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ordinate Judge, Mr. Ranade, is, accordingly, affirmed with costs of this appeal.

This judgment runs to a very great length, caused, however, by the desire to collect and classify (for the use of the Courts subordinate to this Court), so far as may be, the authorities on the difficult subject of the relation in which the Hindu and Mahomedan rule as to possession stands to the Registration Acts which from time to time have been in force in this Presidency.

Decree affirmed.

APPELLATE CIVIL.

FULL BENCH.

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

SOBHAGCHAND GULABCHAND AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* BHAICHAND AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

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February 14 *and March* 3.

Registration—Possession—Notice—San-mortgage in Gujarat—Priority—Priority as between a purchaser at execution sale and prior mortgagee by unregistered san-mortgage—Plea of purchase without notice—At an execution sale the Court sells only what the judgment-debtor could honestly sell—Acts XX of 1866 *and VIII of* 1871.

The general rule in the Presidency of Bombay is that, amongst Hindus, possession is necessary in order to perfect a transfer of immoveable property by mortgage or deed of sale as against subsequent incumbrancers or purchasers. The main ground of this rule is that possession is notice to all subsequent intending mortgagees or purchasers of the title of the party in possession.

It is, however, the established and judicially recognized custom of Gujarat, that possession is not necessary in the case of a *san*-mortgage (1) to validate it as against subsequent mortgagees or purchasers. The necessity of possession being thus dispensed with, it seems to follow that a *san*-mortgage, in other respects good, is valid as against a subsequent mortgagee or purchaser, whether or not such mortgagee or purchaser has notice of the *san*-mortgage. To hold that a subsequent mortgagee or purchaser for valuable consideration, and without notice of a *san*-mortgage is entitled to priority over it, would be tantamount to depriving the *san*-mortgagee of the benefit of the custom that possession is unnecessary.

A buyer of property at an execution sale who registers his certificate of sale does not thereby acquire a title free from the obligation arising from a *san*-mortgage of

*Special Appeal, No. 540 of 1873.

(1) In Gujarát a *san*-mortgage or *sankhat* means a mortgage without possession.

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previous date. When the Court sells the right, title and interest of a judgment-debtor in property, it cannot be regarded as selling more than the judgment-debtor himself could honestly sell. He could honestly sell only subject to any equities existing against himself on the property; and if by concealment of a *san*-mortgage he sold property as free of that charge, he would commit a fraud. The Court cannot be deemed to do that which would be a fraud if done by the judgment-debtor. If, then, the Court sell only the right, title and interest of the judgment-debtor subject to all existing equities against the property sold, the registration of the Court's conveyance (viz., certificate of sale) cannot enlarge the scope of that conveyance and discharge the property from any unregistered incumbrance which was binding on the judgment-debtor.

Per MELVILL, J.—Such perfect security is now afforded by registration that there appears to be hardly room for the plea of purchase without notice. Seeing that a purchaser may secure himself against all unregistered mortgages without possession by simply taking possession or registering his conveyance, he is, if he omit to do so, in *pari delicto* with the prior mortgagee, and it is difficult to see how he is entitled to any relief.

In the case of execution sales under section 287 of the Civil Procedure Code (Act X of 1877), notice is given to purchasers that the sale only extends to the right, title and interest of the judgment-debtor, and that the Court ordering the sale does not warrant the title. This being so, it seems clear that a person who buys an avowedly doubtful title, and pays for it on that understanding, cannot claim to be a purchaser without notice.

The provision of the Registration Act, that a registered document shall take effect as regards the property comprised therein against every unregistered document relating to the same property, only applies where the two documents are antagonistic, not where effect can be given to each without infringement of the other: *e. g.*, if A mortgages or sells to B, and afterwards C purchases at a Court's sale the then existing right, title and interest of A, he (C) buys in the first case the equity of redemption and in the second nothing at all. Registration, therefore, cannot help him, for on the very face of his certificate of sale the property comprised therein is not the property previously conveyed to B, but only the residue of A's estate after such conveyance.

Sirdhar v. *Hakamchand* (1) referred to.
Makandas v. *Shankardas* (2) dissented from.
Lakhmichand v. *Kastur* (3) approved.

THIS was a special appeal from the decision of H. Birdwood, District Judge of Surat, affirming, with a slight variation, the decree of the Second Class Subordinate Judge of Vagra.

Sobhagchand and his brother sued to recover Rs. 149, being principal and interest due on a *san*-mortgage, executed to their father, Gulabchand (deceased) by Udesing and Bhavabhai (defend-

(1) 8 Bom. H. C. Rep. 75, A.C.J. (2) 12 Bom. H. C. Rep. 241.
(3) 9 Bom H. C. Rep. 60.

ants 1 and 2,) on the 1st July, 1870, for Rs. 99-4-0. The plaint was filed on the 23rd November, 1872. The plaintiffs prayed for a decree against the mortgaged property.

Defendants 1 and 2 did not appear. Rupchand, defendant No. 3, answered (*inter alia*) that on the 24th July, 1872, he purchased the property at a Court sale for Rs. 77, without notice of the plaintiffs' mortgage; that he had obtained a certificate of sale dated the 23rd November, 1872; that it was registered on the 5th February, 1873; that the plaintiffs' mortgage was neither registered nor accompanied with possession; that he was not, therefore, liable for their mortgage.

The Subordinate Judge allowed the plaintiffs' claim as against defendants Nos. 1 and 2 personally, but disallowed it as against the mortgaged property. On appeal the District Judge affirmed that decree in appeal, with a slight variation as to costs. The plaintiffs thereupon specially appealed to the High Court.

The case was first heard by West and Pinhey, JJ., who referred it to a Full Bench with the following remarks:—

WEST, J.—The plaintiffs' mortgage in this case is dated 1st July, 1870. The property mortgaged was sold in execution of a money decree on the 24th July, 1872. The certificate of sale was not taken out until 29th January, 1873. It was registered on the 5th February, 1873. In the meantime the plaintiffs, on the 23rd November, 1872, had instituted a suit against the defendants and the judgment-debtor to enforce their mortgage. Upon this state of facts, the District Judge has decided that, as the mortgage-deed was and is unregistered, it cannot prevail against the sale which has been registered. The contention for the plaintiffs now is that the defendants purchased the property subject to their claim, that the registration of their mortgage was optional, its amount being under Rs. 100, and that their suit having been instituted before the certificate of sale was obtained, that certificate conveyed no right that was not subject to such a right as they might be able to establish against the judgment-debtor and the mortgaged property.

It was said in the case of *Mathuradas* v. *Kalia Khushal*[1] by Sir R. Couch that there is an essential difference between a sale

(1) 7 Bom. H. C. Rep. 24.

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in execution and a private sale by the judgment-debtor, and that a purchaser at an execution sale buys the right of the judgment-debtor burdened with all valid liens created by him. This decision was followed in the case of *Chintaman* v. *Shivram*[1] and in Special Appeal 289 of 1873, decided 15th September, 1873. In the case of *Mathuradas* v. *Kalia Khushal* neither the mortgage nor the certificate of sale was registered: in *Chintaman* v. *Shivram* both were registered. The registration of the mortgage in the latter case might perhaps have afforded a sufficient basis for the decision, but the learned Judges prefer to adopt the principle that charges valid against the judgment-debtor are valid against the auction-purchaser with or without notice. On the other hand, the Privy Council, in *Anundo Moyee Dossee* v. *Dhonendro Chunder Mookerjee*[2], say: "Their Lordships think that the title of a judgment-creditor or a purchaser under a judgment (and) decree cannot be put on the same footing as the title of a mortgagor..... The possession of a purchaser under such circumstances is really not the possession of a person holding in privity with the mortgagor, or holding so as to be an acknowledgment of the title of the mortgagee..... Their Lordships are assuming that no notice was proved of the mortgage title given to or acquired by the purchaser." In the recent case, again, of *Brojendro Coomar Roy* v. *The Chairman of the Dacca Municipality*[3], Sir R. Couch says "It cannot be laid down that a person who purchased at a sale by auction in execution of a decree.....is not to be considered in the position of a purchaser for value."

These judgments seem hard to reconcile with the view hitherto taken by this Court, which has rested on the judgment of Sir R. Couch already referred to and those delivered in *Dhondu* v. *Ramji*[4] by Tucker and Gibbs, JJ.

The District Judge has considered that the question of notice was immaterial in this case; but if the position of a purchaser in execution is to be put on the same footing as that of an ordinary purchaser for value, the question of notice at once becomes important. The ordinary doctrine of the English Courts, as indi-

(1) 9 Bom. H. C. Rep. 304.
(2) 14 Moore's Ind. Ap. at p. 111.
(3) 20 Calc. W. Rep. 223.
(4) 4 Bom. H. C. Rep. 114.

cated by the language of the Privy Council already quoted and the case of *Le Neve* v. *Le Neve* and those collected under it in White and Tudor's Leading Cases, seems to be that notice, actual or constructive, of an equitable right in property must be brought home to the purchaser in order to infect his title. There must, at least, have been something to put him on inquiry, and something, as the Privy Council say in *Ramcoomar* v. *McQueen*[1], of a specific character suggesting a particular inquiry. But with respect to the case of a *san*-mortgage, such as that which the plaintiffs here set up, Sir M. Westropp, C. J., in *Girdhar* v. *Hakamchand*[2] says that the onus of proving he had no notice of an existing *sankhat*, lies on the purchaser of the mortgaged property by a private contract. This may imply that the special position of mortgagee under a *san*-mortgage is such as to shift the onus as to proof of notice from him to the purchaser. The contention in the present case is that, even if the vendees at an execution sale are to be deemed purchasers for value, it still rests on them to prove that they bought without notice of the plaintiffs' mortgage.

The District Judge considered that this case was to be distinguished from that of *Mathuradas* v. *Kalia*[3] by the circumstance that here the certificate of sale was registered, while in the earlier case it was not. Section 50 of the Registration Act XX of 1866, he says, provides that the registered sale shall take effect against the unregistered prior mortgage, though the registration of both was optional. Against this it is argued that no right was fully acquired by the defendants until the certificate was issued to them (Special Appeal 255 of 1873), and, before that occurred, the plaintiffs had instituted their suit to enforce their mortgage-lien. Hence it is contended that the final transfer to the defendants of the judgment-debtor's rights was encumbered with any charge which in their then pending suit the plaintiffs could establish against the property, which suit could proceed as well upon an unregistered as on a registered mortgage. If the purchase by the defendants had been a transaction wholly subsequent to the institution of the plaintiffs' suit, this contention would apparently

(1) 4 Beng. L. R. 54. (2) 8 Bom. H. C. Rep. 75.
(3) 7 Bom. H. C. Rep. 24.

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be unanswerable. The result of the *lis pendens*, according to the decision in Special Appeal 406 of 1872 and the decisions in the *Land Mortgage Bank* v. *Ram Rutton Neogy*[1] and *Raj Kishen Mookerjee* v. *Radha Madhub Holdar*[2] would bind the property in the hands of its purchasers, the defendants. But here the case is somewhat different. The defendants had agreed to buy and had paid for the property before the present suit was instituted. All that remained to do was to take out the certificate of sale. Equity would, in such circumstances, regard the purchasers as the real owners, although a conveyance had not been made to them; so, to some extent, did the plaintiffs by suing them; and mere notice intermediately acquired by them of some prior dealing with the property, which, as against the judgment-debtor, would have affected the good faith of his sale to them, would not, according to the case of *Blackwood* v. *London Chd. Bank of Australia*[3], prevent the purchasers from getting a complete legal title if they could. According to this analogy, the defendants here might complete their inchoate title, if *bona fide* acquired, notwithstanding the institution of the suit, supposing the institution of the suit operated only as notice of the plaintiffs' claim. But if the suit would ordinarily operate on the property itself so as to bind it prospectively with any right which might be established in that litigation, then a somewhat nice question arises. The Roman law (Mackeldey, s. 200) regards property in suit as *res litigiosa* incapable, during the pendency of the litigation, of alienation or of longer possession in good faith. This, however, is not inconsistent with rights, already equitably acquired, being formally completed during the litigation. The English maxim is merely *pendente lite nihil innovetur*, and its purpose to prevent proceedings being made abortive by conveyances made in order to evade decrees. It cannot, I think, be reasonably said that the completion of the inchoate sale by taking the certificate is an innovation—a right newly created or attempted to be created, the recognition of which would enable a defendant to cheat a plaintiff of the fruits of his proceedings. Whatever rights the sale, the certificate, and the registration of the certificate could convey to the defendants in this case, apart from the institution of the suit

(1) 21 Calc. W. Rep. 270. (2) 21 Calc. W. Rep. 249.

(3) L. R. 5 P. C. 92.

on the mortgage, are not, therefore, in my view, any the less conveyed through its institution.

We are thus brought back to the questions—(1) whether a purchase in execution, without notice, of property mortgaged by a *sankhat* optionally registrable, unregistered and without possession, is subject to the mortgage.

If not subject, (2) whether the burden rests on the auction-purchaser of proving that he had not notice of the mortgage, or on the mortgagee of proving actual or constructive notice.

If otherwise subject, (3) whether the purchaser, who registers his certificate of sale, thus acquires a title free from obligation arising from the mortgage.

These questions are of great practical importance; and, as different views have been expressed as to the principles on which their solution depends, I think it desirable that they should be referred to a Full Bench.

PINHEY, J.—I concur in this reference.

The authorities cited before the Full Bench are mentioned in their judgments.

Shantaram Narayan for the appellants.

Nagindas Tulsidas for the respondents.

The following are the judgments of the Full Bench :—

WESTROPP, C.J.—The plaintiffs sue to enforce an unregistered *san*-mortgage of the 1st July, 1870, for Rs. 99-4-0 against the lands thereby mortgaged by the first and second defendants to Gulabchand, the deceased father of the plaintiffs. That mortgage being for a sum less than Rs. 100, was, under Act XX of 1866, sec. 18, optionally registrable, and being a *san*-mortgage was without possession. The third defendant Rupchand resisted the enforcement of the plaintiffs' mortgage against the lands, on the ground that he (Rupchand) was a purchaser of those lands for valuable consideration and without notice of the mortgage. His purchase was made at a judicial sale of the right, title and interest of the mortgagors in the lands on the 24th July, 1872. The purchase-money was Rs. 77. The certificate of sale was not prepared or furnished to Rupchand until subsequently to the

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23rd November, 1872, on which day the plaintiffs commenced their present suit. The registration of the certificate was upon the 5th of February, 1873. A question arose in the Division Court (West and Pinhey, JJ.) as to whether the issuing and registration of the certificate, being subsequent to the commencement of this suit, could affect it[1], but that question is not amongst those submitted to this Full Bench. For the purpose, however, only of answering the questions which are submitted to us by the Division Bench, the view which we take of the case admits of our assuming that the date of the certificate of sale and its registration are not open to objection in point of time.

Those questions are: (1) "whether a purchase in execution, without notice, of property mortgaged by a *sankhat* optionally registrable, unregistered and without possession, is subject to the mortgage. If not subject, (2) whether the burden rests on the auction-purchaser of proving that he had not notice of the mortgage, or on the mortgagee of proving actual or constructive notice. If otherwise subject, (3) whether the purchaser, who registers his certificate of sale, thus acquires a title free from obligation arising from the mortgage.

In the recently decided Full Bench case, *Lakshmandas* v. *Dasrat*[2], the general rule in this Presidency, that, amongst Hindus, possession is necessary to perfect a transfer of immoveable property by mortgage or deed of sale as against subsequent incumbrancers or purchasers, is discussed. Many, if not all, of the exceptions to that rule are there mentioned—the first of those exceptions being *san*-mortgages in the province of Gujarat; and the following cases are mentioned in illustration of that exception:—*Jiva* v. *Mobhut*[3]; *Bhagvan* v. *Virchand*[4]; *Dulpatram* v. *Amritlal*[5]; *Dulpatram* v. *Kishore*[6]; *Mathuradas* v. *Kalia*[7]; *Itcharam* v. *Raiji*[8]; *Ranchoddas* v. *Ranchoddas*[9]; Special Appeal 618 of 1870[10]. It must be regarded as the established and judicially recognized custom of Gujarat that posses-

(1) See *Carlisle* v. *Whaley*, L. R., 2 Eng. and Ir. Appeals, 391.
(2) *Supra*, p. 168.
(3) Morris, Part II, 117.
(4) 8 Har. 177.
(5) 8 Har. 179.
(6) 8 Har. 181.
(7) 7 Bom. H.C. Rep. 24, A.C.J.
(8) 11 Bom. H. C. Rep. 41.
(9) I. L. R. 1 Bom., 581.
(10) Printed Judgments of 1873, April 24th.

sion is not necessary in the case of a *san*-mortgage to validate it as against subsequent mortgagees or purchasers. This being so, it must be remembered that the main ground of the general rule as to the necessity of possession is that it is notice to all subsequent intending mortgagees or purchasers of the title of the party in possession; and whereas in the case of *san*-mortgages the necessity of possession is dispensed with, it seems to follow that a *san*-mortgage, in other respects good, is valid as against a subsequent mortgagee or purchaser, whether or not such mortgagee or purchaser has notice of the *san*-mortgage. To hold that a subsequent mortgagee or purchaser for valuable consideration and without notice of a *san*-mortgage is entitled to priority over it, would be tantamount to depriving the *san*-mortgagee of the benefit of the custom that possession is not necessary to validate such a mortgage against subsequent mortgagees or purchasers. We, therefore, think that the first question referred to this Full Bench, viz., "whether a purchase in execution, without notice, of property mortgaged by a *sankhat* optionally registrable, unregistered and without possession, is subject to the mortgage," must be answered in the affirmative. So far as the case of *Girdhar* v. *Hakamchand* [1] implies the contrary, we think that it cannot be sustained.

The answer to the first question being in the affirmative, the second question relating to the onus of proof as to notice does not arise.

The third question is, "whether the purchaser, who registers his certificate of sale, thus acquires a title free from obligation arising from the mortgage." The impression that the Registration Acts were intended as much for the benefit of purchasers at judicial sales as for mortgagees or private purchasers, and that it was advantageous that this should be so, not only for the protection of purchasers at judicial sales, but also to judgment-creditors and judgment-debtors, as being conducive to the production of a fair price for the property, led me to concur in the judgment in *Makandas* v. *Shankardas* [2]. But on reconsideration I do not think that the registered deed of sale to Shankardas Dadabhai in that case, which rested on a previous judicial sale to

(1) Bom. H. C. Rep., 75, A. C. J. (2) 12 Bom. H. C. Rep., 241.

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Kalidas under a mere money decree, was rightly preferred to the unregistered *san*-mortgage to Shankardas Haribhai, which bore date before the judicial sale to Kalidas. Kalidas could not convey to Shankardas Dadabhai more than the Court had conveyed to Kalidas. When the Court sells the right, title and interest of a judgment-debtor in property, we think that it cannot be regarded as selling more than the judgment-debtor could himself honestly sell. He could honestly sell only subject to any equities existing against himself on the property; and if, by concealment of a *san*-mortgage, or other mortgage, he sold property as free of that charge, he would commit a fraud. The Court cannot be deemed to do that which would be a fraud if done by the judgment-debtor. If, then, the Court sell only the right, title and interest of the judgment-debtor subject to all existing equities against the property sold, the registration of the Court's conveyance (the certificate of sale) cannot enlarge the scope of that conveyance, and thus discharge the property from any unregistered incumbrance which was binding on the judgment-debtor. The case of *Mathuradas* v. *Kalia*[1] is not in point here, neither the mortgage nor the certificate of sale there having been registered. Nor is *Chintaman* v. *Shivram*[2], both the mortgage and the subsequent certificate of sale in that case being registered, and the registration of the mortgage being sufficient to uphold the preference shown to it over the certificate of sale. *Lakhmichand* v. *Kastur*[3] is in point; the deed of private sale there being unregistered, and the subsequent certificate of judicial sale being registered. The deed of private sale was nevertheless preferred; the Court being of opinion that the purchaser at the judicial sale purchased subject to all existing equities which would bind the judgment-debtor. That decision seems to us to be strongly supported by the somewhat analogous cases decided on the English Statute 1 and 2 Vic., c. 110, s. 13, and the similar Irish Statute 3 and 4 Vic., c. 105, s. 22. Of these cases, *Whitworth* v. *Gaugain*[4] deserves particular attention. There Wigram, V. C., held that, notwithstanding the Statute 1 and 2 Vic., c. 110, s. 13, an equitable mortgagee retains his right in equity to enforce his security against

(1) 7 Bom. H. C. Rep., 24, A. C. J.

(2) 9 Bom. H. C. Rep., 304. (3) 9 Bom. H. C. Reps, 60.

(4) 3 Hare 416: S. C. on appeal, 1 Phillips, 728.

the title of a creditor under a subsequent judgment, although the latter may have acquired the legal seisin and possession of the land under an elegit without notice of the mortgage. The judgment of Lord Lyndhurst on appeal (when the decision of Wigram, V.C., was affirmed) is especially instructive[1]. After mentioning that an equitable mortgage gives a special lien on the property, he says: "A judgment has relation to the time when it is entered up. It will not affect any *bona-fide* conveyance for value before that time, for it only attaches upon that which is then, or afterwards becomes the property of the debtor. But the rule is not confined to his property at law. If it is charged in equity before the entry of the judgment, the judgment will not affect such charge." It can only attach upon the interest which remains in the debtor, viz., the legal estate subject to the equitable charge. After mentioning some cases in equity he continued: "If such, then, be the effect of the judgment, how does the elegit operate? By Statute 13, Edw. I, c. 18 'when a debt is recovered, the Sheriff shall, at the election of the plaintiff, deliver to him all the chattels of the debtor, and a moiety of the land, until the debt be levied by a reasonable extent.' The land of which a moiety is to be delivered is the land that is bound by the judgment. The judgment and the writ are in this respect co-extensive. If that is so in law, it is equally so in equity. The equitable interests which prevail against the judgment, prevail equally against the writ." After pointing out that the same rule holds in the case of an extent against the goods of a debtor to the Crown, he proceeded to say that "in the argument on the part of the defendant, the case was put upon the footing of a purchaser for value without notice, who would be preferred to a prior equitable mortgagee. But a distinction in this respect has always been made between a judgment obtained without notice of a previous charge and a purchase on mortgage." He refers (*inter alia*) to the following passage in the *Forum Romanum*: "In the case of a judgment-creditor the original security was only personal, and a Court of Equity will not suffer the person that originally lent upon the security of land to have the security destroyed by one who did not lend upon that security." He next referred to the Statute 1 and 2

(1) 1 Phillips, 728.

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Vic., c. 110, which enables the Sheriff to deliver to the judgment-creditor the whole instead of a moiety of the land of the debtor, and observes: "But though the operation of the writ (of elegit) is rendered more extensive against the property of the debtor, it does not appear that the equitable interests in the property, so taken in execution, are affected by the Act, or that the law in this respect has been varied." Referring to the 13th section as enacting that a judgment shall operate as a charge on lands, &c., to which the debtor shall at the time of entering up the judgment or at any time afterwards be entitled for any estate or interest whatever in law or equity, or over which he shall have an unfettered power of disposing for his own benefit, and that the judgment-creditor shall have the same remedy in a Court of Equity against the property so charged as if the charge had been made by an agreement in writing. Lord Lyndhurst says: "The effect of this Statute is not only to make the judgment attach upon the property which was not before bound by it, but also to give it the force of an express charge. With respect to the former proviso, although the judgment may affect a greater extent of property belonging to the debtor, there is nothing to vary the rule as to the equities to which the property may be liable. The whole beneficial interest of the debtor is bound, not the beneficial interest which a stranger may have in the property." In *Abbott* v. *Stratten*[1], Sir Edward Sugden also expressed his approval of Vice-Chancellor Wigram's decision in *Whitworth* v. *Gaugain*. The case of *Watts* v. *Porter*[2], so far as the opinion of the majority of the Court of Queen's Bench was concerned, (Erle, J., *dissentiente*) looked in the opposite direction, but it has been overruled—*Pickering* v. *Ilfracombe Railway Co.*[3]; *Robinson* v. *Nesbitt*[4]; *Beavan* v. *Lord Oxford*[5]; *Kinderley* v. *Jervis*[6]. In *Eyre* v. *McDowell*[7], an important and well-argued case, it was held by the House of Lords that a registered judgment under the provisions of the Statute 3 and 4 Vic., c. 105, and the Statute 13 and 14 Vic., c. 29 only affects such property as the debtor at the time

(1) 3 Jo. & Lat. 603, 614, 615. See also *Meghji* v. *Ramji*, 8 Bom. H. C. Rep., 169, A. C. J.

(2) 3 E. & B. 743.

(3) L. R., 3, C. P. 235.

(4) L. R., 3, C. P., 264.

(5) 6 D., M. & G., 492.

(6) 22 Beavan, 1.

(7) 9 Ho. of Lords Ca., 619, 620.

of the judgment lawfully possessed as of his own right, and over which he had the power of disposition, and, therefore, does not displace a previous mortgage which is unregistered. And in *Evans* v. *Evans*(1), it was held by Lord Chancellor Blackburne in the Court of Chancery in Ireland that a judgment is not, as against the lands of the judgment-debtor, entitled, under the Statutes 10, Car. I, Sess. 2, c. 3 Ir. and 3 and 4 Vic., c. 105, to priority over a voluntary conveyance of anterior date executed by the judgment-debtor when not in embarrassed circumstances.

For these reasons we think that the third question must be answered in the negative.

Reverting to the first question, we should observe that two Privy Council cases were relied upon at the Bar as showing that there is no distinction between a private purchaser and a purchaser at a judicial sale. Of these *Raja Enayet Hossain* v. *Girdhari Lall*(2) was one. There the question was one of limitation; and what their Lordships said was that there was as to limitation no distinction *in favour of* the purchaser at a judicial sale between his right and that of a private purchaser, and in this remark they were simply expressing their disapproval of the view of the High Court of Calcutta, that, although the suit of a private purchaser might have been barred by lapse of time, the suit of a purchaser at a judicial sale was not so barred. In the second case, *Anundo Moyee* v. *Dhonendro*(3), the Privy Council held that the possession of a person who purchased at a Court sale in execution of a decree against a mortgagor is an adverse possession, inasmuch as such purchaser claims to be the owner of the whole estate whether he be so or not, and that, consequently, a suit against such a purchaser is barred after twelve years. Neither of these cases seems to us to bear upon the present question.

On the other hand, the view taken by the Privy Council in *Radanath Doss* v. *Gisborne*(4) as to who is a *bonâ fide* purchaser for valuable consideration within section 15 of Act XIV of 1859, and the remarks there of Lord Cairns as to what

(1) 2 Ir. Ch. Rep., 232.

(2) 12 Moore, Ind. App., 366.

(3) 14 Moore, Ind. App., 101.

(4) 14 Moore, Ind. App., 1.

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are the indispensable averments in a plea of purchase for valuable consideration without notice tend strongly to show that their Lordships would hold that a purchaser at an ordinary judicial sale under Act VIII of 1859 under a mere money decree could not be regarded as a *bonâ-fide* purchaser of an absolute interest without notice, and could not truly make the averments requisite for a plea that he was so.

With the answers which we have given to the questions of the Division Bench, this case must stand remitted to that Court for final disposal.

KEMBALL, J.—I concur.

MELVILL, J.—I concur in this judgment, and wish only to add a very few words.

It is clear that the plea of purchase of valuable consideration without notice will not prevail against a *san*-mortgage in Gujarat. But, in saying this, I wish to guard myself against the inference that the same plea will prevail against a prior mortgage elsewhere. It is not necessary to decide that question now; and I will, therefore, only say that such perfect security is now afforded by registration that there appears to be hardly room for the plea of purchase without notice. If relief is to be given upon that ground in this country, it must be given, not on account of any distinction between a legal and equitable estate (see Phear J.'s observations at page 408, Volume VIII, Calcutta Weekly Reporter), but because the innocent purchaser is supposed to have been the victim of fraud on the part of the vendor, and of laches on the part of the prior incumbrancer, who might have taken possession or registered his mortgage-deed, and so have given notice of his incumbrance. But, seeing that the purchaser may secure himself against all unregistered mortgages without possession by simply taking possession or registering his conveyance, he is, if he omit to do so, *in pari delicto* with the prior mortgagee, and it is difficult to see how he is entitled to any relief.

I have been a party to several decisions in which it has been held that, whatever may be the case with a private purchaser, a purchaser at a Court sale takes the estate subject to all existing liens, whether he has had notice of them or not. A Court sale is only a

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process by which a Court does for a debtor what he is bound to do for himself,—*i. e.*, to sell his property in order to pay his debts. If he did this for himself, he would be bound to protect the rights of prior incumbrancers; and the Court, which acts for him, is equally bound to do the same. Under the former Civil Procedure Code, Act VIII of 1859, there was no inquiry into title, and the law expressly ordered warning to be given to the purchaser that he purchased nothing more than the right, title, and interest of the judgment-debtor, whatever it might be at the time. Under the present Code, Act X of 1877, there is some investigation of title; but, while this investigation may enable the Court to give some information to purchasers, it is not of such a character as to render it possible for the Court to guarantee the title, and, consequently, the High Court has, in the rules made by it under section 287 of Act X of 1877, provided for notice being given to purchasers that the sale only extends to the right, title, and interest of the judgment-debtor, and that the Court ordering the sale does not warrant the title. This being so, it seems perfectly clear that a person who buys an avowedly doubtful title, and pays for it on that understanding, cannot claim to be a purchaser for value without notice. As was said by Lord Cairns in *Radanath Doss* v. *Gisborne*(1) : "An allegation or a plea of a purchase for value is perfectly well known and understood, and the averments in such a plea are not matters of technicality; they are matters of substance. In pleading a purchase for valuable consideration in this country, the very first averment in the plea is that the *person selling either was seized, or alleged that he was seized, for an absolute title;* and then the plea goes on to say that, being so seized, or alleging that he was so seized, *he contracted to sell and did sell and convey that absolute title, asserting it to be such,* to the purchaser *who paid his money for that which was thus sold.*"

I may add that, if an execution purchaser were treated as a purchaser for value without notice, a person who had created a mortgage on his estate, and who could not therefore, sell his estate, as unincumbered, without exposing himself to a prosecution for cheating under the Penal Code, might, by confessing

(1) 14 Moore's Ind. Apps., 1, at p. 17 of the Report.

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judgment and having the estate sold by the Court, be able to get rid of the mortgage, and obtain the full price of an unincumbered estate.

I am glad that my decision in *Lakhmichand* v. *Kastur*,(1) which was dissented from in *Makandas and another* v. *Shankardas* (2), has been rehabilitated by the judgment which has been just delivered. The Registration Acts provide that a registered document shall take effect, as regards the property comprised therein, against every unregistered document relating to the same property. It seems clear that provision can only apply to cases in which the property conveyed by the two documents is the same, or in which the property conveyed by one document includes the property conveyed by the other. In other words, it applies where the documents are antagonistic, but not where effect can be given to each, without infringement of the other. Thus, if A mortgage his estate to B, and afterwards sell the same estate to C, C may, by registering his conveyance, get rid of the unregistered mortgage; but he cannot do so if his conveyance is, in terms, only a conveyance of the equity of redemption; for then the estate given to B and the estate given to C are separate and distinct, and can exist together. So, if A mortgages or sells to B, and afterwards C purchases at a Court sale the then existing right, title, and interest of A, C buys in the one case the equity of redemption, and in the other case nothing at all. Registration, therefore, cannot help him; for, on the very face of his certificate of sale, the property comprised therein is not the property previously conveyed to B, but only the residue of A's estate after such conveyance.

On the return of the case, the Division Bench (Melvill and Pinhey, JJ.,) on the 3rd March, 1882, reversed the decrees of the Courts below, and made a decree in favour of the plaintiffs for the amount claimed, to be recovered from defendants 1 and 2 personally and from the mortgaged property, with interest at 6 per cent. from the date of suit until payment, and directed defendant No. 3 to bear all the plaintiff's costs throughout.

Decrees reversed.

(1) 9 Bom. H. C. Rep., 60. (2) 12 Bom. H. C. Rep., 241.