

no investigation was made, and the application was treated as disposed of. The question is whether this endorsement is such an order as brings the plaintiff within the provisions of the last paragraph of s. 269, and rendered it necessary for him to bring a suit within one year. After providing that "the Court shall inquire into the matter of the complaint, and pass such order as may be proper in the circumstances of the case," the section goes on to say, in the last paragraph, that "the order shall not be subject to appeal, but the party against whom it is given shall be at liberty to bring a suit to establish his right at any time within one year from the date thereof." The authorities are conflicting as to whether an order passed without a previous investigation, is such an order as is contemplated by the section; and on this point we do not think it necessary to give any decision. But we consider that the order contemplated must, at all events, be an order given against one party or the other; and in the present case we find it impossible to regard the endorsement of the Subordinate Judge, acquiescing in the plaintiff's request that his application should not be further proceeded with, as an order given against the plaintiff. On these grounds we reverse the decrees of the Courts below, and remand the case for retrial. Costs to follow the final decision.

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[442] APPELLATE CIVIL.

Before Mr. Justice M. Melvill and Mr. Justice Nanabhai Haridas.

KANITKAR (Original Defendant), Appellant v. JOSHI (Original Plaintiff), Respondent.* [29th March, 1881.]

Registration, compulsory, optional—Priority—Act XX of 1866—Act VIII of 1871, s. 50—Act III of 1877, s. 50.

Section 50 of Act III of 1877 is not retrospective in its application; and, therefore, a deed of sale registered under Act VIII of 1871, and not having, under that Act, priority over unregistered documents relating to the same property, acquires no new rights of priority by the passing of Act III of 1877, though coming within the larger class of registered documents which, by s. 50 of the later Act, have priority over unregistered documents.

[F., 6 B. 495; R., 5 B. 653; 6 B. 168 (192); 13 B. 229; 20 B. 158 (164).]

THIS was a second appeal against the decision of C. B. Izon, Judge of Ratnagiri, confirming the decree of Rao Saheb Atchut Jagannath Ghate, Subordinate Judge of Chiplun.

The material facts are as follows:—

On 18th March, 1867, one Ganu Gopal mortgaged some property to the plaintiff's father for a sum a little less than Rs. 100. The instrument of mortgage was optionally registrable, and was not registered. No possession passed to the mortgagee at the time of executing the mortgage. But on 4th May, 1873, the plaintiff entered into possession of the mortgaged premises.

On 19th March, 1877, the proprietor passed a deed of sale of the property to the defendant for Rs. 297. This was compulsorily registrable under Act VIII of 1871, and was duly registered on the 20th March, 1877, a few days before the day (1st April, 1877), on which the Registration Act III of 1877 came into force.

* Second Appeal No. 345 of 1880.

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MARCH 29. Immediately afterwards the defendant went to the Mamlatdar's Court and, obtaining a possessory decree, dispossessed the plaintiff in July, 1877.
— The plaintiff thereupon brought this suit in August, 1877, to recover
APPEL- possession of the mortgaged property from the defendant.
LATE: The defendant contended that the plaintiff's mortgage was collusive;
CIVIL: but said that, even if genuine, it must be deferred to the defendant's deed
— of sale, as the mortgage was unregistered, and not accompanied with
5 B. 442. immediate possession.

[443] The Subordinate Judge of Chiplun found that the plaintiff was entitled to possession, and his decision was confirmed, on appeal, by the District Judge of Ratnagiri. The defendant appealed to the High Court.

Ganesh Ramchandra Kirloskar, for the appellant.—The defendant's registered deed of sale has priority over the plaintiff's unregistered mortgage not accompanied with immediate possession. The deed of sale was registered just before the present Registration Act III of 1877 came into force, and during the operation of Act VIII of 1871. At the time it was tendered in evidence, however, Act III of 1877 was in force. Section 50 of that Act gives, to documents of the class to which the sale deed belongs, a priority, if registered, over every unregistered document relating to the same property, and not being a decree or order, whether such unregistered document be of the same nature as the registered document or not. This section does not confine the priority it gives to documents registered under that Act. That section is, therefore, intended to have retrospective effect: *Raju Balu v. Krishnarav Ramchandra* (1); *Fuzludeen Khan v. Fakir Mahomed Khan* (2); *Gangaram v. Bansi* (3); *Lachmandas v. Dipchand* (4).

Manekshah Jehangirshah Taleyarkhan, for the respondent, the original plaintiff.—Section 50 of Act III of 1877 should not be construed as having any retrospective effect: it does not apply to the defendant's deed of sale, which was registered while Act VIII of 1871 was in force, and no section of that Act gives any such priority as has been contended for. Before Act III of 1877 became law, a compulsorily registrable document had no priority over a document the registration of which was merely optional. Section 50 of that Act ought to be so read as not to affect rights acquired and existing under previous Acts. Unless the language of an Act is clear and positive, the general rule is that no retrospective effect should be given to it; Maxwell on Statutes, 191-2. In the explanation attached to s. 50 the word "unregistered" is expressly given a retrospective effect. This shows that the word "registered" in that section ought not to have that effect. The effect of the decisions in the cases cited [444] is to give priority to documents registered since the new Act came into force.

JUDGMENT.

The judgment of the Court was delivered by
MELVILLE, J.—The plaintiff claims under a mortgage executed by Ganu Gopal in 1867. It has been found that the plaintiff obtained possession under his mortgage; but, being for an amount less than Rs. 100, his mortgage-deed was not compulsorily registrable, and was not registered. In 1877 the plaintiff was dispossessed by a decree in the Mamlatdar's Court in favour of the defendant, whose claim (so far as we need at present consider it) was founded upon a deed of sale executed by Ganu Gopal in March, 1877, for a consideration of Rs. 297. This deed was registered a few days before Act III of 1877 came into operation. At

(1) 2 B. 273.

(2) 5 C. 336.

(3) 2 A. 431.

(4) 2 A. 851.

the time, therefore, when this registration took place, the rights of the parties, under their respective title-deeds, were governed, so far as registration could affect them, by Act VIII of 1871; and, inasmuch as s. 50 of that Act conferred precedence only upon such registered documents as were of the kinds mentioned in cls. (1) and (2) of s. 18, the defendant, whose deed of sale was of one of the kinds mentioned in s. 17, did not immediately gain anything by his registration. At the time, however, when this suit was brought, Act III of 1877 was in full operation; and it is now contended that, by virtue of s. 50 of that Act, the defendant's deed of sale takes effect against the plaintiff's mortgage-deed. That section provides that "every document of the kinds mentioned in cls. (a), (b), (c) and (d) of s. 17, and cls. (a) and (b) of s. 18 shall, if duly registered, take effect, as regards the property comprised therein, against every unregistered document relating to the same property, and not being a decree or order, whether such unregistered document be of the same nature as the registered document or not." The preference, given by Act VIII of 1871 to voluntarily registrable documents only, is here extended to compulsorily registrable documents also, and there can be no doubt that, if the defendant's deed of sale had been registered under Act III of 1877, it would, unless fraud were proved, take effect against and supersede the plaintiff's deed of mortgage. The question is, whether the same result ensues in the case of a document registered [445] before Act III of 1877 came into force. We do not think that we ought to hold it to be so, unless it be perfectly clear, from the language of s. 50 of the Act, that a retrospective effect was intended. Under the law in force at the time of the registration, the plaintiff's title was good against that of the defendant. If we apply s. 50 of the new Act, the plaintiff loses his right, and the defendant acquires a title to which, when he registered his deed, he had no claim. It is to be presumed that the Legislature did not intend, by a retrospective operation, to destroy one existing title and to set up another. *Nova constitutio futuris formam imponere debet, non præteritis*; where an enactment would prejudicially affect vested rights, or the legal character of past acts, the presumption against a retrospective operation is very strong. "Every Statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect of transactions or considerations already past, must be presumed, out of respect to the Legislature, to be intended not to have a retrospective operation (1)." In the case of *Williams v. Smith* (2) the question decided was very similar to that which arises in the present case. Previously to the passing of 19 and 20 Vic., c. 97, the mere issue of a writ of *fi. fa.* gave to the judgment-creditor, as against a subsequent purchaser for value, the right to have his writ operate upon the goods of his debtor. The first section of that Statute enacted that "no writ of *feri facias* or other writ of execution, and no writ of attachment against the goods of a debtor, shall prejudice the title to such goods acquired by any person *bona fide* and for a valuable consideration before the actual seizure or attachment thereof by virtue of such writ." It was held in *Williams v. Smith* that this section did not apply where the writ had been delivered to the Sheriff before the Act was passed. Under the circumstances of the case, the creditor had, under the old law, a good title against the purchaser; under the new law, if it was applicable, the purchaser had a good title against the creditor. The Court of Exchequer

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(1) Maxwell on Statutes, p. 192.

(2) 28 L.J. Ex. 286.

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refused to apply the Statute, because the words were not sufficiently clear to rebut the presumption that the Legislature [446] could not have intended to take away a vested right. Section 50 of Act III of 1877, by the alteration which it makes in the previous law, effects a mutation of title between two conflicting claimants precisely analogous to that which was caused by the first section of the English Statute; and the words of the latter section which were held not to be sufficiently clear and express to authorize a retrospective application of the section are at least as clear and express as those of the Indian Act. Indeed, they appear to us to be more so; for the express provision contained in the explanation to s. 50 of Act III of 1877, by which retrospective effect is given to the word "un-registered," in some measure suggests the inference that such retrospective effect was not intended to be given to the word "registered."

For these reasons we have come to the conclusion that the defendant's deed of sale is not, by virtue of registration, entitled to take effect against the plaintiff's deed of mortgage.

The decrees of the Courts below are confirmed with costs.

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APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice,
and Mr. Justice Nanabhai Haridas.

SAYAJI BIN NIMBAJI (*Original Defendant*), Appellant v. RAMJI
BIN LANGAPA (*Original Plaintiff*), Respondent.*
[26th January, 1881.]

Mortgagee in possession—Forcible dispossession by mortgagor—Suit for possession—Specific Relief Act, I of 1877, s. 9—Fraud—Appeal.

It is no answer to a suit for possession under s. 9 of the Specific Relief Act, brought against a mortgagor by a mortgagee who has been forcibly dispossessed by the mortgagor, to allege that the mortgage and possession under it were obtained by the fraud of the mortgagee. The mortgagor's proper remedy was by way of a suit to set aside the mortgage and recover possession.

[R., 2 C.P.L.R. 173; 7 C.P.L.R. 3.]

THIS was a second appeal from the decision of R. F. Mactier, Judge of the District Court of Satara, affirming the decree of P. S. Binivale, First-Class Subordinate Judge at the same place.

The plaintiff Ramji brought this suit for possession of certain land, alleging that the same had been mortgaged to him by the defendant for Rs. 300 under a deed, dated the 13th October, 1876; [447] that he had been put in possession of the land under the mortgage; that, subsequently, the mortgagor forcibly turned him out of the mortgaged premises. The plaintiff also claimed Rs. 100 as damages in respect of the crop standing on the land at the time of his dispossession, and removed by the defendant. The plaint was filed on the 13th August, 1877.

The defendant Sayaji answered, *inter alia*, that the plaintiff had caused the mortgage-deed to be executed, and obtained possession of the mortgaged land by fraud.