present case the original loan was made in 1876. There is no acknowledgment of that loan till 1880. The intermediate acknowledgments cannot be proved by oral evidence. The debt is, therefore, barred.

Gokuldas Kahandas Parek, for the respondent:—The acknowledgment, upon which the plaintiff relies, is not a bare acknowledgment of a past liability. It is, in fact, a new promise to pay a time barred debt. Section 19 of Act XV of 1877 does not exclude oral evidence of a document handed to the debtor.

JUDGMENT.

WEST, J.—In this case an acknowledgment, dated 3rd November 1880, is relied on by the plaintiff as having, as the last of an annual series, kept alive his right to sue for a debt contracted and due on the 22nd October, 1876. The intermediate acknowledgments, it is said, were given back, and it is contended that, on proof of this, they can be proved by oral evidence so as to bridge over the interval of four years between the original obligation and the acknowledgment actually produced. But s. 19 of the Limitation Act, XV of 1877, says clearly that oral evidence of the contents of an acknowledgment may not be received, nor is there any saving of acknowledgments received or given back before the Act came into operation. We are constrained, therefore, to apply the enactment to which we have referred, and the true sense of which cannot be doubted after a comparison with the corresponding s. 20 of Act IX of 1871. **[270]** It excludes the intermediate acknowledgments as resting on oral proof, by which the one of 3rd November, 1880, might have been made to bear on a debt then still not barred by limitation, and we must consequently reverse the decrees of the Courts below and reject the claim. Costs in this Court to be borne by the respondent and in the Courts below as there adjudicated.

Decree reversed.

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12 B. 270.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Nanabhai Haridas.

GOVIND ATMARAM (*Original Defendant*), *Appellant v.* SANTAI (*Original Plaintiff*), *Respondent.** [15th August, 1887.]

Evidence—Burden of proof—Suit by a claimant to property under attachment.

The defendant having attached certain property as belonging to his judgment-debtor B., the plaintiff applied for the removal of the attachment, alleging that she had purchased the property from B prior to the defendant's decree. Her application was rejected, and an order maintaining the attachment passed. The plaintiff thereupon brought the present suit to establish her right to the property in question. The Court of first instance dismissed the suit. The plaintiff appealed to the District Judge, who reversed the lower Court's decree, holding that it was incumbent on the defendant to show that the alleged transaction of sale was fictitious. On second appeal by the defendant to the High Court,

Held, that the District Judge was wrong in throwing the burden of proof on the defendant. The defendant had obtained an order maintaining his attachment, and it was incumbent on the plaintiff, who impugned that order by the

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* Second Appeal, No. 459 of 1885.

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12 B. 270.

present suit to prove her case. For this purpose it was necessary for the plaintiff to prove the payment of the purchase-money, and that she had been in possession since the alleged sale.

[F., 30 A. 321=5 A. L. J. 601=28 A. W. N. 125; 4 L. B. R. 228; Appr., 6 C. P. L. R. 81; R., 18 A. 369=16 A. W. N. 106; 25 B. 202 (206); 5 A. L. J. 358; 3 Bom. L. R. 832 (834); 13 C. P. L. R. 69 (70); U. B. R. (1904) 4th Qr., D., C. P. C. p. 8; 2 L. B. R. 152.]

THIS was a second appeal from a decision of W. H. Crowe, District Judge of Satara.

The defendant had obtained a decree against one Balkrishna, and attached his property in execution. The plaintiff, who was Balkrishna's mistress, applied to have the attachment removed, on the ground that the property belonged to her, but her application was rejected and an order maintaining defendant's attachment passed. The plaintiff, therefore, brought this suit to establish [271] her right to the property. She alleged that she had purchased it from Balkrishna for Rs. 600, and had been in possession and enjoyment of it.

The defendant contended (*inter alia*) that the sale to the plaintiff was fictitious and had been effected for the purposes of screening the property from attachment.

The Court of first instance held that the transaction of sale was fictitious, and accordingly rejected the plaintiff's claim.

On appeal by the plaintiff, the District Judge reversed the lower Court's decree with the following remarks :—

"My finding is that the defendant has not proved the sale transaction to be collusive * * * *. Both of the deeds of sale produced by the plaintiff are registered, and they are both anterior to the date of the defendant's decree, which was passed on 25th February, 1881. It is quite possible that they were executed by Balkrishna to prevent his property from falling into the hands of his creditors. That circumstance alone does not make the transaction a collusive one. Fraud must be proved, and not presumed. It was incumbent on the defendant to show that the transaction was altogether a fictitious one,—that is to say, that the ownership still remained with Balkrishna, and that the transfer was a nominal one only * * *."

From this decision the defendant preferred a second appeal to the High Court.

Ganesh Ramchandra Kirloskar, for the appellant:—The District Judge was wrong in throwing the burden of proof on the defendant. The plaintiff having failed in successfully resisting the attachment was bound to prove her title—*Tillakchand Hindumal* v. *Jitamal Sudaram*(1); *Rajan Harji* v. *Ardeshir Hormusji*(2). Under the Civil Procedure Code (Act XIV of 1882) the plaintiff was bound to prove her purchase and her possession since the purchase.

JUDGMENT.

SARGENT, C. J.—The Judge says that "it was incumbent on the defendant to show that the transaction (*viz.*, the alleged sale to plaintiff) was altogether a fictitious one." This view is, however, [272] opposed to the ruling in *Tillakchand Hindumal* v. *Jitamal Sudaram*, (1), as explained in *Rajan Harji* v. *Ardeshir Hormusji Wadia* (2). The defendant had obtained an order maintaining his attachment, and it was incumbent on

(1) 10 B.H.C.R. 206.

(2) 4 B. 70 (74).

the plaintiff, who impugns that order by the present suit, to prove her case. For this purpose it would be necessary for the plaintiff to prove the payment of the purchase-money, and that she had since been in possession.

As the Judge has considered the evidence from a wrong point of view, we cannot accept his conclusion on the question whether the sale to the plaintiff was a real transaction, and must reverse the decree, and send back the case to the lower Court of appeal for a fresh decision. Costs of this appeal to be costs in the cause.

Decree reversed.

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12 B. 272.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Nanabai Haridas.

SHRIDHAR NARAYAN *(Original Plaintiff), Appellant v.* KRISHNAJI VITHOJI *(Original Defendant), Respondent.**
[19th September, 1887.]

Insolvency—Civil Procedure Code (Act XIV of 1882), ss. 354, 355 and 356—Receiver selling a mortgaged property of insolvent—Purchaser at such sale—Right of mortgagee unaffected by such sale.

By an order dated the 9th July, 1879, A. was declared an insolvent under s. 351 of the Civil Procedure Code (XIV of 1882), and his property vested in the receiver, who was ordered to convert it into money. Nine fields, which were part of A.'s property, had been mortgaged to the plaintiff, who was duly cited to appear and prove his debt. The plaintiff, however, failed to appear, and he was consequently omitted from the schedule of A.'s creditors. The receiver sold one of the fields, which was purchased by A.'s undivided son G. At the sale the plaintiff gave notice of his claim as mortgagee. After paying off the debts of the scheduled creditors the receiver made over to A. the residue of the purchase-money and the eight unsold fields. In 1881 the plaintiff sued A. for possession of the mortgaged property, and on appeal obtained a decree. While that suit was pending, G. sold to [273] the defendant the field which he had purchased. In execution of his decree the plaintiff recovered possession of the eight fields, but on attempting to get possession of the ninth field he was obstructed by the defendant, who was in possession, and he consequently brought this suit to recover it.

Held, that the plaintiff was entitled to recover it from the defendant. The only interest the insolvent had in the mortgaged premises was the equity of redemption, and this having vested in the receiver under s. 354 he under s. 356 was directed to convert it into money. G., therefore, at the sale only purchased the equity of redemption in the one field; and the defendant, who now stood in G.'s shoes with notice of the plaintiff's claim, although he might possibly be entitled to redeem the whole nine fields comprised in the mortgage, was bound to deliver possession to the plaintiff (the mortgagee) until that was done.

The mortgaged property could not be sold by the receiver without the consent of the plaintiff (the mortgagee), or paying him off. Section 356 of the Civil Procedure Code (Act XIV of 1882) no doubt contemplates the payment of debts secured by mortgage out of the proceeds of the conversion of the insolvent's property in priority to the general creditors; but this must be taken in connection with s. 354, and must be understood as referring to those cases in which the mortgaged premises have been sold after coming to an understanding with the mortgagee.

THIS was a second appeal from a decision of G. McCorkell, Assistant Judge of Ratnagiri.

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* Second Appeal, No. 457 of 1885.