an equitable mortgage upon the said immoveable property in respect of the sum of Rs. 3,000 with interest at the rate of 12 per cent. per annum from the 15th of August 1862 until payment, and the taxed costs of the suit, and that, if the defendants did not pay the above-mentioned sum of Rs. 3,000, interest and costs, within six calendar months from the date of the decree (15th March 1877), the equitable mortgage should be foreclosed.

The making, by Parvatibai, of the equitable mortgage for Rs. 3,000 was contested before Sir C. Sargent. He held that she did make it, and with the consent of her sons, the defendants. So far his ruling has not been impeached in the appeal to us. The right, however, of the plaintiff Adarji Dadabhai to maintain a suit upon that mortgage was also contested before Sir C. Sargent. It was contended, for the defendant Ganpat Pandurang, that the deed of assignment by Pestanji Dinsha, executed on the 17th March 1873, being unregistered, was, under the Registration Act VIII of

1871, secs. 17 & 40, invalid as an assignment, and inadmissable in evidence. Sir C. Sargent held it to be invalid as an assignment, and inadmissable, in that character, in evidence; but he permitted an amendment of the plaint, by which amendment Adarji Dadabhai was described as suing "in his own name and as the constituted attorney of Pestanji Dinsha," and Sir C. Sargent then further permitted the deed of the 17th March 1873 to be given in evidence to show the power thereby conferred on Adarji Dadabhai to sue for and recover all debts due to Pestanji Dinsha, and, therefore, to maintain the present suit in respect of the equitable mortgage for Rs. 3,000.

To this admission of the deed of the 17th March 1873 in evidence, to prove the right of Adarji Dadabhai to maintain this suit, many objections were taken before this Court on appeal. It is sufficient for us, without enumerating those objections, to say that we then held that inasmuch as the power of attorney purported to enable Adarji Dadabhai to recover the debts mentioned in the deed on his own account only and not on account of Pestanji Dinsha, we were of opinion that, if the suit be regarded as that of Pestanji Dinsha, the power did not enable Adarji Dadabhai to maintain the suit for Pestanji Dinsha, and that, if the suit be regarded as that of Adarji Dadabhai, we should, by treating the power in the deed as enabling him to recover the sum of Rs. 3,000 on his own account, virtually give to that power the full effect of an assignment; and for that purpose such an assignment, whether legal or equitable, must be registered: sections 17 and 47 of Act VIII of 1871, *Ex parte Mackay*,(1) *Ex parte Conning*.(2) The execution of the deed of March 17, 1873, preceded the making over of the title-deeds by Pestanji Dinsha to Adarji Dadabhai. "The mere possession of the title-deeds by the latter, without evidence of the contract upon which the possession originated, or, at least, of the manner in which that possession originated, so that a contract may be inferred, will not be enough to create an equitable security." So said Lord Selborne, C., in *Dixon* v. *Muckleston*.(3)

(1) L. R. 8 Ch. App. 643. (2) L. R. 16 Eq. 414.
(3) L. R. 8 Ch. App. 155, at p. 162.

1877
GANPAT PANDURANG v. ADARJI DADABHAI.

We, however, thought it fair to the plaintiff Adarji Dadabhai to say that we would, before finally disposing of the case, grant him an adjournment in order to enable him to complete his title as equitable mortgagee (for Rs. 3,000) of the property, of which he held the title-deeds, by obtaining, registering and giving in evidence a new assignment to himself from Pestanji Dinsha (which Adarji Dadabhai has since done, the new assignment duly registered having been put in), and upon that understanding the remaining points in the appeal were then argued.

It had been contended before Sir Charles Sargent that this suit was barred by the law of Limitation. The plaint was presented on the 14th August 1874, although the plaintiff did not sue out the summons until the 7th of August 1876, and did not serve it on the defendants until some days subsequently. On the question of limitation Sir Charles Sargent said : "It is admitted that the suit was brought within twelve years from the date of the mortgage (15th August 1862), and, in my opinion, it, therefore, falls within either article 132 of the Limitation Act IX of 1871, Schedule II (which corresponds, in general terms, with section 40 of Stat. 3 & 4, Wm. IV, c. 27, which V. C. Shadwell(1) and V. C. Wigram(2) thought applied to suits for foreclosure), or article 149 of Act IX of 1871, Schedule II, (which provides for mortgagee 'recovering the lands mortgaged,' using the same language as in section 24 of Stat. 3 & 4, Wm. IV, c. 27, which Lord St. Leonards in *Wrixon* v. *Vize*(3) thought applicable to suits for foreclosure), and if either clause is applicalbe the suit is not barred. The latter clause, though somewhat unfortunately worded, would appear to be the clause applicable to suits of this nature, as it is not probable that it was intended to make a distinction between suits for foreclosure and redemption; and article 148 clearly applies to suits for redemption, as appear from the language in the third column."

The plaint having been filed in 1874, the Limitation Act applicable to this suit is Act IX of 1871. There cannot be any doubt that if Act XIV of 1859 were the Limitation Act which regulated this suit, brought as it is for the enforcement of an equitable

(1) *Dearman* v. *Wyche*, 9 Sim. 570. (2) *Du Vigier* v. *Lee*, 2 Hare, 326, 334, 335. (3) 3 Dru. & War. 104, 120; 2 Dru. & War. 192; 4 Ir. Eq. R. 463; 5 Ir. Eq. R. 173.

mortgage of immvoeable property, the provision in that Act to be applied would be section I, cl. 12: *Pearee Mohun Bose* v. *Gobind Chander Addy*.(1) The object of the suit being the realization of debt as against the hypothecated house and lands, it is a suit for the recovery of an interest in immoveable property to which no other provision than section 1, clause 12, applied: *Chetti Gaundan* v. *Sundarram*(2) *Kristan Row* v. *Hachapa*;(3) *Raja Kawndan* v. *Muttammal*;(4) *Surwar Hossein Khan* v. *Gholam Mahomed*,(5) a Full Bench case in which the judgment was given by Peacock, C. J.: *Munoolal* v. *Pigue* (6) and *Jonna Venkatsawmy* v. *Basireddy*(7) and the reference from the Judge of poona (No. 79, dated 23rd January 1865), respectively referred to in the note to 1 West's Acts, p. 688. Section 1, clause 15, of Act XIV of 1859 is nearly identical with articles 147 and 148 of Act IX of 1871, Schedule II, but contains no provision resembling article 149 of that Act.

We have already in the course of the hearing stated it to be our opinion that if this suit do not fall within article 149, it does fall within article 132 as being a suit "for money charged upon immoveable property," which the sum of Rs. 3,000 certainly is by exhibit F. It is not essential that we should in this case determine within which of these articles the present suit should be ranged. For, whether this be regarded as a suit "for money charged upon immoveable property" and, therefore, liable to the twelve-year limit, or a suit "before a Court established by Royal Charter in the exercise of its ordinary original civil jurisdiction by a mortgagee to recover from mortgagor the possession of immoveable property mortgaged," and, therefore, liable to the sixty-years' limit, the result will be the same; for, either case, the suit is within time. And it is also immaterial whether or not there was a demand; for, reckoning the cause of action to have accrued—*i.e.*, the money to have been due—on the most remote of the two dates of exhibit F, viz., the 15th August 1862, the plaint having been presented on the 14th August 1874 is within twelve years.

(1) 10 Calc. W. R. 56 Civ. Rul.
(2) 2 Mad. H. C. Rep. 51.
(3) *Ibid.* 307.
(4) 3 Mad. H. C. Rep. 92.
(5) Beng. L. R. (Sup. Vol. F. B. Rul.) 879.
(6) 10 Calc. W. Rep. 379 Civ. Rul.
(7) 4 Mad. H. C. Rep. 364.

1877
GANPAT PANDURANG v. ADARJI DADABHAI.

We have not overlooked the very awkward and defective statement in the third column of article 149 as to the period when time begins to run, or the omission in that article of any *express* mention of foreclosure suits, or the amendment introduced into the more recent Limitation Act (XV of 1877), Schedule II, article 147, where suits by a mortgagee for foreclosure or sale are expressly provided for. Even assuming that these circumstances militate against such a construction of article 149 of Act IX of 1871 as to include within it suits by mortgagees seeking foreclosure or sale, and that we must fall back on article 132, the suit is within the twelve-years' limit.

This being so held, it was next argued for the appellant Ganpat Pandurang that interest, from the date of the note of the 15th August 1862 until payment, ought not to have been awarded, but that only six-years' arrears of interest ought to have been given against the mortgaged premises, and article 118 of Schedule II of the Limitation Act was relied upon. We cannot, however, yield to this argument; for, although the note of the 15th August is not very distinctly worded, yet we think that the intention of the parties to it was that both interest and principal should be charged upon the property mentioned in it, and the subject of the title-deeds previously deposited, and, therefore, that neither the interest nor the principal is barred, whether regard be had to article 132 or article 149. *Hunter* v. *Nockalds* (1) was referred to; but we have no such provision in Act IX of 1871, with respect to arrears of interest on mortgages or other incumbrances, as the English Stat. 3 & 4, Wm. IV, c. 27, s. 42, on which that case turned. (2) Parvatibai having been and Ganpat Pandurang and her other sons the defendants being Hindus (Gentus), (3) the law of *damdupat* is applicable, and is not inconsistent either with article 118 or article 132 of the schedule to Act IX of 1871. Those articles relate to the time within which a suit must be brought, whereas the rule of *damdupat* prescribes that an amount of interest greater than the principal cannot be recovered at one time: *Dhondu* v. *Nara-*

(1) 1 Mac. & Gor. 640; S.C. 14 Jur. 256; 19 L. J. N. S. Ch. 177; 18 *(ibid)* Ch. 497.
(2) See note 1 at p. 144 of Sugden's Real Property Acts (ed. of 1852).
(3) Charter, Supreme Court of Bombay, cl. 29; 2 Morley's Dig. 653; Charter, High Court, 1862, cl. 18; Charter, High Court, 1865, cl. 19.

yan.(*1*) And this rule has not been abrogated by Act XXVIII of 1855 or the Limitation Acts: *Khushal Chand* v. *Ibrahim*,(*2*) *Rama krishna* v. *Vithoba*(*3*) *Ramlal Mookerji* v. *Haranchandra Dhar*,(*4*) *Hakma Manji* v. *Meman Ayab*;(*5*) and see *per* Phear, J., in *Meeah Khan* v. *Beebee Beebeejan*(*6*) and *Deen Dyal* v. *Kylash Chunder*(*7*) *per* L. Jackson, J.

The rule of *damdupat* is applicable in a case, like the present, of a mortgage where no account of rents and profits has to be taken: *Nathubhai* v. *Mulchand*,(*8*) *Vithal* v. *Daud*,(*9*) *Narayan* v. *Satvaji*,(*10*) *Ramchandra* v. *Bhimrav*.(*11*)

The interest awarded by the decree is one per cent. per mensem (*i.e.* 12 per cent. per annum) from the 15th August 1862 until payment, which would greatly exceed the amount of the principal. We must vary the decree by limiting the interest to Rs. 3,000, being the amount of the principal.

We order the plaint and subsequent proceedings, including the decree, to be amended by striking out the words "and as the constituted attorney of Pestanji Dinsha."

The decree has been drawn up by mistake as in part a personal decree against the defendants. As the plaintiff only asked for a foreclosure decree this clause must be omitted, and the decree confined to a direction that, unless the defendants pay the principal and interest together with the costs hereinafter directed to be paid by Ganpat Pandurang, the mortgage be foreclosed. We extend the time for them to make that payment, by way of redemption, to three calender months from to-day. No objection was made, at the hearing of this appeal, that the decree is, in form, a decree for foreclosure, and not, in what is here the more usual and, as I think, more just form, a decree for sale.

We think that, as to costs, the decree should be varied by directing the defendant Ganpat Pandurang to bear his own costs of the

(1) 1 Bom. H. C. Rep. A.C.J., 47.
(2) 3 Bom. H. C. Rep. 23, A.C.J.
(3) 3 Bom. H. C. Rep. 25, A.C.J.
(4) 3 Beng. L. R. 150, O. C.
(5) 7 Bom. H. C. Rep. 19, O. C. J.
(6) 14 Calc. W. Rep. (Civ. Rul.) p. 308.
(7) 24 Calc. W. Rep. (Civ. Rul.) 106.
(8) 5 Bom. H. C. Rep. 196.
6 Bom. H. C. Rep. A. C. J., 90.
(10) 9 Bom. H. C. Rep. 83.
(11) Ind. L. R. 1 Bom. 577.

1877
GANPAT PANDURANG v. ADARJI DADABHAI.

suit, and to pay to the plaintiff three parts out of seven of the plaintiff's taxed costs of the suit as between party and party of the suit. The delay in bringing the suit was very great: so, too, the delay in serving the summons. The plaintiff succeeded in establishing his equitable mortgage to the extent of Rs. 3,000 only, although he claimed Rs. 4,000 more, and could not have established it at all if we had not granted to him the idulgence of perfecting his title by obtaining and giving in evidence a new deed of assignment from Pestanji Dinsha. The plaintiff and defendant Ganpat Pandurang must, respectively, bear their own costs of the appeal. The defendants Vithoba Pandurang and Govind Pandurang must, respectively, bear their own costs of the suit and of the appeal (if any). The deposit of defendant Ganpat Pandurang, as security for costs of appeal, must be returned to him.

Attorneys for the appellant.—Messrs. *Shapurji and Thakurdas.*
Attorney for the respondent.—Mr. *J. C. Cama.*

ORIGINAL CRIMINAL.

(68)

Before Sir C. Sargent, Justice.

EMPRESS *v.* DOSSAJI GULAM HUSEIN.

1878
December 3.

Jurisdiction of High Court to try criminal cases sent from Zanzibar—Stat. 6 & 7, Vic., c. 94.—Stat. 28 & 29, Vic., c. 116—Stat. 29 & 30, Vic, c. 87—Order in Council of 9th August 1866—Evidence—Deposition of witnesses—Indian Evidence Act (I of 1872), Sec. 33.

The High Court at Bombay has jurisdiction to try a prisoner accused of having committed murder at Zanzibar, and sent by the British Consul at Zanzibar for trial to Bombay.

A prisoner accused of having committed murder at Zanzibar was sent by the British Consul there for trial before the High Court at Bombay. The Consul could not enforce the attendance of witnesses at Bombay, but he transmitted to the High Court the depositions which he had taken in the course of the inquiry he had held with regard to the commission of the alleged offence. In the absence of the witnesses these depositions were tendered in evidence at the trial in Bombay.

Held that the British Consul at Zanzibar was authorized to take the depositions, and that they were admissable in evidence at the trial, under section 33 of the Indian Evidence Act (I of 1872),