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[447] ORIGINAL CIVIL.

Before Mr. Justice Marriot.

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PREMJI TRIKAMDAS (*Plaintiff*) v. MADHOWJI MUNJI (*Defendant*).*
18th, 9th, 12th, 13th and 15th April, 1880.]

Principal and agent—Undisclosed principal—Settlement of accounts between principal and agent—Right of unpaid vendor—Contract Act (IX of 1872), ss. 231, 232—Transshipment permit—Sea Customs Act (VIII of 1878).

The defendant, who resided in Dholera, employed the firm of S. K. as his agents in Bombay. A running account was kept, in which the defendant was debited with the price of goods purchased on his account by S. K. and was credited with the price of goods sold by S. K. on his account and with the amount of the remittances which he made from time to time. In fulfilment of orders received from the defendant on 16th March, 1879, S. K. on the 23rd March, 1879, bought from the plaintiff 20,000 cocoanuts (out of a cargo of 42,000 then lately arrived at Bombay); on the 24th March, 1879, 10,160 cocoanuts (out of a cargo of 23,000); and on the 27th March, 26,626 cocoanuts out of a cargo of 71,250. By each of these three contracts it was agreed that the purchase-money should be paid on delivery. At the time of making these contracts the plaintiff did not know, nor had he any reason to suspect, that S. K. was an agent and not principal in the transactions. On the 27th and 28th March, 1879, the 30,160 cocoanuts (the subject-matter of the first two contracts) were transhipped into the vessel "Lakhmiprasad," and on the 29th March, 1879, the 26,626 cocoanuts (the subject-matter of the third contract) were transhipped into the vessel "Lalsary" for conveyance to Dholera. The "Lalsary" sailed from Bombay on the 31st March, and on her arrival at Dholera the defendant obtained possession of the third lot of 26,626 cocoanuts which had been shipped on board. On the 1st April, S. K. received from the defendant remittances sufficient to pay for all the cocoanuts, and to leave a balance of Rs. 1,727 to the credit of the defendant in his account with S. K. These remittances were made by the defendant in good faith, and were received by S. K. at a time when the plaintiff gave credit to S. K., and did not know of any one else to be charged with the price of the cocoanuts. On the 2nd April the firm of S. K. stopped payment, and on the 3rd April, 1879, the plaintiff, in consequence of the failure of S. K. and the non-payment of the price of the cocoanuts, transhipped the 30,160 cocoanuts (the subject of the first two contracts) from the "Lakhmiprasad" into the "Ramprasad." These cocoanuts were subsequently sold, and the proceeds of the sale deposited in the Bank of Bombay to abide the result of this suit. On the 4th April the plaintiff discovered that the defendant was the principal in the cocoanut transactions, and brought this suit against him to recover the price of the three lots of cocoanuts. The defendant denied that S. K. had authority to pledge his (defendant's) credit in making purchases, and contended that, having in good faith paid his agent S. K. for the cocoanuts, prior to the institution of the suit, he (the defendant) was not liable to the plaintiff.

[448] *Held*, that the plaintiff was entitled to recover. The rule of English law, which makes the liability of an undisclosed principal subject to the qualification that he has not *bona fide* paid the agent, or that the state of accounts has not been altered, is not adopted in the Indian Contract Act.

Section 232 is to be read as a qualification of the first portion of paragraph 1 of s. 231, which gives a principal a general right to enforce a contract entered into by his agent. Section 232 qualifies that general right by making it subject to the rights and obligations subsisting between the agent and the other contracting party.

The second clause of paragraph 1 of s. 231 gives a party contracting with an agent the same rights against the principal only as he would have had against the agent; and s. 234 adds a further qualification to his rights as against the principal.

Section 232 of the Indian Contract Act adopts the qualification imposed by English law upon the right of the principal to enforce a contract, *viz.*, that he must take the contract subject to all the equities, in the same way as if the

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agent were the real principal; but it does not impose upon the right of the other contracting party the qualification laid down by the cases of *Thompson v. Davenport* (1) and *Armstrong v. Stokes* (2) namely, that the principal has not paid the agent, or that the state of the account between the principal and agent has not been altered to the prejudice of the principal. The only qualification to the right of the other contracting party against the principal, is that imposed by s. 234, namely, that he has not induced the principal to act upon the belief that the agent only will be held liable.

A transshipment permit issued under s. 128 of the Indian Sea Customs Act (VIII of 1878) does not, like a bill of lading represent the goods mentioned in it, or give any lien upon or control over them.

ACTION for the price of goods sold. The plaintiff stated that the defendant was a merchant, resident in Dholera. His agents in Bombay were one Moti Ganesh and one Narranji Kessowji, the latter of whom carried on business in Bombay under the name of Sunderji Kessowji.

On the 23rd March, 1879, Moti Ganesh, in the name of the firm of Sunderji Kessowji, purchased from the plaintiff 20,000 cocoanuts (out of a cargo of 42,900 then lately arrived in Bombay) at the rate of Rs. 34 per thousand. On the 24th March, 1879, he made a further purchase from the plaintiff of 10,160 cocoanuts, at the rate of Rs. 35 per thousand, out of another cargo of 23,100; and on the 27th March, 1879, he made a third purchase of 26,626 cocoanuts (out of a cargo of 71,250) at the rate of Rs. 35 per [449] thousand. By each of the three contracts it was agreed that the purchase-money should be paid on delivery.

All the above purchases were made at the request and on account of the defendant, but the plaintiff at the time was not aware of the fact.

On the 27th March, 1879, the 20,000 cocoanuts, which were the subject-matter of the first contract, were transhipped into the "Lakhmiprasad"; and on the 28th March, 1879, the 10,160 cocoanuts (the subject-matter of the second contract) were put on board the same vessel for conveyance to Dholera. On the 29th March, 1879, the 26,626 cocoanuts (the subject-matter of the third contract) were shipped, for the same purpose on board the "Lalsary." The plaintiff stated that he caused the transshipment permits to be made out in his own name, and that he retained them in his possession pending the payment of the purchase-money.

He further stated that on the 30th March, 1879, at the request of Moti Ganesh, who promised that the purchase-money would be paid in a day or two, the plaintiff's munim handed over to Moti Ganesh, at his request and on reliance upon his promise that the purchase-money would be paid in a day or two, the transshipment permit of the last-named vessel, the "Lalsary". That ship sailed from Bombay on the 31st March, 1879, and on her arrival at Dholera, the defendant obtained possession of the 26,626 cocoanuts which had been shipped on board.

On the 2nd April, 1879, the firm of Sunderji Kessowji suspended payment.

The plaintiff claimed to recover from the defendant the sum of Rs. 824-8-0, the amount of the purchase-money of the above cocoanuts, on the ground, that they were bought on defendant's account, and also on the ground that defendant had obtained delivery of them through the false representation of his agent, Moti Ganesh.

After the failure of the firm of Sunderji Kessowji the plaintiff refused to hand over the transshipment permit of the ship "Lakhmiprasad," which, as above stated, had on board 30,160 cocoanuts (the subject-matter

(1) 2 Smith's L.R. (7th ed.) 364.

(2) L.R. 7 Q.B. 598.

of the first and second contracts), or [450] to allow Moti Ganesh to take possession of the cocoanuts until the price was paid. According to a subsequent arrangement these cocoanuts were sold, and the proceeds paid into the Bank of Bombay to abide the event of this suit. The sale realized Rs. 936-9-0, which was Rs. 20-13-0 in excess of the contract price. The plaintiff prayed for a declaration that he was entitled to the whole of the proceeds of the sale, or, in the alternative, that the defendant should be ordered to pay the contract price.

In his written statement the defendant stated that he was in the habit of ordering goods from the firm of Sunderji Kessowji, and that the said firm purchased such goods in their own name and on their own credit, and forwarded them to the defendant. The said firm had no authority, express or implied, to pledge the defendant's credit in making such purchases, and, save as aforesaid, the firm was not the defendant's agent.

The defendant further stated that Moti Ganesh was his servant, who remained in Bombay in order to see that the goods purchased by the firm of Sunderji Kessowji were suitable to defendant's wants, and that they were sent to defendant in proper order, but that in making purchases in the name of the firm he had acted on behalf of the firm, and not for the defendant.

The defendant also alleged that on the 16th March, 1879, he ordered 60,000 cocoanuts from Sunderji Kessowji; that the contracts above stated were entered into in fulfilment of that order, and that on the 1st April, 1879, he caused the price of cocoanuts, ordered by him on the 16th March, to be paid to the firm. The defendant denied that the permits were made out in the name of, or that they were retained by, the plaintiff, or that Moti Ganesh had made the promise as to payment of the price alleged in the plaint. The plaintiff had obtained possession of the permits from the tindel, in order to obtain permission from the Custom authorities for transhipment of the goods.

The defendant contended that a complete delivery of all the cocoanuts had been made by the plaintiff to the firm of Sunderji Kessowji, prior to the failure of that firm, and that the property had passed to them, and that the plaintiff, therefore, had no claim against the defendant.

[451] The defendant stated that, after the failure of the said firm, the plaintiff, illegally and in collusion with the tindel of the "Lakhmiprasad," obtained possession of the cocoanuts on board, and defendant contended, that plaintiff was not entitled to the proceeds of sale.

The Hon'ble *F. L. Latham* (Acting Advocate-General) and *Lang*, for the plaintiff.—As to the third lot of cocoanuts, of which the defendant actually got delivery, we can recover the price from defendant, who is bound by the promise of his agent, Moti Ganesh, to pay the plaintiff if the plaintiff would hand over the permits, and thus enable defendant to get possession. As to the other two lots on board the "Lakhmiprasad" they were never delivered by the plaintiff, and he is, therefore, entitled to the proceeds of the sale. But, even assuming that delivery of the latter had been made by the plaintiff, he is entitled to recover from the defendant as an undisclosed principal. The fact (if proved) that the defendant has, subsequently to the contract, paid his agent, makes no difference. The case is governed by the Indian Contract Act (IX of 1872). ss. 231, 232, 233, 234. These sections embody the law as laid down in *Heald v. Kenworthy* (1). The case of *Armstrong v. Stokes* (2), in which the Judges on some points

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(1) 10 Ex. 739.

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dissent from *Heald v. Kenworthy*, was decided on 6th July, 1872, and was not, therefore, before the Indian Legislature when framing the Contract Act. See, also, Story on Agency (7th ed.), para 446. By the Contract Act it was intended to make the undisclosed principal liable in every case, except, where the other party to the contract is estopped by conduct from proceeding against him. Section 233 states the liability of the principal in the widest possible terms, and s. 234 gives the only exception to that liability. *Smethurst v. Mitchell* (1) shows what would amount to an estoppel in proceeding against an undisclosed principal. See *Armstrong v. Stokes* (2), *Irvine v. Watson* (3). Counsel referred to *Smyth v. Anderson* (4); Chitty on Contracts (10 ed.), p. 202; *Macfarlane v. Giannacopulo* (5); Benjamin on Sales, p. 665.

[452] *Farran and Macpherson*, for the defendant.—There was complete delivery of all the goods by the plaintiff to Sunderji Kessowji and he cannot recover from the defendant. The Contract Act is not exhaustive. It merely "defines and amends certain parts of the law relating to contracts." Sections 231 and 232 state the law as laid down in *Thompson v. Davenport* (6), and recognized in *Armstrong v. Stokes* (2), s. 233 is the law laid down in the case of *Calder v. Dobell* (7). Section 234 is the law laid down in the case of *Heald v. Kenworthy* (8). This case does not conflict, as suggested, with the later cases. Parke, B., went further than was necessary for the decision of the case, and such remarks are said in *Armstrong v. Stokes* (2) not to be binding as an authority. Sections 231 and 232 are the converse of each other: otherwise s. 232 is an exact repetition of s. 231. If the words "the principal" in s. 232 be read "the former" then all difficulty will disappear. We admit that the illustration to s. 232 is against this construction, but we say this illustration belongs to s. 231. But if s. 232 be construed as identical with s. 231, we claim to be protected under s. 234, on the ground that the defendant was induced to act on the belief that Sunderji Kessowji only would be held liable.

JUDGMENT.

MARRIOTT, J.—The plaintiff seeks to recover from the defendant the sum of Rs. 824-8-0, the price of 26,626 coconuts, and asks for a declaration that he is entitled to a sum of Rs. 936-9 10 produced by the sale of 30,160 coconuts, and now standing to the credit of Messrs. Payne and Sayani in the Bank of Bombay, and, in the alternative, seeks to recover from the defendant Rs. 915-12-0, the price of the last-mentioned coconuts.

The plaintiff is a merchant in Bombay, and the defendant is a merchant residing and carrying on business at Dholera.

One Narranji Kessowji (who traded in Bombay under the name of Sunderji Kessowji) was, prior to and in the year 1879, the defendant's agent in Bombay for the sale and purchase of goods. The defendant had a running account with the firm of Sunderji [453] Kessowji, in which account the defendant was debited with the price of the goods purchased on his account by Sunderji Kessowji, and, on the other hand, was credited with the value of the goods sold by the firm on his account, and with the amount of his remittances.

(1) 1 E. & E. 622.

(2) L.R. 7 Q.B. 598.

(3) 5 Q.B.D. 102.

(4) 7 C.B. 21.

(5) 3 H. & N. 860.

(6) 2 Smith's L. C. (7th ed.) 364.

(7) L. R. 6 C. P. 486.

(8) 10 Ex. 739.

Narranji Kessowji stated that the defendant remitted money when purchases were made, but that he never sent money in full settlement of the account; that there was no fixed time for such remittances, but that it depended upon the defendant's convenience; and, on cross-examination, he said that he credited the defendant with the purchases, and that the defendant made general remittances on account.

The defendant had a servant in Bombay, named Moti Ganesh, who sat at Sunderji Kessowji's shop, and made purchases for the defendant; but the orders of the defendant were communicated by letters to Naranji Kessowji, who, upon receipt of them, directed Moti Ganesh to make the required purchases on the defendant's account.

The contracts for purchase were made in the name of the firm of Sunderji Kessowji, and it does not appear that the vendors were ever informed that Sunderji Kessowji were agents only and not principals.

On the 23rd March, 1879, the firm of Sunderji Kessowji, through Moti Ganesh, by written contract, purchased from the plaintiff 20,000 coconuts at Rs. 34-1-0 per trade hundred, part of a cargo of 42,900 coconuts which had arrived from Goa by the *phatemar* "Esperanca," consigned to the plaintiff. On the 24th March, 1879, the firm of Sunderji Kessowji, through Moti Ganesh, by written contract, purchased from the plaintiff 10,160 coconuts at the rate of Rs. 35-1-0 per trade hundred, part of a cargo of 23,100 coconuts that had arrived from Goa in the *phatemar* "Samsher" consigned to the plaintiff. And on the 27th March, 1879, the firm of Sunderji Kessowji, through Moti Ganesh, by written contract purchased from the plaintiff 26,626 coconuts, at the rate of Rs. 35 1-0 per hundred, part of the cargoes of three *phatemars* which had arrived from Goa, consigned to the plaintiff.

[454] These contracts (although the contracts themselves do not so state), according to Purshotam Rupal (plaintiff's munim), were for cash, and he stated that his master had had several prior transactions with Sunderji Kessowji—'cash' transactions, and that in those transactions the price of the goods was paid, eight, nine, or ten days after delivery.

All these three lots of 20,000, 10,160 and 26,626 coconuts were purchased by Moti Ganesh by the direction of Narranji Kessowji for the defendant, and purchased, according to orders received by Narranji Kessowji from the defendant; but the plaintiff did not know, nor had he any reason to suspect, that the firm of Sunderji Kessowji were agents, or, in fact, that they were not the principals in the three contracts, [His Lordship then stated the various facts detailed in evidence, and continued]:—It appears, therefore, that the defendant paid Sunderji Kessowji for the goods. Indeed, the result of the remittances made by the defendant to Sunderji Kessowji about the 1st April was that the state of the accounts between them was altered much to the prejudice of the defendant; for whereas he had been indebted to Sunderji Kessowji in the sum of Rs. 2,174, he was now a creditor of that firm to the amount of Rs. 1727. It is also clear that these remittances made by the defendant were made by him in good faith, and were received by Sunderji Kessowji at a time when the plaintiff was giving credit solely to Sunderji Kessowji and, in fact, did not know that any one else was concerned in the transactions.

Having now stated the general facts, I proceed to consider the plaintiff's right to recover, the two sums mentioned in the plaint.

The plaintiff claims to recover them from the defendant, as the undisclosed principal in the transaction; and whether he is entitled to do

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so or not, depends upon the construction of ss. 231, 232 and 234 of the Contract Act.

Section 231, para. 1, enacts that "if an agent makes a contract with a person who neither knows, nor has reason to suspect, that he is an agent, his principal may require the performance of the contract; but the other contracting party has, as against the principal, the same rights as he would have had against the agent if the agent [455] had been the principal." This section provides with reference to the assertion of rights by or against the undisclosed principal—(1) that the principal of the agent making the contract, may require performance of the contract from the other contracting party, and (2) that the other contracting party, has, against the principal, the same rights as he would have had against the agent, if the agent had been the principal.

It is to be observed that the first portion of this paragraph of the section gives the principal the right to specific performance of the contract, without any qualification whatever. But, on the other hand, the second portion gives the other contracting party, as against the principal, the same rights only as he would have had against the agent.

Then comes s. 232, which enacts that "when one man makes a contract with another, neither knowing nor having reasonable ground to suspect that the other is an agent, the principal, if he requires the performance of the contract, can only obtain such performance subject to the rights and obligations subsisting between the agent and the other party to the contract." The 'principal' in this section is the principal of the agent. The concluding sentence of the section makes any other construction impossible. The section so construed, makes the right of the principal to require performance, subject to the rights and obligations existing between the agent and the other contracting party, and thus qualifies the unlimited right of the principal given by the first portion of s. 231.

It was argued for the defendant, that s. 232, as so construed, became a nullity, and is but a repetition of s. 231, and that the proper mode to construe the section is to substitute the word "former" for 'principal' and that the section would then be consistent with the exception engrafted by English law on the personal liability of an undisclosed principal (*Thompson v. Davenport*(1) and *Armstrong v. Stokes*(2)), viz., that the right of the other contracting party to hold the principal liable, is subject to the qualification that the principal has not *bona fide* paid the agent or that the state of the accounts between the principal and agent has not been [456] altered to the prejudice of the principal. To arrive at this desired construction, not only should I have, as suggested, to substitute the word 'former' for 'principal,' but it would also be necessary to alter the concluding sentence of the section (viz., "the principal...can only obtain such performance subject to the rights and obligations subsisting between the agent and the other party to the contract") by substituting the word 'principal' for the words "other party to the contract." Moreover, the illustration to this section would be inapplicable.

I do not think s. 232 is a repetition of the first paragraph of s. 231. It is, I think, a qualification of the first portion of that paragraph which gives a principal a general right to enforce a contract entered into by his agent. Section 232 qualifies that general right by making it subject to the rights and obligations subsisting between the agent and the other contracting party.

(1) 2 Smith's L. S. (7th Ed.) 964.

(2) L. R. 7 Q. B. 598.

Section 233 makes either the agent or the principal, or both, liable to the agent's contracts where the agent is personally liable.

Section 234 enacts that "where a person who has made a contract with an agent, induces the agent to act upon the belief that the principal only will be held liable, or induces the principal to act upon the belief that the agent only will be held liable, he cannot afterwards hold liable the agent or principal, respectively."

Thus s. 234 imposes a further qualification upon the rights given to the other contracting party by the second portion of the first para. of s. 231.

It will be seen, therefore, if my view of the construction of the sections is correct, that the Indian Contract Act has by s. 232 adopted, as regards the principal, the qualification imposed on him by English law, namely, that he must take the contract subject to all the equities, in the same way as if the agent were the real principal; but that, in the converse case of the "other contracting party" it has not imposed upon him the qualification laid down by the cases of *Thompson v. Davenport* (1) and *Armstrong v. Stokes* (2), namely, that his (the other contracting party's) right to hold the principal liable, subject to the qualification that the principal has not paid the agent, or that the state of the [457] accounts between the principal and agent has not been altered to the prejudice of the principal. The only qualification imposed on the assertion, by the other contracting party, of his rights as against the principal, is that imposed by s. 234, namely, that he has not induced the principal to act upon the belief that the agent only will be held liable.

This qualification is almost the language used by Parke, B., in *Heald v. Kenworthy* (3) in explanation of the language of Bayley, J., in *Thompson v. Davenport* (1). Parke, B., says: "If, for example, the principal is induced, by the conduct of the seller, to pay his own agent on the faith that the agent will settle with the seller, in such a case the seller would be precluded from recovering, as it would be unjust for him to do so. But, under ordinary circumstances, the plaintiff in such case is entitled to recover, unless he has either deceived the defendant (there the principal), or induced him to alter his position."

The rule laid down by Lord Tenterden and Bayley, J., in *Thompson v. Davenport* regarding the right of the other contracting party to hold the principal liable, was adhered to by the Court of Queen's Bench in the case of *Armstrong v. Stokes* (2), and the opinion of Parke, B., in *Heald v. Kenworthy* (3) dissented from. *Armstrong v. Stokes* was a decision of 1872, and it may well be, as was suggested in argument, that the Indian Legislature adopted Baron Parke's explanation, in *Heald v. Kenworthy* (3), of the rules laid down by Bayley, J., in *Thompson v. Davenport*; but be that as it may, I can only look to the language of the Act itself.

Then, has the plaintiff here induced the defendant to act upon the belief that the firm of Sunderji Kessoji only would be held liable? I think not. There is no evidence whatever of such inducement. Lalji Ganji's receipt for 26,626 cocoanuts is dated the 29th March, and nothing had occurred between the 29th March and the 1st and 2nd April, when the bill and *hundi* were handed over by Moti Ganesh to Sunderji Kessoji and the grain arrived, to induce such a belief in either the defendant at Dholera or Moti Ganesh as his agent in Bombay.

(1) 2 Smith's L. C. (7th ed.) 364. (2) L.R. 7 Q. B. 598. (3) 10 Ex. 739.

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[458] I am, therefore, of opinion that the plaintiff is entitled to recover from the defendant, as undisclosed principal, the sum of Rs. 824-8-0 the price of the 26,626 cocoanuts, which were the subject of the third contract, and also that the plaintiff is entitled, as against the defendant to the amount realised by the sale of the 30,160 cocoanuts, the subject-matter of the first two contracts, which sum is now in the Bank of Bombay awaiting the result of this suit.

It was also argued for the plaintiff that the plaintiff was entitled to recover the price of the 26,626 cocoanuts from the defendant, on the ground that the plaintiff had retained the transshipment permit of these goods; that by such retention he retained the property and control over the goods, and that he was induced to part with the transshipment permit to Moti Ganesh on the latter's express promise to pay for the goods. This was denied by Moti Ganesh.

As I have decided, upon the main question, that the plaintiff is entitled to recover, I do not consider this point in detail, but I am of opinion that a transshipment-permit (which is issued under s. 128 of the Indian Sea Customs Act of 1878) does not, like a bill of lading, represent the goods mentioned in it, or give any lien on, or control over, them; and that, considering the character of transshipment-permits and their uses and the previous course of dealing between the plaintiff and the firm of Sunderji Kessowji as found in the case, I have come to the conclusion that the plaintiff did not retain the transshipment-permits, or deliver them to Moti Ganesh upon such promise, as alleged.

Judgment for plaintiff.

Attorney for plaintiff.—Mr. H. W. Payne.

Attorneys for defendant.—Messrs. Tyabji and Sayani.

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[459] APPELLATE CIVIL.

*Before Sir Michael Roberts Westropp, Kt., Chief Justice, and
Mr. Justice F. D. Melvill.*

PARMAYA (Original Defendant No. 1), Appellant v. SONDE
SHRINIVASAPA (Original Plaintiff), Respondent.*
[16th February, 1880.]

Registration Acts, XIX of 1843, XX of 1866, VIII of 1871—Registration—Mortgage without possession—Subsequent purchase with possession.

Deeds of sale dated, respectively, the 22nd October, 1868, and 7th February, 1874, and registered, the former under Act XX of 1866 and the latter under Act VIII of 1871, are not thereby entitled to priority over an unregistered mortgage deed, dated the 13th June, 1864, the registration of which was optional under Act XIX of 1843, where the consideration for the rival deeds exceeds Rs. 100.

Quære.—Whether in Kanara, a mortgage without possession can be sustained against a subsequent purchase from the mortgagor with possession.

[R., 13 B. 220 (232); 15 B. 183; 20 B. 408 (417) (F.B.)]

THIS was a second appeal from the decision of A. L. Spens, Judge of the District Court of Kanara, in appeal No. 157 of 1877, reversing the decree of V. V. Wagle, Subordinate Judge (Second Class) at Sirsi.

* Second Appeal, No. 450 of 1879.