1895.

COWASJI N. POCHKHA'NA'WA'LLA v. R. D. SETNA.

entitled to the whole *corpus* of the fund? No doubt the result is startling, but the Court has to administer the law as it is, and not according to a result, which possibly may be due to the too narrow terms of a section of a statute. The learned counsel for the plaintiff submitted whether it would not be inconsistent to establish as a perpetual charity that which is really no charity at all. Here the deed is void, not on account of any absence of certain formalities under any statute such as the Mortmain Act, but it is in itself void as creating a perpetual trust which the law does not recognise. The answer to this question is that the deed is neither more nor less void than was the deed in the case of *Churcher* v. *Martin*, in which it was held that the deed was void altogether. Kekewich, J., refused to consider the question whether the effect of his decision would be to establish the charity. I must follow the same course.

Holding the claim to be barred by limitation, I must dismiss the suit. Under the particular circumstances of the case, the costs of both sides as between attorney and client may come out of the estate.

Suit dismissed.

Attorneys for the plaintiff:—Messrs. *Pestanji, Rustim and Kola.*

Attorneys for the defendant:—Messrs. *Edgelow and Gulábchand.*

ORIGINAL CIVIL.

Before the Honourable Chief Justice Farran and Mr. Justice B. Tyabji.

1895.
December 6.

HA'JI ESSA SULLEMA'N, PLAINTIFF, *v.* DAYA'BHAI PARMA'NANDA'S AND OTHERS, DEFENDANTS.*

Vendor and purchaser—Concealment of claim against property—Whether such concealment entitles purchaser to rescind—Transfer of Proverty Act (IV of 1882), Sec. 55—Meaning of words "material defects."

The expression "material defect" in section 55 of the Transfer of Property Act (IV of 1882) includes a defect in the title to an estate.

CASE stated for the opinion of the High Court under section 69 of the Small Cause Court Act (XV of 1882) by R. M. Patel, Second Judge:—

* Small Cause Court Reference, No. 11648 of 1895.

"The defendants are executors to the estate of one Dayábhai Tribhovandás and the plaintiff is a purchaser from them of a piece of land at Memon Mohla at an auction sale held on the 6th March, 1894. The plaintiff agreed to purchase the property at Rs. 2,900, and deposited Rs. 500 by way of earnest-money. He now seeks to rescind the contract of purchase and to recover back the deposit with interest and charges. He claims in all Rs. 584-8-0 and costs. One of the conditions of sale was that the vendors sold as trustees, and would give such title as they had, and the purchaser should not raise any objection to their title, or make any requisition thereon, but should accept such title as they had or could give. The property having been in litigation for years, the plaintiff added a clause to his signature with the consent of the vendors as follows:—'If there be any claims or disputes about the house, the vendors will clear the same.' The case was argued on both sides, treating this clause as one of the conditions of sale.

"2. The plaintiff sought to rescind the contract on three grounds, two of which I decided against him and in favour of the defendants. The third point I decided in favour of the plaintiff, *viz.*, that one Jackaria Moosa had laid a claim to the property as equitable mortgagee to the extent of Rs. 500 and interest thereon, and defendants had taken no steps to clear or dispose of the same; and that the said claim was known to the defendants before the date of the auction-sale, but they had failed to inform the purchaser or to notify it to him, and that the contract of sale was thereby vitiated under section 55 of the Transfer of Property Act.

"3. The premises were originally mortgaged to the defendants' testator by one Hazrábái under a deed of mortgage dated 4th of January, 1871. Jackaria Moosa alleges that the testator had during his life-time raised a loan from him of Rs. 500 and delivered to him the said mortgage-deed by way of equitable mortgage, and Jackaria still continues in possession of the said deed. In January, 1894, the defendants attempted to sell the premises to one Hasandádá, and Jackaria Moosa then gave notice of his claim as equitable mortgagee to the intending purchaser. Correspondence passed between the solicitors to the defendants and Jackaria

1895.

HA'JI ESSA SULLEMA'N v. DAYA'BHAI PARMA'NANDA'S.

Moosa, and on the 2nd of February, 1894, the former wrote to Jackaria Moosa's solicitors that their client had made a false claim, and if the deed of mortgage was not returned and given up, "steps might be taken to compel its delivery." The bargain with Hasandádá fell off and no step, or legal proceedings, as threatened, having been taken, Jackaria Moosa continued in possession of the deed. Jackaria must be, therefore, presumed to have a subsisting claim as an equitable mortgagee.

"4. It is admitted that at the auction-sale which subsequently took place on the 6th of March, 1894, no notice or information was given by the defendants or their auctioneer of the claim that had been set up by Jackaria Moosa. Nor was plaintiff aware of the claim till some time, in response to a *battáki* beaten as usual, Jackaria Moosa again sent a notice of his claim through his solicitors to the municipal assessor. That claim was brought to the notice of the defendants, but they took no steps whatever, and simply relied on the correspondence that had previously passed.

"5. Under section 55 of the Transfer of Property Act I was of opinion that the expression 'material defect in the property' included 'material defect in title,' and that under the last clause of the same section the *omission* to disclose any material defect in title was fraudulent. I held that any omission, *i. e.*, concealment or suppression of a material fact affecting the title made from mere inadvertence or even from accident, should be treated as fraudulent under section 55, as that section did not require any active concealment of a fact as provided for by section 17 of the Contract Act. I was of opinion that all omissions to disclose a material defect, whether through carelessness or design, were to be considered fraudulent so as to avoid the contract at the option of the purchaser (see Pollock on Fraud, page 98). The value of the premises being Rs. 2,900, and the alleged claim of Jackaria Moosa having been over Rs. 500, the disclosure of the claim made by him, if made at the time of the auction-sale, might have induced the purchaser to avoid the contract on account of the alleged incumbrance and apprehended litigation; or it might probably have persuaded him to offer a lower value. On the authority of *Pearee Mohun* v. *Abdool*

Sobhan[1] I held that the neglect on the part of the defendants to disclose the fact of the claim of Jackaria Moosa was a fraudulent concealment, and vitiated the contract. I may be permitted to say I also relied on *Waddell* v. *Wolfe*[2]; *Mostyn* v. *The West Mostyn Coal, &c., Company*[3]; *Nottingham Patent Brick and Tile Company* v. *Butler*[4]; and on *Gajapathi* v. *Alagia*[5] and *Morgan* v. *he Government of Haidarabad*[6]. I gave verdict for plaintiff for Rs. 584-8, &c.

"6. As the defendants' solicitor has proposed questions (iv) and (v), it is necessary to state that during his life-time the testator Dayábhai had filed a suit, No. 170 of 1875, on the said mortgage in the High Court, and under a decree obtained therein the premises in question were sold, and Dayábhai purchased the same with leave of the Court and obtained a certificate of sale dated the 2nd August, 1887. Amongst the documents of title now in the possession of the defendants, the said mortgage-deed of the 4th January, 1871, has been missing, and it is now in the possession of Jackaria Moosa. No evidence whatever was given by the defendants to show that Jackaria Moosa was aware of the existence of the High Court suit, or of the decree, or of the subsequent purchase of the property under the said certificate of sale by the testator Dayábhai. Nor was the point raised by question (v) argued and pressed as therein suggested.

"7. At the request of the defendants' solicitor, I beg respectfully to submit the following questions for the opinion of their Lordships:—

"(i) Whether under the circumstances of the case the alleged claim of Jackaria Moosa amounts to a 'material defect in the property' in terms of section 55 of the Transfer of Property Act?

"(ii) Whether, having regard to the conditions of sale (Ex. D), the defendants were bound to remove the claim put forward by the said Jackaria Moosa?

"(iii) Whether the defendants were bound to disclose to the plaintiff before the auction-sale the claim made by the said

(1) 7 Cal. W. R., 258.
(2) L. R., 9 Q. B., 515.
(3) 1 C. P. D., 145.
(4) 16 Q. B. D., 778.
(5) I. L. R., 9 Mad., 89.
( ) I. L. R., 11 Mad., 419.

1895.

HA'JI ESSA SULLEMA'N v. DAYA'BHAI PARMA'NANDA'S.

Jackaria Moosa, and whether by the reason of the non-disclosure of the said claim, the plaintiff is entitled to rescind the contract and claim his deposit with interest and costs?

"(iv) Whether the deed dated 4th January, 1871, which is in the possession of Jackaria Moosa is a document by the deposit of which an equitable mortgage of the property could be created, having regard to the fact that a decree in the High Court Suit No. 170 of 1875 was passed upon the said mortgage and a certificate of sale issued to the said Dayábhai on his purchasing the said property under the said decree?

"(v) Whether, having regard to the said decree and certificate, the said mortgage is extinguished so as to cease to be a document of title to the property by the deposit of which an encumbrance could be created?"

The following were the conditions of sale under which the property in question was sold:—

"The highest bidder shall be declared to be the purchaser, and if any dispute shall arise between two or more bidders the property shall be immediately put up again at the last preceding bidding and re-sold.

"2. The purchaser shall pay immediately into the hands of the auctioneer a deposit of Rs. 25 per cent. in part payment of the purchase-money and sign an agreement for payment of the remainder to the vendors or their solicitor within one month from the day of the date of the sale. If from any cause whatever the purchase shall not be completed within the aforesaid time, the purchaser shall pay to the vendors interest at the rate of 12 per cent. per annum on the remainder of the purchase-money from the date of sale until the purchase shall be completed. This condition is to be without prejudice to the seventh condition.

"3. The purchaser shall prepare a conveyance of the property purchased by him at his own expense, the same to be approved of by the vendors, and on payment of the remainder of the purchase-money the same when tendered shall be executed by the vendors.

"4. The vendors sell as trustees of the estate of the late Dayábhái Tribhovandás and will give such title only as they have. The purchaser shall not raise any objection to their title or make any requisition thereon, but shall accept such title as they have or can give.

"5. The description of the property as contained in the particulars is believed to be correct, but if any error or misstatement or omission in the particulars be discovered, the same shall not annul the sale, nor shall any compensation be allowed by the vendors to the purchaser in respect thereof.

"6. If the purchaser shall neglect or fail to comply with the above conditions or any one of them the deposit money shall be forfeited and the vendors shall be at liberty

to re-sell the said property by public auction without previously tendering any conveyance to the purchaser, and the deficiency in the amount of the purchase-money, if any, together with all charges attending the re-sale shall be made good by the purchaser at the re-sale and be recoverable by the vendors, and for liquidated damages.

"7. The vendors will give possession of the property to the purchaser on his paying the full purchase-money and tendering a proper conveyance to the vendors for execution.

"8. The vendors as aforesaid are the trustees of the estate of the late Dayábhai Tribhovandás, and they will not enter into any covenant other than usually necessary to be inserted in the conveyance.

"9. The purchaser shall besides the expenses of the preparation and execution of the conveyance bear the stamp fees and expenses of registration and all other costs of and incidental to the completion of the purchase and the transfer of the property to his name in the book of the Fazendár and Municipality of Bombay."

After the sale the plaintiff signed the following document :—

"I, Háji Essa Sulleman of Bombay, hereby acknowledge that on sale by auction this 6th day of March, 1894, of the property mentioned in the foregoing particulars, I was the highest bidder for and was declared the purchaser thereof, subject to the foregoing conditions of sale, at the price of Rs. 2,900 only, and that I have paid the sum of Rs. 500 only deposit and in part payment of the said purchase-money to Mr. Bomanji Dossábhoy, the auctioneer, and I hereby agree to pay the remainder of the said purchase-money and complete the said purchase according to the foregoing conditions.

"(Signed) ABDULLA HA'JI
for HA'JI ESSA SULLEMA'N.

"Witness :
"TULSIDA'S JAKISONDA'S."

"If there is any claim in connection with this house, then the same is to be cleared by the seller at his own expense.

Lowndes for defendants :—The questions are (1) Is the plaintiff as purchaser entitled to rescind his contract of purchase, because of concealment of a material defect in the property? (2) Can he rescind on the ground that the defendants have not cleared the property of Jackaria's claim? We contend he is not entitled to rescind. We say section 55 of the Transfer of Property Act (IV of 1882) does not apply to this case. The section does not include defects of title. *Dixon* v. *Muckleston*[1]; Transfer of Property Act (IV of 1882), section 108; Specific Relief Act, I of 1877, section 18, clauses (*c*) and (*d*), and section 22.

Even if it is a defect, it is not a material defect. The mortgage-deed is not a document of title—Transfer of Property Act

(1) L. R., 8 Ch., 155.

1895.

HA'JI ESSA SULLEMA'N v. DAYA'BHAI PARMA'NANDA'S.

(IV of 1882), section 59; Dart's Vendors and Purchasers (6th Ed.), page 1233. The contract will only be rescinded if the defect is material, *i. e.*, when the purchaser does not get the thing he contracted for—*Mostyn* v. *The West Mostyn Coal, &c., Company*(1); *Nottingham Patent Brick, &c., Company* v. *Butler*(2); *Gajapathi* v. *Alagia*(3); *Morgan* v. *The Government of Haidarabad* (4); *Waddell* v. *Wolfe*(5).

Scott for plaintiff:—We contend that this is a material defect in the property within section 55 of the Transfer of Property Act (IV of 1882)—*Pearee Mohun* v. *Abdool Sobhan*(6). The plaintiff knew of the claim and did not disclose it—Contract Act (IX of 1872), section 17. It was a claim which was likely to produce litigation. The deposit of the mortgage-deed would be an equitable mortgage—*Russell* v. *Russell*(7); *Venkatachella* v. *Pan Janadien*(8); *Ex-parte Chippendale*(9); *Ex-parte Arkwright*(10); *Roberts* v. *Croft* (11); *Dixon* v. *Muckleston*(12).

B. TYABJI, J.:—This is a reference to the High Court under section 69 of the Small Cause Court Act (XV of 1882) by the learned Second Judge, Mr. Rustomji Merwánji Pátel. The first question we have to answer is whether, under the circumstances stated in the case submitted to us, the alleged claim of Jackaria Moosa amounts to a "material defect in the property" within the meaning of section 55 of the Transfer of Property Act (IV of 1882). This question sub-divides itself into two questions:—

(*a*) Whether the expression "defect in the property" includes defects not in the estate itself, but in the title to such estate, and

(*b*) Whether if so, the alleged defect in this case, namely, the existence of the mortgage-deed dated 4th January, 1871, and its alleged deposit with the said Jackaria Moosa by way of an equitable mortgage for Rs. 500 is "material" within the meaning of the same section.

(1) 1 C. P. D., 145.
(2) 16 Q. B. D., 778.
(3) I. L. R., 9 Mad., 89.
(4) I. L. R., 11 Mad., 419.
(5) L. R., 9 Q. B., 515.
(6) 7 Cal. W. R., 258
(7) White and Tudor's Leading Cases, (6th Ed.), Vol. I, p. 773.
(8) I. L. R., 4 Mad., 213.
(9) 2 Montague Ayrton, 299.
(10) 3 Mont. D and DeG., 129.
(11) 2 DeG. and J., 1.
(12) L. R., 8 Ch., 155.

The learned Second Judge has held that a defect in the property includes a defect in title under section 55, and although this construction was not pressed upon us by Mr. Scott, who argued the case on behalf of the plaintiff before us, we still think it our duty to consider and decide the question as it has been specifically put to us by the learned Judge.

Although at first sight it seems somewhat straining the meaning of the words "defects in the property" to hold that they include defects in the title to the property, yet, after a careful consideration of the whole of section 55 and other sections of the Act bearing on the question, we have come to the conclusion that the construction put upon the words by the learned Second Judge is correct.

Mr. Justice Shephard and Mr. Brown in their learned Commentary upon the Transfer of Property Act, page 145, say: "There may be some doubt whether defects not in the estate itself, but in the title, are intended to come within the clause,—whether the duty, imposed on the vendor, relates to matters other than those of the class referred to in section 108. It is apprehended, however, that the term is not to be so restricted, and that an omission to disclose flaws in the title or incumbrances, which the purchaser has no apparent means of discovering, might equally be fraudulent under the section. In England, positive fraud is not necessary to entitle a purchaser to relief; it is enough if he proves concealment, on the seller's part, of a material defect in the title. And it is not competent to a vendor failing to disclose such a defect to put forward conditions of sale which are to force a bad title upon his purchaser."

We consider that the above statement of the law is borne out by the English authorities.

In Sugden's Law of Vendor and Purchaser, (14th Ed.), p. 5, the doctrine is broadly stated in these terms: "The same rule applies to incumbrances and defects in the title to an estate as to defects in the estate itself. The vendor is bound to deliver to the purchaser the instrument by which the incumbrances were created, or on which the defects arise, or to acquaint him with the facts if they do not appear on the title deeds. If a seller knows

1895.

HA'JI ESSA SULLEMA'N v. DAYA'BHAI PARMA'NANDA'S

and conceals a fact material to the title, relief cannot be refused to the purchaser."

Again in Dart, p. 105, we find it laid down: "As to incumbrances and defects in title—a vendor, so far as his *primâ facie* liability in this respect is not negatived or restricted by the terms of the contract, must produce to the purchaser all such documents of title in his possession or power as are necessary, and must inform him of all material facts not apparent thereon."

In *Mostyn* v. *West Mostyn Coal and Iron Company*(1) Mr. Justice Brett says: "Now although there is a statement that plaintiff knew and defendants did not and could not know of the want of title to part of the demised premises, and that such a want of title was in respect of a part material to the enjoyment of the rest, still there is no allegation of anything amounting to fraud on the part of the plaintiff. The question is whether a Court of Equity would, if a bill had been filed containing a statement of these facts, set aside the lease. If so, then there is a good *primâ facie* answer to the action. I think the passage from Sugden's Vendor and Purchaser, (14th Ed.), p. 246, and the case of *Edwards* v. *McLeay*(2) are authorities to show that equity in such a case as this will set aside the transaction. * *" In *Edwards* v. *McLeay* the Master of the Rolls (Sir William Grant) says: "Whether it would be a fraud to offer as good a title which the vendor knows to be defective in point of law, it is not necessary to determine, but if he knows of and conceals a fact material to the validity of the title, I am not aware of any principle on which relief can be refused to the purchaser.

Again Archibald, J., at p. 153 said: "Where there has been concealment of a material fact, though it may not amount to affirmative fraud and though there has been no eviction, a Court of Equity will set aside the lease."

In *Nottingham Patent Brick and Tile Company* v. *Butler*(3) Lord Esher, M.R., said: "It seems to me an astounding proposition that a vendor can by means of such conditions of sale force upon a purchaser a defective title, even though he (the vendor) knew the defect. Now, that Butler did know of the defect seems

(1) 1 C. P. D., at p. 151. (2) G. Coo. 303; 2 Sw. 287.
(3) 16 Q. B. D., at p. 786.

to have been assumed by Wills, J.; if you treat him as dealing himself with the purchasers he knew of the defect and if the conversation between his solicitor and the plaintiffs' solicitor, at which he was present, amounted to nothing at all, then it comes to this that he, knowing the defect, by his agent put forth the condition of sale. If that is so, the case is absolutely within the authority of *Haywood* v. *Mallalieu*[1] as it seems to me. It is impossible for a vendor, knowing of a defect in his title, either by himself or his agent to put forward conditions of sale which are to force upon a purchaser a bad title of which he knew, but which he did not disclose. A Court of Equity would not be of much use if it could not meet such a case as that, and it seems to me clear that a Court of Equity would never have enforced a contract under such circumstances."

The case of *Gajpathi* v. *Alagia*[2] is an illustration of the same doctrine, as applied by the High Court of Madras in India. There a Hindu had executed a sale-deed of a house in the Mofussil. The deed contained no covenant for title. The purchaser having been evicted from a portion of the house under a decree, of which the vendor was aware at the time of the sale, sued the vendor for damages. The Munsiff decreed the claim on the ground that the vendor had fraudulently concealed the existence of the decree. On appeal the District Judge reversed this decree, holding that as the purchaser had not insisted on a covenant of title, he must be held to have accepted all risks. It was, however, held by Hutchins and Parker, JJ., that, if there had been fraudulent concealment as alleged, the purchaser was entitled to damages. At p. 91 the learned Judges say that "it appears to us that if the respondent did conceal from the appellant the existence of the decree for partition, he was guilty of fraudulent concealment and is bound to refund the purchase-money. In the absence of positive law, we are bound in this country to apply the principles of good conscience and equity * * . Even under English law the vendee is bound to make compensation for a fraudulent concealment of a defect in the title or of any incumbrance.....Although a purchaser cannot ordinarily obtain relief against a vendor for any incumbrance or defect in the title to

(1) 25 Ch. D., 357. (2) I. L. R., 9 Mad., 89.

1895.

HÁJI ESSA SULLEMA'N v. DAYA'BHAI PARMA'NANDA'S.

which his covenants do not extend, an exception is made to this rule in the case of a vendor, or his agent suppressing an incumbrance or a defect in the title....Even though the purchase-money has been paid and the conveyance executed by all the parties, yet if the defect do not appear on the face of the title deeds and the vendor was aware of the defect, and concealed it from the purchaser, he is in every such case guilty of fraud and the purchaser may either bring an action on the case or file his bill in equity for relief."

Again in *Pearee Mohun Soor* v. *Abdool Sobhan*[1] it was held by Trevor and Glover, JJ., that where a vendor knowing that he had no right or title to property or being cognizant of the existence of incumbrances or of latent defects materially lowering its value, sold it, and neglected to disclose such defects to the purchaser, there was a fraudulent concealment vitiating the contract.

Again under the Specific Relief Act (I of 1877), sections 17 and 18, a contract of selling or letting is declared not to be enforceable in favour of a vendor or lessor who knowing himself to have no title to the property has contracted to sell or let the same; and in clause (*d*), section 18, it is laid down that "where the vendor or lessor sues for specific performance of contract, and the suit is dismissed on the ground of his imperfect title, the defendant has a right to return of his deposit with interest and costs."

Further, it is to be observed that in section 108 of the Transfer of Property Act (IV of 1882) the duty of the lessor is confined disclosing the defects "in the property with reference to its intended use," which latter words are obviously inserted to exclude defects in the title of the lessor being disclosed to the lessee.

Moreover, clause 5 of section 55 of the Transfer of Property Act, which deals with the corresponding duty of the buyer, in express words casts upon him the duty of disclosing to the seller "any fact as to the nature or extent of the seller's interest in the property of which the buyer is aware, but of which he has reason to believe that the seller is not aware and which materially increases the value of such interest." It is difficult to believe that the Legislature would have cast upon the buyer the

(1) 7 Calc. W. R., 258.

duty of communicating facts relating to the seller's title without casting a similar duty upon the seller himself.

On the whole we believe that clause 1 (*a*) of section 55 casts upon the seller the duty of disclosing to the buyer all defects whether in the title or in the estate itself, while clause 5 (*a*) casts upon the buyer only the duty of communicating facts relating to the nature and extent of the seller's interest, and not relating to the property itself.

For the reasons above given, therefore, we are of opinion that the words "defects in the property" include defects in the title.

The next question is whether the alleged claim of Jackaria Moosa is a "material defect," the non-disclosure of which vitiates the whole contract. We are of opinion that under the circumstances of the case the alleged claim does not constitute a material defect, as, even if well founded, it is a defect which the vendor could readily remove and the conditions of sale bind him to do so, and it bears only a small proportion to the purchase-money, out of which it can be cleared by the purchaser himself.

The second question is whether, having regard to the condition of sale, the defendants were bound to remove the claim put forward by the said Jackaria Moosa. We answer this question in the affirmative. The defendants were bound to remove the claim if requested so to do by the plaintiff, and if they refused, the plaintiff was entitled to rescind.

The third question is whether the defendants were bound to disclose to the plaintiff, before the auction-sale, the claim made by the said Jackaria Moosa, and whether by reason of the non-disclosure of such claim the plaintiff is entitled to rescind the contract and claim his deposit with interest and costs.

We have already answered this question so far as section 55 of the Transfer of Property Act is concerned. As regards the Indian Contract Act, the answer depends upon the inference to be drawn from the facts. If the non-disclosure amounts to fraud within the meaning of section 17, Indian Contract Act, the plaintiff would be entitled to rescind the contract under section 19 of that Act. Under the circumstances of this case, however, we do not

1895.

HA'JI ESSA SULLEMA'N v. DAYA'BHAI PARMA'NANDA'S.

think that such fraud can be inferred as a conclusion of law, and we, therefore, answer this question in the negative.

The fourth question is whether the mortgage-deed, dated 4th January, 1871, which is in the possession of Jackaria Moosa, is a document by the deposit of which an equitable mortgage of the property could be created having regard to the fact that a decree in High Court Suit No. 170 of 1875 was passed upon the said mortgage and a certificate of sale issued to the said Dayábhai on his purchasing the said property under the said decree.

The answer to this question depends upon whether or not the alleged deposit was made before the decree. If it was, the deposit would effect, of course, an equitable mortgage; and, even if made after the decree, it would be effectual if the deposit were made without informing the intended equitable mortgagee of the decree.

The fifth question is whether, having regard to the said decree and certificate, the said mortgage is extinguished so as to cease to be a document of title by the deposit of which an incumbrance could be created. Our observations on the fourth question sufficiently answer this question also.

Attorneys for the plaintiff:—Messrs. *Brown and Moir.*

Attorneys for the defendants:—Messrs. *Edgelow and Gulábchand.*

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ránade.

1895. *February* 14.

VA'SUDEV MORBHAT KA'LE (ORIGINAL PLAINTIFF), APPELLANT, *v.* KRISHNA'JI BALLA'L GOKHALE AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Minor—Guardian—Act XX of 1864, *Sec.* 2—*Decree to bind minors—Debts contracted for immoral and improper purposes—Burden of proof not shifted by proof of immoral habits.*

In execution of a decree against the estate of Vishnu Bhikáji his estate was sold and it ultimately came into the hands of the plaintiff as purchaser, who sued for partition. It was contended that two of the defendants, parties to the suit in which the decree was passed, being then minors were not properly represented by their

*Second Appeal, No. 737 of 1891.