a kind that it is impossible to say that the Court below in disposing of it as it did was plainly and certainly wrong. I therefore concur in the order proposed by my learned colleague.

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Rule discharged.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Russell, Acting Chief Justice, and Mr. Justice Beaman.

MAHAMAD AMIN VALAD MAHAMAD IBRAHIM (ORIGINAL PLAINTIFF), APPELLANT, *v.* HASAN VALAD MAHAMAD IBRAHIM AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

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Indian Evidence Act (I of 1872), sections 13, 40-43—Principles applicable to purchase—Hindus—Mahomedans—Judgment not inter partes*—Admissibility in subsequent suit—Transaction—"Particular instances in which the right is claimed"*—Res-judicata.

The principles applicable to a purchase by one member of a joint Hindu family from another are not applicable to Mahomedans.

Plaintiff, a Mahomedan, brought a suit against his brother, brother's wife and the widow of a deceased brother to recover possession of a house on the strength of a registered sale-deed passed to the plaintiff by his deceased father.

Subsequent to the sale to the plaintiff, certain mortgagees of the father brought a suit on the mortgage against the plaintiff, his father and mother. In the said suit the sale to plaintiff was held to be a sham transaction and the plaintiff had to pay off the mortgage.

In the suit brought by the plaintiff for the recovery of the house on the strength of the sale-deed, the defendants relied on the judgment in the suit on the mortgage to show that the sale was a colourable transaction. The first Court allowed the claim, but the Judge in appeal dismissed it on the ground that the purchase by the plaintiff from his father was not proved to be *bonâ fide*.

On second appeal by the plaintiff a question having arisen as to the admissibility in evidence of the judgment in the suit on the mortgage, *held*,

Per RUSSELL, *Ag. C. J.*—The proceedings in the suit on the mortgage were admissible as relevant evidence because the plaintiff and defendants, either by themselves or their predecessors, were parties to that suit. The said proceedings came within the words "particular instances in which the right was claimed" in section 13 of the Indian Evidence Act (I of 1872).

* Second appeal No. 505 of 1905.

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Per BEAMAN, J.—The Judgment in the suit on the mortgage was admissible to prove that the genuineness of the plaintiff's sale-deed was then questioned, but it cannot be used for any ulterior purpose.

SECOND appeal from the decision of B. S. Joshi, First Class Subordinate Judge of Thana, with Appellate Powers, reversing the decree of V. V. Pataskar, Second Class Subordinate Judge of Mahad.

One Mahamad Ibrahim valad Mahamad Jafar Chandle was the owner of a house and some other property. He had three sons, namely, (1) Mahamad Amin, (2) Hasan and (3) Kamal. Hasan was married to Khadubibi and Kamal died leaving a widow whose name also was Khadubibi. Mahamad Ibrahim had mortgaged his property to one Haji Gite. Subsequent to the mortgage he sold the house to his son Mahamad Amin for Rs. 3,000 under a registered deed, dated the 22nd April 1885. In the year 1886 the mortgagee's sons Mahamad Ismail and others brought a suit against the mortgagor Mahamad Ibrahim, his wife and Mahamad Amin for the recovery of the mortgage debt. In that suit Mahamad Amin pleaded his purchase from his father, but the purchase was held to be a sham transaction and he had to pay off the mortgage debt. Mahamad Ibrahim died in the year 1888 and in the year 1905 Mahamad Amin brought the present suit for the recovery of the house and the ground appurtenant to it against his brother Hasan and his wife and the widow of Kamal alleging that he was in possession of the house and was wrongfully dispossessed of the same by the defendants.

Defendant 1, Hasan, answered that the house in suit was the joint ancestral property of the parties; that they had not separated; that the house did not belong to the plaintiff alone and he was not aware of the sale to plaintiff; that the sale was a colourable transaction; and that he did not prevent plaintiff from entering the house.

Defendant 2, Khadubibi, wife of defendant 1, was absent.

Defendant 3, Khadubibi, widow of Kamal, contended that the house was the joint property of the parties and did not belong exclusively to the plaintiff and that she was not aware of the purchase by the plaintiff.

The Subordinate Judge found that the property in suit belonged to the plaintiff by right of purchase which was neither fraudulent, colourable or collusive as alleged by the defendants and that they caused wrongful obstruction to the plaintiff. He therefore allowed the claim.

Against the said decree defendant 1 appealed and produced certain documentary evidence including the judgment in the suit brought by the mortgagees in the year 1886. The Judge found (1) that the fresh evidence tendered by the appellant (defendant 1) was admissible and (2) that it was not proved that the plaintiff's purchase from his father was *bonâ fide*. He, therefore, reversed the decree and dismissed the suit. The following is an extract from his judgment:—

> The so-called sale, be it remarked, purports to be a clean parting with of all belongings to the *pater familias* and when plaintiff was asked in his evidence in this suit what the old man depended upon for his livelihood after making the sale, he had to answer that he did not know. Kamal is admitted to have died only a short time before the institution of this suit, and plaintiff has had to admit the fact of his having defrayed the expenses of Kamal's daughter's marriage 2 or 3 years ago. This was certainly consistent with the character and duties of a man at the helm of a joint family. The additional evidence admitted in appeal on behalf of appellant shows that in a suit brought by Mahamad Ismail valad Haji Gite and his brothers in the year 1886 against plaintiff, his father and mother on a mortgage bond executed in favour of their father the sale was presumed by the Court of first instance as also by the appellate Court of the District to be a sham transaction, and plaintiff does not deny that he had to pay off that debt. The transaction was in 1886 very fresh and green and convincing evidence without the inevitable disadvantage of the infirmity of human memory must necessarily have been then available. That advantage cannot be expected now that the transaction has become very stale. Had appellant come to know about the suit of 1886 earlier he would have been enabled to put in copies of other papers also from its record. However, I think, the evidence that there is already on the record, establishes facts and suggests inferences sufficient to enable the Court to gauge aright the real character of the transaction in dispute.

Plaintiff preferred a second appeal.

D. A. Khare for the appellant (plaintiff):—The parties to the suit being Mahomedans, the Judge was wrong in deciding the case on principles of Hindu Law. The case is adjudged on the basis that the plaintiff, defendants and their father formed a joint Hindu family. The Judge was of opinion that the sale to

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us being made in derogation of natural love and affection towards our other brothers put us to the strict proof of *bonâ fides* and payment of consideration. This is an erroneous view.

Our sale-deed being duly registered and proved, the burden of proving *bonâ fides* of the transaction was wrongly placed upon us. It was for the defendants to prove the *mala fides* of the transaction. The Judge framed an improper issue and wrongly placed the burden of proof upon us.

The Judgment in the suit of 1886 was wrongly admitted in evidence. Our father had mortgaged the property to one Haji Gite and the suit of 1886 was brought by the mortgagee's sons against us, our father and mother on the basis of the mortgage deed. The present defendants were not parties to that suit. Therefore the judgment in that suit was not admissible, *Ranchhoddas Krishnadas* v. *Bapu Narhar*[1], *Gujju Lall* v. *Fatteh Lall*[2], *Surender Nath Pal* v. *Brojo Nath Pal*[3], *Mahendra Lal Khan* v. *Rosomoyi Dasi*[4]. According to section 43 of the Indian Evidence Act such judgments are admissible only if they are relevant under some other section of the Act. We contend that they are not so relevant either under section 13 or 11 of the Act. The judgments are not transactions nor are they instances under clauses 1 and 2 of section 13, nor do they come within the purview of section 11.

P. P. Khare for the respondents (defendants):—The Judge has found as a fact that the sale set up by the plaintiff was not *bonâ fide* and this is a finding of fact.

The references and expressions used by the Judge in respect of joint Hindu family are merely incidental and he has not made them the basis of his conclusions. On the contrary he was aware of the danger of applying the principles of Hindu Law to a Mahomedan family. The Judge distinctly says that the parties being Mahomedans there cannot be, in the absence of special circumstances, a presumption in favour of union as between brothers in Hindu Law. As detailed by the Judge the circumstances of the family were peculiar and hence he, by way of

(1) (1886) 10 Bom. 439.
(2) (1880) 6 Cal. 171.
(3) (1886) 13 Cal. 352.
(4) (1885) 12 Cal. 207.

analogy, made reference to the principles of joint family under Hindu Law. He has not applied the principles of Hindu Law in deciding between the rights of the members of a Mahomedan family.

It was for the plaintiff to prove the payment of the consideration as the genuineness and *bonâ fides* of the sale-deed were questioned by us. Even though the sale-deed was registered, the plaintiff was, under the circumstances, bound to prove the consideration. The judgment in the suit of 1886 justified the Judge in wording the issue in the manner he has done. In that suit the sale in dispute was in question. It was then found that the sale was fraudulent, without consideration and void. The judgment being admitted in evidence the Judge was right in framing the second issue and in placing the burden of proof on the plaintiff.

Judgments in previous cases, although not *inter partes*, are admissible in evidence under the combined effect of sections 43, 11, 13, clauses (1) and (2), of the Indian Evidence Act. The Calcutta High Court upto the ruling in *Gujju Lall* v. *Fatteh Lall*[1] held that such judgments were admissible in evidence: *Neamut Ali* v. *Gooroo Doss*[2], *Doorga Doss Roy* v. *Nurendro Coomar Dutt*[3], *Omer Dutt Jha* v. *Colonel James Burn*[4]. That Court held that the word "right" in section 13 of the Indian Evidence Act meant only incorporeal rights and that judgments not *inter partes* were inadmissible. But in *Peari Mohun Mukerji* v. *Drobomoyi Dabia*[5], which was a suit for possession of land, a previous judgment not *inter partes* was admitted to show the character of defendant's possession and the nature of the enjoyment. In *Kowsulliah Sundari Dasi* v. *Mukta Sundari Dasi*[6] the question was whether the land was zamindari or rent paying, and previous judgment was admitted to show the character of the land. The rulings of the Privy Council in *Run Bahadur Singh* v. *Lucho Koer*[7] and *Ram Ranjan Chakerbati* v. *Ram Narain Singh*[8] materially over-rule the Calcutta decisions. In *Jiaullah Sheikh*

(1) (1880) 6 Cal. 171.
(2) (1874) 22 W. R. 365 (Civ. Rul.).
(3) (1866) 6 W. R. 232 (Civ. Rul.).
(4) (1875) 24 W. R. 470 (Civ. Rul.).
(5) (1885) 11 Cal. 745.
(6) (1885) 11 Cal. 588.
(7) (1884) 11 Cal. 301.
(8) (1894) 22 Cal. 533.

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v. *Inu Khan*[1] a previous decree passed under section 9 of the Specific Relief Act was admitted as evidence of possession. In *Tepu Khan* v. *Rajani Mohun Das*[2] it was held that the authority of the ruling in *Gujju Lall* v. *Fatteh Lall*[3] was shaken by the decisions of the Privy Council. The Allahabad High Court in *The Collector of Gorakhpur* v. *Palakdhari Singh*[4] differed from the ruling of the Calcutta High Court in *Gujju Lall* v. *Fatteh Lall*[3] and held that such judgments were admissible. The Madras High Court in *Subramanyan* v. *Paramaswaran*[5], *Ramasami* v. *Appavu*[6], *Krishnasami Ayyangar* v. *Rajagopala Ayyangar*[7] concurred with the view in *Gujju Lall* v. *Fatteh Lall* [3]. But in *Thama* v. *Kondan*[8] it was held that judgments not *inter partes* were not conclusive, but were admissible in subsequent litigation as piece of evidence. In Bombay such judgments were held admissible: *Naranji* v. *Dipa*[9]. But in *Ranchhoddas Krishnadas* v. *Bapu Narhar*[10] the judgment was held inadmissible and differing from the Calcutta High Court it was held that the word "right" in section 13 of the Indian Evidence Act meant not only incorporeal rights but all rights. But latterly judgments not *inter partes* were held admissible under sections 11 and 13 as being only relevant and not conclusive: *Lakshman* v. *Amrit*[11], *Govindji Jhaver* v. *Chhotalal Velsi*[12], *Dharnidhar* v. *Dhundiraj*[13]. The Privy Council in *Ram Ranjan Chakerbati* v. *Ram Narain Singh*[14] allowed previous judgment to be put in for showing ancient possession and assertion of title. In *Dinomoni Chowdhrani* v. *Brojo Mohini Chowdhrani*[15] the Privy Council held that police orders were admissible upon general principles and under section 13 of the Indian Evidence Act to show the fact that such orders were made.

Thus the later decisions of all the High Courts and Privy Council concur in holding that judgments not *inter partes* are

(1) (1896) 23 Cal. 693.
(2) (1898) 25 Cal. 522.
(3) (1880) 6 Cal. 171.
(4) (1889) 12 All. 1.
(5) (1887) 11 Mad. 116.
(6) (1887) 12 Mad. 9.
(7) (1893) 18 Mad. 73.
(8) (1892) 15 Mad. 378.
(9) (1878) 3 Bom. 3.
(10) (1886) 10 Bom. 439.
(11) (1900) 24 Bom. 591.
(12) (1900) 2 Bom. L. R. 651.
(13) (1903) 5 Bom. L. R. 230.
(14) (1894) 22 Cal. 533.
(15) (1901) 29 Cal. 187 at p. 197.

admissible in evidence under section 13 of the Act. We, therefore, submit that the Judge rightly admitted the judgment in the suit of 1886.

D. A. Khare, in reply.

RUSSELL, Ag. C. J.:—Plaintiff herein one Mahamad Amin, son of Mahamad Ibrahim, filed a suit against his brother Hasan, the 1st defendant, the 2nd defendant, wife of the 1st defendant, and the 3rd defendant, the wife of a deceased brother of the plaintiff and defendant No. 1, named Kamal, to recover possession of a house and grounds in the plaint described. The said house and land belonged to the father of the plaintiff and defendant No. 1 and the deceased Kamal.

The plaintiff's case was that by a registered sale-deed in the year 1885 he purchased the property from his father. In 1886 certain mortgagees filed a suit against the plaintiff and his said father and mother on a mortgage bond executed by the father. The Court of first instance as also the District Court, held that sale to be a sham transaction, and there is no doubt that the plaintiff herein paid off that mortgage-deed. The father died in 1888. The first Court held that the plaintiff was entitled to succeed, the material issues raised therein being (1) whether the property in suit belongs to the plaintiff, and (2) whether the sale to plaintiff, if any be proved, is fraudulent, colourable and collusive as alleged by the defendants.

The first Court, however, appears not to have gone into the question of whether the plaintiff actually paid any consideration for the sale, and seems to have assumed that the deed dispensed with proof thereof. As is well known, however, the law in India differs from that in England on this point, and previous to the Contract Act the Privy Council held that the fact of an instrument being under seal does not of itself, in India, import that there was a sufficient consideration: *Raja Sahib Prahlad Sen* v. *Baboo Budhu Sing*[1]. Under that Act the fact of the agreement being in writing dispenses with consideration only in the cases mentioned in clauses 1 and 3 of section 25. Neither of these

(1) (1869) 2 Ben. L. R. P. C. 111.

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clauses, however, apply; the latter being quite inapplicable and the former only referring to an instrument in writing registered and made on account of natural love and affection between parties standing in a near relation to each other, which does not appear to have been the consideration for the deed in question.

The first Court rightly held that the *onus* of proving the 2nd issue as aforesaid was on the defendant and holds that there was not a tittle of evidence to prove that plea in this respect. But unfortunately the lower Court proceeds to discuss the evidence for the plaintiff on the question of consideration; and the reasoning of that Court does not appear to me to be satisfactory. It is unfortunate that the first Court had not before it the proceedings and decree in the suit of 1886, which I have above referred to. The case accordingly went up on appeal, but the appellate Court has not dealt with it, to my mind, in the way in which it should have been dealt with because in the first place it is evident from the judgment of the lower appellate Court that the learned Judge had in his mind and dealt with the case upon the principles applicable to a purchase by one member of a joint Hindu family from another, whereas the parties herein being Mohamedans the law applicable to Hindus cannot in any way apply to this case. That this is so is evident from many expressions of the lower appellate Court at pages 3 and 4 of the record. Moreover, the lower appellate Court has not considered the question whether any consideration for the deed was actually proved, and if so what it was and I have no hesitation in saying that it is impossible upon the face of the judgments of either of the lower Courts to say what the consideration for the deed really was, and it may fairly be said, I think, that the judgment of the lower appellate Court is based entirely upon the judgment in the said suit of 1886.

We have had addressed to us very lengthy arguments upon the question of whether that judgment is admissible at all or not, and in my opinion it is impossible to hold that the judgment in that case comes within either the word "transaction" in section 13 or "particular instances" in that section. But although this is so the proceedings in that suit would come within the words "particular instances in which the right was claimed,"

etc., for I think that we are bound by the decision of Sir Charles Sargent in *Ranchhoddas Krishnadas* v. *Bapu Narhar*[1], where he says that "rights and customs in section 13 must be understood as comprehending all rights and customs recognized by law, and, therefore, including a right of ownership."

Further, for my part I cannot distinguish the present case from the case of *Lakshman* v. *Amrit*,[2] which was followed in *Govindji* v. *Chhotalal* [3], and see also the case of *Dharnidhar* v. *Dhundiraj*[4], a decision of the Chief Justice and Mr. Justice Batty.

It appears to me, therefore, that the proceedings in the suit of 1886 should be admitted as relevant evidence in the present suit, for it must be remembered that the present plaintiff and the defendants, either by themselves or their predecessors, were parties to that suit of 1886. I should therefore remand the case to the lower appellate Court for a finding on the issue whether there was any and if so what consideration for the sale deed of August 1885 ?

No further evidence except the record of the suit of 1886 to be given and finding to be remitted to us within two months.

BEAMAN, J.:—I shall confine myself to one point. The facts which give rise to it are, that the plaintiff alleges that he purchased the property in suit while the defendant alleges that although that may have been so nominally, in fact the sale was void for want of consideration, even if it ever took place. In 1886 there was a suit against the father of the plaintiff, and the decree-holder attached and sought to sell the property which is now in suit. The plaintiff pleaded that the property was his own and alleged the same sale on which he now relies. As between him and the judgment-creditor the sale was held to be invalid, and the plaintiff had to pay the decretal debt. The present defendant has put in the judgment in that suit, with the object of course of proving that the sale to the plaintiff on which the present suit is based was then held to be invalid. The question is whether, that judgment not being *inter partes* is admissible and if so, what is its precise probative value ? I should

(1) (1886) 10 Bom. 439 at p. 442.
(2) (1900) 24 Bom. 591.
(3) (1900) 2 Bom. L. R. 651.
(4) (1903) 5 Bom. L. R. 230.

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add that the plaintiff alleges that the sale was made to him by his father who was the judgment-debtor in the suit of 1886. The relevancy of judgments of Courts of justice is regulated by sections 40—43, Indian Evidence Act. Section 40 merely enacts that the existence of any judgment order or decree which by the provisions of section 13, Civil Procedure Code, constitutes *res judicata* is a relevant fact. Section 41, without attempting any precise or exhaustive definition aims at, and probably does let in all judgments *in rem* proper. Section 42 provides that judgments, orders or decrees other than those mentioned in section 41 are relevant if they relate to matters of a public nature relevant to the enquiry. Section 43 declares all judgments, orders or decrees, other than those specified in sections 40, 41, 42, to be irrelevant, unless the existence of the judgment is itself a fact in issue, or is relevant under some other section of the Act. The judgment, which the defendant offered and the Court below admitted, is not relevant under section 40; because that section is admittedly limited to judgments, etc., which constitute a *res judicata*, and to do that they must be *inter partes*. It is not admissible under either section 41 or 42, that too is admitted; and therefore unless it can be brought in under the last words of section 43 it is admittedly excluded by express enactment. It is not contended that the fact of the judgment is itself a fact in issue, but it is contended that "the existence of the judgment is relevant under some other provision of the Act". In order to bring it in, defendant has recourse to section 13 which says that "where the question is as to the existence of any right or custom the following facts are relevant: (*a*) any transaction, etc., (*b*) particular instances, etc. It is hardly necessary to say that there is a formidable array of authority for the general proposition, that judgments not *inter partes* are admissible under this section and it would be as tedious as unprofitable to examine the numerous leading cases in order to extract, if possible, a definite and consistent principle from them. In order to get a clear view of all that is involved in the materials available for argument on this recurring point, I should like here to approach the facts of the case we have to deal with, as though the case were for a moment *res integra* and then apply the law, disencumbered of

authority, to it. Here is a plaintiff suing on a deed of sale, which a defendant alleges to be void for fraud and want of consideration. The issue to be tried between the parties is "whether as appearing on the face of the registered instrument the plaintiff paid consideration?" The burden of proving that he did not, is of course on the defendant. The defendant adduces no evidence but refers the Court to a judgment twenty years old between the plaintiff of the one part and another person of the other, in which an issue was raised touching the validity of this sale, and the Court came to the conclusion that it was void for want of consideration or fraud on the creditor and so forth. Upon this the first question is whether the judgment falls within the definitions of judgments which are expressly admissible, and the answer is that it does not; the next question is whether it falls within the concluding part of section 43, whether in other words its existence is a fact in issue or relevant under some other provision of the Act. It certainly is not a fact in issue, but it is contended that it is relevent under section 13. To satisfy the requirements of that section the question must be as to the existence of a right or custom. The existence of the judgment must be relevant as a transaction by which the right was claimed, modified, etc., etc., or as a particular instance in which the right was claimed, etc., etc. I think that, were there no case law on the subject no one would hesitate for a moment upon being asked to bring a judgment of that kind in evidence to prove that a sale-deed was void, to reply that neither the language nor the object of section 13 served the purpose. What class of cases the section was intended to meet is as plain as possible not only from its language but from the illustrations. And those are cases in which the right or custom in question is regarded as capable of surviving repeated instances of its assertion and denial, where transactions may be supposed to have gone on modifying, asserting, denying, creating, recognizing it, or being inconsistent with its existence, leaving it, after all that has been given in evidence, fair matter for judicial consideration, as to whether the Court should or should not decree it. I confess I do not find it easy to understand how that language can without absurdity be applied to such a case as this. Let us substitute it

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for the illustration. "The question is whether a sale-deed is fraudulent, particular instances in which the Courts had previously held that the same sale-deed was fraudulent although not between the same parties; and particular instances in which the vendee had declared that his deed was genuine, but other persons had denied that it was, are relevant facts." A right which is created by and inseparably bound up in a document does not admit of proof or disproof by particular instances of assertion and denial, and is therefore plainly and essentially distinguishable from all the rights which are denoted in section 13. The deed is the only proof as it is the sole foundation of the right; that has to be proved, nothing else; any attack upon its genuineness, if made good, is fatal once and for all to the right founded on it, and if such an attack had really been made in another suit *inter alia* and had proved successful, it is plain that allowing the judgment in that suit to go in, would, if the judgment were really evidence of what it purports to be, instantly decide the matter. The Court would have to accept or reject the judgment. If it accepted it, as in ninety-nine cases out of every hundred it probably would, there would be nothing left to adjudicate upon. The single successful denial of the right, must have killed it for ever. The rights contemplated by section 13 are plainly conceived as admitting of proof by cumulative instances and transactions, and not by a single and decisive and final way, namely the terms of a document. The only question being whether a registered sale-deed was genuine or fraudulent it is inconceivable that the language of section 13 can reasonably and logically be fitted to the case. That was the view taken of the meaning and intention of the words "right" and "custom" in section 13 by a majority of the Calcutta Full Bench. But it has since been dissented from and at present it must be conceded that the balance of authority favours the extension of the term right, to include any and every right known to the law. Against that opinion, might well be advanced the section itself. Had that really been the intention it is difficult to understand why the legislature enacted the opening words which certainly are of a limiting and defining character. It would have been just as easy, had the intention been to make the section applicable to every

legal right to omit the words " Where the question is as to the existence of any right or custom ". But then the section would have altogether lost its distinctive character. The whole context indicates that the section is dealing with continuing rights which may be interrupted without being necessarily destroyed. Still we must take it as settled for the present by the weight of judicial authority, that the term right, in the section, comprehends every right known to the law. The next question is what is the effect of so extending the concluding words of section 43 read with section 13 (I think we need not seriously discuss the attempts here and there made in the cases, to avoid the awkward consequences of an analytical examination of this rule and its contents by a recourse to section 11, a step which I feel materially increases rather than lessens the difficulty) as to make all judgments though not *in rem* and not *inter partes*, and not upon questions of public right, relevant as transactions or instances, of the assertion or denial of the right in question, where one party to the subsequent was also a party to the prior litigation. An examination of the voluminous case law on the point will, I think, disclose this result. Although in every case the Courts have been most particular to disclaim the doctrine of *res judicata* in respect of judgments so admitted, the effect of admitting them has been to conclude the point to prove which they are admitted. That is to say that while the Courts have in theory declared consistently that these judgments are not *res judicata*, and are not even conclusive of the points to which they are directed, they practically, as judgments *proprio vigore* and incapable of any rebuttal, do conclude those points. It is indeed extremely difficult to understand what other effect they could have. It is true that in the case of public rights a judgment not *inter partes* while relevant may not be conclusive but it is still conclusive of its own subject matter. To take the commonest illustration, in a suit for trespass B, the defendant, puts in a judgment recovered by C, a defendant in a like suit on the same ground, namely, that C had as B alleges himself to have a public right of way over A's land. Now while that judgment is relevant, it is not conclusive against A that B also has a right of way, because, whether or not there is a public right of way in

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these circumstances is not to be finally settled by a single judgment between A and C in an action for trespass. But the judgment, I apprehend, is absolutely conclusive of its own subject matter which is that in the action which A brought against C, C's defence was held good. And so where the subject matter of the judgment coincides with and is identical with the entire right in issue, or that ever can be in issue, on the same state of facts, it becomes a matter of the utmost nicety to distinguish between the relevance and the conclusiveness of the judgment. And that is the case here. If we are to take the judgment *qua* judgment as relevant, to the extent of its subject matter and contents, then *cadit questio*, for in that judgment it was held that the sale-deed was colourable, fraudulent and void. Saying that while a judgment is relevant it is not conclusive, the commonest phrase in all the leading cases, must, I think, mean one of two things: either that the judgment is not conclusive of the whole case in part proof of which it is adduced, or that while relevant it is not conclusive of itself. The first proposition is comparatively simple and intelligible, although on a closer scrutiny it will be seen to impair the integrity of the salutary and well established principle of *res judicata*, namely that no man is to be concluded by a judgment in a cause to which he was not a party. Casuistry might of course step in here, and point out that that principle really does not apply to cases of this kind where the verdict was against the very man, against whom it is now sought to use it a second time.

But that implies that the verdict was *in rem* which *ex-hypothesi* for the purposes of this discussion we have taken it not to be. Upon that refinement I will not dwell here; it is sufficient to note it and indicate, that in some connections it might have more than merely academic value. The proposition amounts to this that while a previous judgment not *inter partes* may not conclude the whole, it may conclude a part of the case. *Pro tanto* then it would, notwithstanding all verbal disclaimers, be *res judicata*, and commonly, in this indirect way, would operate to be *res judicata* of the entire matter. But turning to the second proposition, it is obvious that the judgment if its subject matter is co-extensive with the subject matter of the suit in which it is offered as

evidence must be altogether or not at all *res judicata*. And that I suppose is what is meant by the rather vague phrase that while relevant it is not conclusive. But if it is strictly and accurately speaking admissible, as a judgment, it can only be treated as conclusive of its own contents. Less than that, and what is it? Nothing more of course than the mere opinion of a person, whether a judge or not does not matter as soon as you strip it of its special attributes as a judgment, who is not before the Court to be cross-examined upon the grounds of that opinion. And that never has been deemed good evidence. There is, I believe, no logical escape from this dilemma. If you treat the thing as a judgment and admit it on that footing, then the whole of its contents must be *pro tanto, res judicata*; if you deny them that effect, then the thing is mere opinion, and does not appear admissible, as to its contents, under any section or provision or known principle of evidence or the Evidence Act. Leaving the cases which have occasioned the immediately preceding remarks, and returning to the statute, it becomes, I think, fairly plain, that adopting the most comprehensive view, and allowing to "right" the amplest possible meaning, judgments brought in under section 43 and section 13 must be either "transactions" or "instances". All the best authorities I think agree that a judgment *qua* judgment and in respect to its contents, certainly is not such a "transaction" or "instance," but it may be the simplest and most convenient proof of the transaction, namely the litigation, or the instance, namely the assertion by the plaintiff and the denial by the defendant of the right. So limited, there would be no great objection or difficulty in the way of admitting the judgment. Its probative effect would then be no more than this, to establish that at the time it was given, there had been a transaction between the parties to it in which the right in question had been asserted or denied, or so forth. But here comes in the fallacy which interpenetrates an extremely loose and questionable principle, and connects it with a much more questionable practice. It does not need a very rigorous logic to expose it. It being conceded as I think on a correct reading of the best authorities it must be conceded, that if judgments of this kind are admissible at all under sections 43 and 13 they are

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admissible only as the simplest proof of a transaction, or an instance within the meaning of the latter section, it follows of course that the proof cannot be taken beyond the thing to be proved and the thing to be proved is no more than that there was an assertion or a denial, not the grounds upon which a judge held that the assertion or the denial was good or bad in law. But the inveterate habit of the Courts and advocates seems to be to confound the proper with the improper use of a judgment so admitted in evidence. And for a very good reason. Restricted to its proper use, by reason of the defect of the principle under which it is brought in under section 13 the judgment cannot of course be of the slightest value to the party relying on it. He does not want to prove what he pretends that he wants to prove namely that on a former occasion the right in question was asserted and denied; but he wants to prove that a Court of law adjudicated on all that was implied in that assertion and denial, in other words to use a judgment not *inter partes* as *res judicata*.

Here for example what the defendant desires to prove by the judgment and struggle how he would to conceal it in a cloud of phrases, his pleader always had to come back to it, was not the mere transaction or the instance but the findings of the Court on the issue of fraud. Now if that material be admissible at all, it must be *res judicata* or mere opinion; there is no alternative but this. In the former case it is admittedly excluded by the perfectly well understood and legislatively enacted rule, that there can be no *res judicata*, except *inter partes*; in the latter I own that I do not understand upon what principle it can be evidence at all. I think that if judgments are admissible only under sections 43 and 13, then they must be rigidly restricted to proving the transaction or the instance meant by the section. Where the case is not of the kind really contemplated by that section, their use thus logically restricted is innocuous; it does no good but neither can it do any harm; for a transaction or an instance of that kind in such a case, cannot possibly be of any probative value. But I am most strongly of opinion that a party who has been allowed to put in a previous judgment not *inter partes*, for the purposes of section 13, cannot be allowed to use its contents *qua* judgment virtually thereby

converting it into a *res judicata*. That is the distinction which I have set myself to bring out clearly and I hope simply and intelligibly. Applying it in the present case the result is this, that while we may, deferring to the authorities, concede that the judgment was admissible to prove that in 1886 there was a dispute about the genuineness of this sale deed, we cannot use it for any ulterior purpose. We certainly cannot look at the issues in the judgment and the findings which the judge came to upon them, and then treat those findings as of any legal probative value in this suit. I am therefore prepared to allow on the strength of that judgment that the genuineness of the sale deed was questioned in 1886, but that alone is not enough I think in the total absence of all other proof given by the defendant to discharge the *onus* which was admittedly on him.

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This is meant for the guidance of the Court in dealing with this piece of evidence on the remand.

Issue sent down.

G. B. R.

APPELLATE CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Beaman.

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November 16.

MANJAPPA SUBBAYA AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS, *v.* VENKATESH BAB PRABHU (ORIGINAL PLAINTIFF), RESPONDENT.*

Right to sue—Suit for rent—Relationship of landlord and tenant must be shown to arise out of contract or privity of estate.

Before a plaintiff can succeed in a suit to recover rent, he must establish relationship of landlord and tenant existing between himself and the defendant and resting either on contract or privity of estate.

SECOND appeal from the decision of G. D. Madgavkar, District Judge of Kánara, confirming the decree passed by E. F. Rego, Subordinate Judge of Honávar.

Suit to recover rent.

* Second Appeal No. 8 of 1906.