1885.

THE MANOCKJI PETIT MANUFACTURING COMPANY, LIMITED, *v.* THE MAHÁLAXMI SPINNING AND WEAVING COMPANY, LIMITED.

"No. 20 red tie" yarn with the devices or marks complained of, other than as in paras. 2 and 3 of the written statement admitted. (2) That there is no proof that any of the defendants' "No. 20 red tie" yarn has been sold in Madras as and for the plaintiffs' "No. 20 red tie" yarn. (3) That the plaintiffs are entitled to the sum of Rs. 3,110 in excess of the sum of Rs. 1,000 paid in Court. (4) That the plaintiffs are entitled to a decree as follows, *viz.* :—that an injunction do issue in terms of para. (*b*) of prayer of plaint, and that the defendants do pay to the plaintiffs the sum of Rs. 3,110 in addition to the sum of Rs. 1,000 paid into Court, which the plaintiffs will be at liberty to draw out, and the costs of this suit, including the costs (if any) reserved.

Attorneys for the plaintiffs :—Messrs. *Craigie, Lynch, and Owen.*
Attorneys for the defendants :—Messrs. *Tyabji and Dayábhái.*

ORIGINAL CIVIL.

Before Mr. Justice Farran.

1886. *September* 3.

JAITHA' BHIMA' AND ANOTHER, (PLAINTIFFS), *v.* HA'JI ABDUL VYAD OOSMA'N, AN INSOLVENT, AND C. A. TURNER, OFFICIAL ASSIGNEE, (DEFENDANTS).*

Mortgage—Equitable mortgage by deposit of title-deeds—Legal mortgage unregistered—Claim by mortgagee, who has failed to register mortgage-deed, to have an equitable mortgage by virtue of deposit of title-deeds previously to execution of mortgage-deed.

The plaintiff having consented to lend Rs. 10,000 to the defendant, the latter deposited with him, on the 2nd April, 1883, the title-deeds of a certain property. On receiving them the plaintiff told the defendant that he would take them to his attorney, have a deed drawn up, and then advance the money. The defendant applied to the plaintiff for the money before the deed was prepared, but the plaintiff refused, saying he would not advance the money until he was satisfied by his attorney, and the deed had been prepared. At the time the deeds were handed over to the plaintiff, (*i.e.*, the 2nd April, 1885), there was no existing debt due by the defendant to the plaintiff. On the 6th April, 1885, the mortgage-deed was executed, and on the same day the money was advanced by the plaintiff to the defendant. The plaintiff stated that he "had advanced the money on the security of the title-deeds on the same day." He did not say how long before the execution of the deed the money had been paid, but the deed itself recited that the Rs. 10,000 were paid immediately before the execution

*Suit No. 210 of 1885.

of the mortgage. The mortgage-deed was not registered. The plaintiff stated that he knew that it required registration, but that it was left unregistered at the request of the defendant, who did not wish to be "exposed in the eyes of the public."

The plaintiff sued for a declaration that he was entitled to an equitable mortgage upon the said property and for the sale thereof, in default of the payment of the mortgage-debt. He contended that the loan had been made on the security of the title-deeds which had been deposited on the 2nd April; that he had, no doubt, intended to obtain a legal mortgage, but that he had abandoned that intention by consenting to leave the mortgage-deed unregistered, and had, on the 6th April, elected to rely upon his equitable mortgage.

Held, that the plaintiff had no equitable mortgage. At the time when the deeds were deposited, there was no antecedent or existing debt, nor was any oral agreement made, that the title-deeds should stand as a security for future advances, nor was any advance, in fact, made until the mortgage-deed was about to be executed. There could be no doubt, that if the defendant had not been ready to execute the deed, no advance would have been made. The money was really advanced on the security of the mortgage-deed, though, at the time the money was advanced, the plaintiff had the title-deeds in his possession.

SUIT to have it declared, that the plaintiffs were entitled to an equitable mortgage on certain property of the first defendant, Háji Abdul Vyad Oosmán, for the sum of Rs. 10,000, and interest, and, in default of punctual payment thereof, for the sale of the said property.

The plaintiffs alleged that on the 2nd April, 1883, they agreed to lend the defendant Rs. 10,000 on the security of certain land situate at Mándvi, in the town of Bombay; and, on the 6th April, the plaintiffs made the said advance to the defendant on the title-deeds of the said property being deposited with them by way of equitable mortgage.

The plaint further stated that, "subsequently, the plaintiffs took from the defendant, as an additional security, a mortgage writing, dated the 6th April, 1883; that the said mortgage writing was, however, by mutual consent, allowed to remain unregistered, as both the plaintiffs and defendant considered that the equitable mortgage, which the plaintiffs held, was sufficient to cover the plaintiffs' claim."

The first defendant became insolvent on the 18th March, 1884, and his property vested in the second defendant as Official Assignee.

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The following paragraphs of the plaint set forth the defence set up by the second defendant, as assignee of the estate of defendant No. 1 :—

"(6) The said defendant, C. A. Turner, does not dispute the *bona fides* of the aforesaid transaction, nor does he dispute that the said sum of Rs. 10,000 was *bonâ fide* lent and advanced by the plaintiffs to the said defendant, Abdul Vyad ; but nevertheless the said defendant, C. A. Turner, contends that the plaintiffs have lost their right, or are not now entitled to any equitable mortgage, on the said property, owing to the aforesaid mortgage writing not having been registered.

"(7) The plaintiffs, however, contend that the aforesaid mortgage writing is quite independent of, and does not affect, the equitable mortgage in favour of the plaintiffs."

The plaintiffs prayed for a declaration as above stated, and for sale of property in default of payment of their claim.

The second defendant, (the Official Assignee), filed a written statement, in which he denied that the loan made to the first defendant by the plaintiffs was on the security of the title-deeds. He alleged that, prior to the actual advance of the money, the title-deeds had been handed to the plaintiffs, in order that a legal mortgage might be prepared ; and that it was upon a legal mortgage that the plaintiffs proposed to lend the money ; that, at the time the deeds were handed to the plaintiffs, no money was, or had been, lent to the first defendant ; that the plaintiffs refused to advance any money without a legal mortgage ; and that no money was advanced until what purported to be a legal mortgage was executed, which was the mortgage writing mentioned in the plaint.

The second defendant contended that the plaintiffs had no equitable mortgage on the property in question.

The Official Assignee, (defendant No. 2), under section 36 of the Indian Insolvent Act, (Stat. 11 & 12 Vic., cap. 21), obtained an order for the examination of the plaintiff, Jaithá Bhimá, before the Commissioner of the Insolvent Court. On the 25th March, 1885, the examination took place, and the plaintiff stated the circum-

stances under which the loan was made to the first defendant. From the evidence given, it appeared that the first defendant had applied to the plaintiffs for a loan, and that the plaintiffs refused to advance it until they were satisfied as to the security. Accordingly, the title-deeds were handed over to them by the first defendant on the 2nd April, 1883. The plaintiffs then had the deeds examined and approved by a solicitor. The money was paid on the 6th April, 1883; and on that day the "mortgage writing" was executed. The plaintiffs stated that this "mortgage writing" had been intentionally left unregistered, the first defendant having requested them not to register it, lest he (the first defendant) "should be exposed in the eyes of the public."

The following is the material part of the plaintiff's evidence:—

"I have got the mortgage-deed. It was executed by the insolvent in my favour. I produce it. It is dated the 6th April, 1883. It is to secure the repayment of Rs. 10,000 advanced to the insolvent on the security of the title-deeds of a house.

"We obtained this mortgage-deed on the day it is dated; but we had advanced money on the security of the title-deeds on the same day.

"The title deeds had been deposited a few days previously.

"When the title-deeds were deposited with me, I told him (the insolvent) I would go with him to my attorney, have a deed drawn up, and then advance the money.

"He applied to me for the money before the deed was drawn, but I refused; and said I would not advance the money till I was satisfied by my attorney, and the deed had been prepared.

"This mortgage-deed was not registered, as the party himself told me not to get it registered, for fear of his being exposed in the eyes of the public."

* * * * * * * * * *

"I never intended to pay any money to the insolvent without taking the title-deeds.

"It was agreed, from the first, that the title-deeds should be deposited with me.

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"Accordingly, the title-deeds were deposited with me four days before the money was advanced.

"I had the title-deeds examined by Hormasji Merwánji Vakil. I was satisfied that the deeds showed a good title in the insolvent. Being satisfied, I paid the money. In addition to the deposit of the title-deeds, I took what I considered a good mortgage.

"In taking that mortgage-deed, I did not intend to waive my right to the title-deeds."

"*Question* :—Was it not your object to take additional security, and not to weaken any security you had already got ?

"*Answer* :—Yes. I knew that the deposit of title-deeds was a good security.

"I knew that a mortgage-deed required registration.

"When I consented not to register the mortgage-deed, I did not, in any way, weaken the equitable security I had by the deposit of the deeds.

"I got the deeds, and have the same, all of them, and have had ever since.

"Insolvent never disputed my title.

"I decline to part with the deeds unless I am paid the money."

* * * * * * * * * * *

By agreement the above evidence was read as evidence in this suit.

P. M. Mehtá (with *B. Tyabji*) for the plaintiffs :—We claim to have an equitable mortgage on the property. The deeds were deposited with us by the first defendant on the 2nd April, 1883, in order that we might be satisfied that we had a good security for the loan. Having satisfied ourselves on that point, we advanced the loan on the 6th April, 1883. The plaintiffs' evidence is uncontradicted, that he made the loan on the security of the title-deeds. No doubt he intended to get a legal mortgage, but that intention was deliberately abandoned ; for he says it was agreed that the writing should not be registered, and he knew that registration was necessary. But the fact of having agreed to

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go without that security, does not deprive him of the equitable security on which he relied.

[FARRAN, J.:—What you have to show, is that the money was advanced on the security of the title-deeds. Now, at the time of the deposit on the 2nd April, no money was advanced. The loan was not made until the 6th April, when the writing was executed. You argue that there were two transactions—first an equitable mortgage by deposit, and then the execution of the legal document. But there seems to have been only one transaction of loan, namely, that on the 6th April.]

No. The evidence shows two transactions. The deeds were handed over on the 2nd April. The plaintiff on examination was satisfied with them, and on the 6th April agreed to keep them as security, and made the loan. This, in fact, amounted to a second deposit of the deeds. Then he also gets the writing; but that is a separate matter.

[FARRAN, J.:—If your argument is good, every mortgagee, who has an invalid legal mortgage, can fall back on his equitable mortgage if he has retained the deeds.]

Every case must stand by itself. Here our evidence as to the circumstances of the deposit proves an equitable mortgage. The Court can accept that evidence, although the mortgage-deed is inadmissible in evidence—White and Tudor's Leading Cases, Vol. I. (ed., 1877,), p. 734; *Hiern* v. *Mill*[1]. The presumption of an equitable mortgage arises from the mere deposit of title-deeds for the purpose of preparing a legal mortgage—White and Tudor (ed., 1877), Vol. I, p. 733.

[FARRAN, J.:—Yes. But that is where a debt exists at the time of the deposit. Where there is an antecedent debt, the Court presumes that a deposit of title-deeds is intended as security for that debt. Here, however, at the time the deeds were handed to the plaintiff, there was no debt due by the first defendant to him. Can we make any presumption where the deposit comes first, and the loan afterwards?]

We have not to depend on a presumption here, for we have uncontradicted oral evidence of plaintiff as to the circumstances.

(1) 13 Ves., 114.

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Inverarity (with *Macpherson*) for the second defendant (the Official Assignee) :—The loan was made, not upon an equitable mortgage, but upon the security of a legal mortgage, or what was intended to be one. The real contract is contained in the legal mortgage-deed of the 6th April, 1883, which is unregistered, and, therefore, cannot affect any interest in immoveable property. The document is inadmissible in evidence; and no other evidence can be admitted as to the terms of the contract—section 91 of the Evidence Act I of 1872. If no fresh evidence is admissible, then the plaintiffs must rely upon the mere possession of the title-deeds. But that is not sufficient evidence of an equitable mortgage—*Dickson* v. *Muckleston*(1); *Ganpat Pándurang* v. *Adarji Dádábhái*(2).

A deposit of title-deeds raises a presumption of an equitable mortgage only when money has already been advanced; but where the advance is not made until the execution of the legal mortgage, a previous deposit of deeds, in order that a legal mortgage may be prepared, creates no equitable mortgage—*Dayál Jairáj* v. *Jivráj Ratansi*(3); *Bulfin* v. *Dunne*(4); Seton on Decrees (4th ed.), 1131; Coote on Mortgage (5th ed.), Vol. I., p. 343. Here the plaintiff says he refused to advance the loan until the legal mortgage was prepared. The legal mortgage is, therefore, the contract between the parties.

[FARRAN, J. :—Yes. But the difficulty here is that the Court cannot recognize that there was any legal mortgage. It is inadmissible.]

Yes, and that being so, there is no evidence to connect the deposit of the deeds with the advance of the money. Any oral evidence of it is excluded by section 91 of the Evidence Act I. of 1872. Moreover, the evidence shows that the money was advanced on the security of the unregistered document.

September 17. FARRAN, J. :—The plaintiffs in this case seek to have it declared, that they are entitled to an equitable mortgage on the property described in the plaint, to secure, with

(1) L. R., 8 Ch. Ap., 155. See page 162. (3) I. L. R., 1 Bom., 237.
(2) I. L. R., 3 Bom., 312. See page 329. (4) 11 Ir. Ch. R., 198.

interest, the sum of Rs. 10,000 advanced by them to the defendant, Abdul Vyad Oosmán, on the 6th April, 1883. The fact of the advance having been made, is not denied.

The defendant, Háji Abdul Vyad Oosmán, filed his petition in the Insolvent Court on the 18th March, 1884, and on that day a vesting order was made, by which all his property became vested in the second defendant, the Official Assignee; and it is against the latter, therefore, representing the general body of the creditors of the defendant, Háji Abdul Vyad Oosmán, that the declaration is now sought.

The contention of the plaintiffs is that they advanced the sum of Rs. 10,000 upon the deposit of the title-deeds of the premises in question; and that they subsequently took a legal mortgage of the property as a better or additional security for their advance. The legal mortgage has not been registered, and cannot, therefore, be relied upon as creating a charge upon the property.

That being so, they contend that they can fall back upon their equitable mortgage.

The defendant, the Official Assignee, contends that the plaintiffs advanced their money upon obtaining a document purporting to be a legal mortgage of the premises from Háji Abdul; but that this document was not registered, and that the plaintiffs, therefore, did not obtain, by its execution, a charge upon the premises; and that the plaintiffs have not, and never had, an equitable mortgage over them created by the deposit of title-deeds or otherwise.

The only evidence in the case consists of the examination of the plaintiff, Jaithá Bhimá, taken before the Commissioner of the Insolvent Court, which by consent was put in as exhibit B, owing to Jaithá Bhimá being absent from Bombay when the case came on; and the exhibits referred to in that evidence, namely, the mortgage-deed, exhibit C; and an entry from the plaintiff's books, exhibit D, and the correspondence which preceded the suit.

I transpose the evidence of Jaithá Bhimá, so as to bring it into accord with the sequence of events, and transcribe it, omit-

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ting the legal inferences which the witness drew at the suggestion of his counsel.

"It was agreed, from the first, that the title-deeds should be deposited with me. Accordingly, the title-deeds were deposited with me four days before the money was advanced. * * When the title deeds were deposited with me, I told him I would go with them to my attorney, have a deed drawn up, and then advance the money, and this I accordingly did. He applied to me for the money before the deed was drawn, but I refused, and said I would not advance the money till I was satisfied by my attorney, and the deed had been prepared. I had the title-deeds examined by Hormasji Mervánji Vakil. I was satisfied that the deeds showed a good title in the insolvent. Being satisfied, I paid the money. We obtained this mortgage-deed, exhibit C, on the day it is dated, but we had advanced money on the security of the title-deeds on the same day. On the same day, and in the presence of Hormasji Vakil, the money was advanced."

(The witness does not say how long before the execution of the mortgage the money was advanced; but the mortgage-deed recites that Rs. 10,000 were paid immediately before the execution of the mortgage.)

"The mortgage-deed was not registered, as the party himself told me not to get it registered, for fear of his being exposed to the eyes of the public. I knew that a mortgage-deed required registration. I consented not to register the deed. I got the deeds, and have the same, all of them, and have had ever since. At the foot of the deed, entries have been made of interest paid by insolvent. The last entry bears date 8th March, 1884. These entries are in the handwriting of Motilál, the *mẽhtá* of the insolvent. Motilál came and made the payment. That is all the interest that has ever been paid by the insolvent on the mortgage, *i. e.* for eleven months."

The further answers of the witness are these—

"I never intended to pay any money to the insolvent without taking the deeds.

"In addition to the deposit of the title-deeds, I took what I considered a good mortgage. In taking that mortgage, I did not intend to waive my right to the title-deeds. My object in taking that deed was to take an additional security, and to strengthen, and not to weaken, any security I had. I knew that the deposit of title-deeds was a good security. When I consented not to register the mortgage-deed, I did not, in any way, weaken the equitable security I had, by the deposit of the title-deeds. I decline to part with the deeds, unless I am paid the money."

Upon this evidence it is to be observed that nothing was said to the insolvent before, or at the time when, or after the money was advanced, to show that Jaithá Bhimá had changed his mind or intention from what it was when he told the insolvent that he would not advance the money till the deed was drawn up. Apart from the statement of Jaithá Bhimá as to his objects and intentions, the facts he proves are :—That the insolvent asked for a loan on the deposit of the title-deeds ; that Jaithá Bhimá refused to make any advance till the title was investigated and a mortgage-deed was prepared ; that the title-deeds were handed to Jaithá Bhimá for that purpose ; and that, when the mortgage-deed was ready, the mortgagor and mortgagee and the mortgagee's solicitor met, when the money was paid, and the mortgage-deed was executed immediately upon such payment. The deeds remained, as is usual, with the mortgagee.

The contemporaneous entry made by Jaithá Bhimá is a record of these facts, exhibit D. It is under date 6th April, 1883. "Debited to the account of Memon Háji Abdul, Rs. 10,000, on account thereof a house bearing No. 201, situated in Antári Mohlá, is mortgaged. The amount is a charge thereon. All the vouchers relating thereto are deposited with us, the interest, &c."

The question is, whether, under the above circumstances, the law implies an equitable mortgage upon the house by reason of the title-deeds having been given to the plaintiffs, and having been in their possession, when the money was advanced, and having remained in their possession ever since. Was an equitable mortgage ever, in fact, created ?

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No difficulty arises when title-deeds are deposited with the declared intention to secure an antecedent debt, or a present advance, or under circumstances such that the law will imply that they are so deposited; and subsequently the depositor of the deeds executes a legal mortgage, or other document of charge, which for want of registration cannot be given in evidence. The invalid legal mortgage or document charging the land does not, in such cases, destroy or impair the prior valid equitable charge. Such was the case of *Jivandás* v. *Frámji*[1].

When there is a debt in existence, and title-deeds are deposited by the debtor with the creditor to secure the debt, an equitable mortgage is at once created, and that is so even though the deeds are deposited for the express purpose of having a legal mortgage prepared (see *Dayál Jairáj* v. *Jivráj Ratansi*[2] and the cases there cited); and I apprehend the law to be the same when title-deeds are deposited under an oral agreement to cover present and future advances. As each advance is made, it becomes a charge upon the land comprised in the title-deed, from the force of the prior oral agreement that it shall be so—*Jivandás* v. *Frámji*[3]; *Ex parte Langston*[4]; *Ex parte Whitbread*[5]; *Ex parte Kensington*[6].

In Seton on Decrees, p. 1131, the law is thus stated:—"If deeds be delivered to enable a legal mortgage for securing an existing debt to be prepared, there is an equitable mortgage until the legal mortgage is completed; *secus* if to secure a fresh loan yet to be made." For this proposition, see *Hockley* v. *Bantock*[7]; *Keys* v. *Williams*[8]; and *Ex parte Bruce*[9] are cited. The *secus* is borne out by the following passage from the judgment in *Keys* v. *Williams*[10]:—"Certainly, if, before the money was advanced, the deeds had been deposited with a view to prepare a future mortgage, such a transaction could not be considered as an equitable mortgage by deposit; but it is otherwise where there is a present

(1) 7 Bom. H. C. Rep., 45, O. C. J.
(2) I. L. R., 1 Bom., 237.
(3) 7 Bom. H. C. Rep., O. C. J., 45.
(4) 17 Ves., 227.
(5) 19 Ves., 209.
(6) 2 V. & B., 79.
(7) 1 Russ., p. 141.
(8) 3 Y. & C., p. 55.
(9) 1 Rose, p. 374.
(10) 3 Y. & C. at p. 61.

advance, and the deeds are deposited under a promise to forbear suing, although they may be deposited only for the purpose of preparing a future mortgage. In such case the deeds are given in as part of the security, and become pledged from the very nature of the transaction."

In the present case, when the deeds were deposited with the plaintiff, there was no antecedent or existing debt, nor was any oral agreement made that the title-deeds should stand as a security for future advances, nor was any advance, in fact, made until the mortgage-deed was about to be executed; and there is no doubt that, had the insolvent not been ready to execute the deed, no advance would have been made. The money was really advanced on the security of the mortgage-deed, though, at the time the money was advanced, the plaintiffs had the title-deeds in their possession. That is so, however, in the case of almost every legal mortgage. The question resolves itself into this. Does a mortgagee in possession, as he usually is, of the title-deeds of his mortgagor, obtain an equitable mortgage when he actually advances money upon the security of a legal mortgage about to be executed, and when such legal mortgage, by reason of not being registered, never operates as a mortgage? To hold that he does, would to a considerable extent defeat the policy of the registration law. It would be also implying an agreement which is really contrary to the fact, but yet is an agreement which parties would probably enter into on all occasions were the desirability of it to occur to them. If, however, they expressed it in words, the provisions of section 92 of the Evidence Act I of 1872 would exclude it from the consideration of the Court. The application of the maxim, *expressio facit cessare tacitum*, would, upon similar principles, I think, exclude the implied agreement. See *per* Lord Cairns in *Shaw* v. *Foster* at page 340 of the report[1]. The plaintiffs' possession of the title-deeds is properly referable to the fact of the premises having been conveyed to them, and to their, therefore, being entitled to the deeds; but they have not taken the proper steps to make that conveyance to them effectual in law.

(1) L. R., 5 Eng. & Ir. App., p. 321.

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The case for the plaintiffs is put thus. If the money had been advanced, and the legal mortgage had not been executed, there would have been a good equitable charge upon the premises. Is not the result the same when the parties do not choose to complete the mortgage they have executed by registration? Assuming, for the sake of argument, that the proposition enunciated is, in the absence of an agreement to that effect, sustainable; the answer is, that the Evidence Act, section 92, and the maxim I have referred to in the former case, have no application, while in the latter they apply. It is said the parties have, in fact, waived the completion of the legal mortgage, but I think that is not the correct view. There is no direct evidence to that effect; and, in fact, they have not waived it. The interest was paid in respect of the mortgage, and its receipt was endorsed upon the mortgage-deed. They have only omitted to take the steps requisite to enable a Court to give effect to its terms.

Sumpter v. *Cooper*(1) is relied upon as an authority in favour of the plaintiffs' view. In that case, however, the deeds were deposited, in 1827, to secure a present advance of £500, and a good equitable mortgage was then created by deposit of title-deeds. It was held that a subsequent invalid assignment, in March, 1828, of the premises to the equitable mortgagee did not affect his prior valid equitable mortgage. *Hiern* v. *Mill*(2) has also been referred to. In that case, also, the deeds were deposited to secure a present advance, and were to be retained as security for such advance till a legal mortgage should be prepared, and subsequent advances were also expressly made upon the same security. The legal mortgage was not executed, and the equitable mortgage was held to be valid.

In *James* v. *Rice*(3) the deeds were in the hands of the plaintiff, and there was a parol agreement to give him a legal mortgage to secure an existing debt. This was held to create a valid equitable mortgage.

I have not been able to find any English case on all fours with the present.

(1) 2 B. & Ad., p. 223. (2) 13 Ves., p. 114.
(3) 5 DeG. M. & G., 461.

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In the case of *Dwárkánáth Mitter* v. *S. M. Sarat Kumari Dasi*[1], title-deeds were sent with a letter stating that they were to be held as security for an antecedent debt. The letter was not registered, though it needed registration, and, therefore, could not be given in evidence. The holder of the title-deed sued, in effect, to establish an equitable mortgage; but though he had the title-deeds in his possession, as he had no proof of the equitable mortgage other than the possession of the deeds, his suit was dismissed.

That case was recognized and distinguished in *Kedanáth Dutt* v. *Shámloll Khettry*[2]. In the latter case, the equitable mortgage was upheld, as the unregistered letter was but a record of the deposit of the title-deeds and of the purpose of such deposit, and, therefore, was admissible in evidence. The reasoning of the Court seems to assume that had it contained the terms of the contract between the parties, and purported to create a charge upon the land, the decision would have been against the plaintiff. Couch, C. J., at page 412 of the report, says: "The rule, with regard to writings, is that oral proof cannot be substituted for the written evidence of any contract which the parties have put into writing. And the reason is, that the writing is tacitly considered by the parties themselves as the only repository, and the appropriate evidence, of their agreement. If this memorandum was of such a nature that it could be treated as the contract for the mortgage, and what the parties considered to be the only repository and appropriate evidence of their agreement, it would be the instrument by which the equitable mortgage was created, and would come within section 17 of the Registration Act. But it was not a writing of that character. As I have said, the equitable mortgage was created by the agreement, which was evidenced by the loan and the deposit of the title-deeds: the promissory note, whether given either 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 between the

(1) 7 Beng. L. R., p. 55. (2) 11 Beng. L. R., p. 405.

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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 memorandum is, we find it is not the contract for the mortgage,—not the agreement to give a mortgage for the Rs. 1,200, but nothing more than a statement, by Woomáchurn Bánerji, 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 memorandum 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."

Following the law thus laid down, I must hold that the plaintiffs have failed to establish that they have an equitable mortgage over the premises in question, and their suit must, therefore, be dismissed.

Costs to follow the event.

Attorneys for the plaintiffs :—Messrs. *Tyabji and Dáyábhái.*

Attorneys for the second defendant :—Messrs. *Payne, Gilbert and Sayáni.*

APPELLATE CIVIL.

Before Mr. Justice Birdwood and Mr. Justice Jardine.

1886. *April* 20.

NA'RO HARI BHA'VE, DECEASED, BY HIS SON AND HEIR, A'TMA'RA'M, A MINOR, BY HIS GUARDIAN, MAHA'DUJI SAKHA'RA'M BHA'VE, AND ANOTHER, (PLAINTIFFS), APPELLANTS, *v.* VITHALBHAT AND OTHERS, (DEFENDANTS), RESPONDENTS.*

Mortgage—Redemption—Right of one of several joint mortgagors to redeem the whole estate—Parties to a redemption suit.

1. In the case of joint-family property, which, though held in certain shares by the several co-parceners, is mortgaged as a whole and redeemable upon payment of the entire sum, each and every one of the mortgagors has a right to redeem the whole estate, seeking his contribution from the rest.

* Second Appeal, No. 726 of 1883.