ORIGINAL CIVIL.

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

TEHILRAM GIRDHARIDAS, PLAINTIFF AND APPELLANT, *v.* KASHIBAI, WIDOW, DEFENDANT AND RESPONDENT.* 1908. *February* 25.

Transfer of Property Act (IV of 1882), section 55, clause (4) (b), clause (6) —Vendor's lien for unpaid purchase-money—Sale-deed containing acknowledgment of receipt of consideration money in full—Mortgagee taking the mortgage without notice of unpaid purchase-money—Estoppel—Evidence Act (I of 1872), section 115.

In a registered sale-deed of a chawl it was stated that the vendor had received consideration in full and there was also an acknowledgment of the vendor at the foot of the deed to the same effect. The vendor had also parted with all the title-deeds relating to the property. The vendee subsequently mortgaged the property to the plaintiff who had no knowledge that the full amount of the consideration money was not paid to the vendor though he knew that the vendor was in possession of some portion of the property,

Held, that the defendant (the vendor) was estopped from contending that she had a lien on the chawl for the unpaid balance of the purchase-money by her declaration as to the receipt of the whole purchase-money and by her act in handing over the title-deeds.

Per BATCHELOR, *J.* :—A vendor of immoveable property who endorses upon the purchase-deed a receipt for the purchase-money cannot set up a lien for unpaid purchase-money as against a mortgagee for value without notice under the purchaser.

ONE Mahomedali mortgaged to the plaintiff, by a registered deed dated 7th April 1904, a chawl for securing in trust for the person or persons who had accepted or discounted or would thereafter accept or discount at the plaintiff's request hundis, notes, etc., drawn or payable by the mortgagor for the aggregate sum not exceeding at any time the amount of Rs. 7,000.

The mortgagor handed to the plaintiff deeds and muniments of title relating to the said property including a registered deed of sale from the defendant to the mortgagor, dated 3rd April 1903. At the foot of this deed it was endorsed that the sum of

* Suit No. 422 of 1906 : Appeal No. 1506.

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Rs. 9,000 had been paid as consideration money by the mortgagor and received by the defendant in full.

The plaintiff demanded on the 12th May 1905 from the mortgagor the sum of Rs. 6,455-3-6 for principal, interest and costs due by him and in default of payment gave notice that the plaintiff would exercise the power of sale reserved to him. No answer having been received from the mortgagor the plaintiff caused the chawl to be put up for sale by auction to be held on the 16th September 1905.

On 13th September 1905 the defendant for the first time intimated to the plaintiff that Rs. 4,000 out of the consideration money still remained unpaid to her by the mortgagor and therefore called upon the plaintiff not to put up the said chawl for sale as the plaintiff's mortgage could not affect the defendant's rights and interests in the property.

The plaintiff alleged that he was a *bonâ fide* mortgagee for value without notice of the defendant's alleged lien and entitled to possession of the chawl under the mortgage-deed; and that as the defendant knowing that the amount of the purchase-money had not been received by her in full caused it to be falsely stated otherwise in the sale-deed and had also parted with all other title-deeds relating to the said chawl, she was estopped from setting up her lien if any.

The plaintiff prayed for a declaration that he was entitled to sell the chawl under the mortgage-deed free from any lien of the defendant; and for an order directing the defendant to deliver possession to the plaintiff of the said chawl including the four rooms therein in her personal occupation.

The defendant contended that the mortgage was a sham transaction; that the sale-deed was not explained to her; that the vendee (the mortgagor) by a writing of even date agreed to pay to her the balance of the purchase-money; that she was in possession of the chawl in exercise of her right of lien as unpaid vendor, and the plaintiff was aware of her possession, that she had obtained a High Court decree against the mortgagor for the amount of Rs. 3,444 due to her; that she was fraudulently induced to part with her title-deeds by the mortgagor alleging that they

were necessary for the preparation of the deed of sale; that the suit was bad in law as under the mortgage deed the plaintiff was appointed a trustee on behalf of an uncertain class and the plaintiff had not obtained the leave of the Court to sue on behalf of that class; that the mortgagor was a necessary party to the suit. The defendant by way of counterclaim sought for a declaration that she as unpaid vendor had a lien on the chawl for the balance of the purchase-money and that she was entitled to enforce her right by the sale of the said premises.

The Court (Macleod, J.) passed a decree in the defendant's favour and dismissed the suit with costs.

The plaintiff appealed.

Strangman (with *Raikes*) for the appellant.

Macleod, J., decided case on two points: (1) that the so-called mortgage was not a mortgage and the plaintiff did not take under the mortgage, (ii) that the plaintiff had notice of the defendant's lien for unpaid purchase-money. See mortgage deed which says "in respect of hundis, bills or advances made *through* him the said Multani Tehilram Girdharidas." On this Macleod, J., has held that plaintiff was only a volunteer and not a secured creditor. The learned Judge relied on *Wallwyn* v. *Coutts* [1] and *Garrard* v. *Lord Lauderdale* [2], but the facts in these two cases are different from those here. Plaintiff is himself interested in the mortgage deed and is also liable to others and is not a mere volunteer. See *Siggers* v. *Evans* [3]. "*Through him*" would include loans made by the plaintiff, the plaintiff guarantees the payment back of the loans.

The plaintiff had no notice of lien as required by Transfer of Property Act, section 55, cl. 4 (*b*). *Webb* v. *Macpherson* [4], which is relied on by them, is not applicable because the question of estoppel arises. See *Kennedy* v *Green* [5].

Macleod, J., has held that defendant's possession of the mortgaged property was in itself constructive notice to the plaintiff

(1) (1815) 3 Mer. 707.
(2) (1830) 3 Sim. 1.
(3) (1855) 5 El. & Bl. 367.
(4) (1903) L. R. 30 I. A. 238.
(5) (1834) 3 Myl. & K. 699.

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of defendant's claim. This is not so: see *White* v. *Wakefield*[1]. She might have been in possession as a tenant of the purchaser; possession in such a case would mean nothing. This story about notice is never set up in correspondence before we come to Court. See Lord Cain's judgment in *Shropshire Union Railways and Canal Company* v. *The Queen*[2].

Mirza (*Setalvad* with him) for the respondent.

The plaintiff is a trustee on behalf of the creditors. The assignee cannot stand in a better position than the assignor, none of the creditors of the mortgagors were privy to the mortgage deed: see *Johns* v. *James* [3].

On the question of notice we say the plaintiff had constructive notice of our lien: see Wigram, V. C., in *Jones* v. *Smith*[4], Alderson B. in *Whitbread* v. *Jordan* [5], *West* v. *Reid* [6], *Doorga Narain Sen* v. *Baney Madhub Mozoomdar* [7], *Gobind Chunder Mookerjee* v. *Doorgapersaud Baboo* [8].

Possession has the effect of notice: *Kondiba* v. *Nana* [9]. If there is notice no question of estoppel can arise.

Raikes in reply.

JENKINS, C. J.—On the 7th of April 1904 Mahomedali Abdul Husein Goriawalla executed in favour of the plaintiff a mortgage of immoveable property in Bombay, and the purpose of this suit is to restrain the defendant from interfering with the exercise by the plaintiff of the power of sale contained in the mortgage deed. The interference is admitted, and is sought to be justified by the defendant on the ground that she has a charge on the mortgaged property under section 55 (4) (*b*) of the Transfer of Property Act.

Macleod, J., has passed a decree in the defendant's favour and dismissed the suit with costs. The plaintiff now appeals from that decree. The charge claimed by the defendant is in respect of unpaid purchase money due under an instrument of transfer

(1) (1835) 7 Sim. 401.
(2) (1875) L. R. 7 H. L. 496 at p. 510.
(3) (1878) 8 Ch. D. 744.
(4) (1841) 1 Ha. 43.
(5) (1835) 1 Y. & Coll. 303 at p. 328.
(6) (1843) 2 Ha. 249.
(7) (1881) 7 Cal. 199.
(8) (1874) 22 W. R. (Civ. Rul.) 218.
(9) (1903) 27 Bom. 408.

executed by her in favour of Mahomedali, the plaintiff's mortgagor, on the 3rd of April 1903, whereby the ownership of the mortgaged property passed to Mahomedali as the buyer.

The actual consideration named in the instrument of transfer was Rs. 9,000, but of this only Rs. 4,000 was paid at the time. By an agreement of even date Mahomedali agreed to pay the balance within one year, and it was thereby provided as follows: "In case I" (that is Mahomedali) "or my heirs sell the said premises in question and mentioned in the said conveyance the said vendor should at once attach the sale-proceeds of the said premises and recover the balance out of it." A part of this balance is still unpaid.

The points urged by the defendant are, first, that she has a charge under section 55 of the Transfer of Property Act: secondly, that under the mortgage deed the plaintiff has no right to sell the property: and, thirdly, that if he has that right, it is subject to the charge in the defendant's favour.

I will first consider whether the plaintiff has a right to sell the property under the mortgage deed.

The circumstances that led up to the mortgage are indicated in the recitals, which run as follows:—

This indenture made the 7th day of April in the Christian year one thousand nine hundred and four between Mahomedali Abdul Husein Goriawalla of Bombay Vorah Mahomedan inhabitant of the one part and Multani Tahilram Girdharidas of Bombay Hindu inhabitant of the other part whereas the said Mahomedali Abdul Husein Goriawalla is seized of or otherwise well and sufficiently entitled to the hereditaments and premises hereinafter more particularly described and intended to be hereby granted for an estate of inheritance in fee simple in possession free from incumbrances and whereas the said Multani Tahilram Girdharidas is a broker and has been for some time past procuring loans of money from several persons to the said Mahomedali Abdul Husein Goriawalla hundis drawn or payable by him and other negotiable instruments and on personal security and whereas the said Multani Tahilram Girdharidas has up to the date of these presents procured various loans of money to him the said Mahomedali Abdul Husein Goriawalla from different persons some of which have been paid off by the said Mahomedali Abdul Husein Goriawalla and that a balance of Rs. 6,200 now remains due and owing by the said Mahomedali Abdul Husein Goriawalla on account thereof and whereas it has been agreed by and between the parties hereto that in consideration of the said

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Multani Tahilram Girdharidas procuring such loans from time to time which loans shall not in any case exceed in aggregate Rs. 7,000 at any time the said Mahomedali Abdul Husein Goriawalla should as a security for such loans execute a mortgage of the said hereditaments and premises for the said sum of Rs. 7,000 to the said Multani Tahilram Girdharidas for the use and benefit of the person or persons who have already been or may or shall hereafter be procured by him the said Multani Tahilram Girdharidas to make such loans to him the said Mahomedali Abdul Husein Goriawalla to the extent of the said sum and in manner hereinafter appearing now this Indenture witnesseth that in pursuance of the said agreement and consideration of the premises the said Mahomedali Abdul Husein Goriawalla doth hereby for himself his heirs executors and administrators covenant with the said Multani Tahilram Girdharidas his heirs executors administrators and assigns that he the said Mahomedali Abdul Husein Goriawalla his heirs executors or administrators will on demand made to him or them or left at the place of his or their business pay to the said Multani Tahilram Girdharidas his heirs executors administrators or assigns the balance which shall for the time being be owing by him the said Mahomedali Abdul Husein Goriawalla his heirs executors or administrators in respect of hundis bills notes or drafts accepted paid or discounted or loans or credits or advances made through him the said Multani Tahilram Girdharidas to or for the use or accommodation or at the request of the said Mahomedali Abdul Husein Goriawalla and for interest commission or otherwise in trust for the person or persons his or their heirs executors administrators and assigns who have hitherto accepted paid or discounted or may or shall hereafter accept pay or discount such hundis bills notes or drafts or who have made or may or shall thereafter make such loans credits or advances as aforesaid as his or their own proper moneys in proportion due to him or them respectively and to be assigned and disposed of as he or they shall direct.

Then Mahomedali covenanted to pay to the plaintiff the balance for the time being owing by him, Mahomedali, "in respect of hundis, bills, notes or drafts accepted, paid or discounted or loans or credits or advances made through him the said Multani Tahilram Girdharidas to or for the use or accommodation or at the request of the said Mahomedali Abdul Husein Goriawala and for interest, commission or otherwise in trust for the person or persons, his or their heirs, executors, administrators and assigns who have hitherto accepted, paid or discounted or may or shall hereafter accept, pay or discount such hundis, bills, notes or drafts or who have made or may or shall thereafter make such loans, credits or advances as aforesaid as his or their own proper moneys in proportion due to him or them respectively and to be assigned and disposed of as he or they shall direct."

The transfer of the property is expressed to be to the plaintiff "in trust for the person or persons his or their heirs, executors and assigns who have hitherto accepted or paid or discounted or may or shall hereafter accept or pay or discount the said hundis bills or notes or drafts or who have made or may or shall hereafter make the loans credits or advances through the said Multani Tahilram Girdharidas as aforesaid and whichever moneys shall for the time being remain due and owing in respect thereof."

And then the trusts of the sale-proceeds are expressed to be after payment of costs and expenses to pay and satisfy the money then owing on the security of the mortgage-deed.

The defendant contends that the deed is voluntary, and that there is no one who can claim the benefit of it.

The plaintiff on the other hand claims that he is entitled to the benefit of the security created by the mortgage-deed, and he makes out his claim as follows.

He says that at the institution of the suit there was, and that there still is, a sum of Rs. 5,700 with interest due on the security of the deed. This amount is made up of Rs. 3,700 and Rs. 2,000. The sum of Rs. 3,700 represents two notes for Rs. 2,500 and Rs. 1,200 and the sum of Rs. 2,000 represents two hundis for Rs. 1,000 apiece, all discounted through the plaintiff as contemplated by the mortgage-deed. These notes and hundis were not met by Mahomedali at maturity, and the holders were paid by the plaintiff, who took from Mahomedali promissory notes for the amounts paid by him.

But if the notes and hundis paid by the plaintiff come within the terms of the mortgage-deed, then the plaintiff can in my opinion claim the benefit of the security. The evidence shows that the notes and hundis were discounted on the plaintiff's assurance and the conclusion to which I come is that he guaranteed repayment. The notes and hundis have been produced by him and there can (in my opinion) be no doubt that he held them by way of security for the amount paid by him. Moreover, it appears that by the cancellation of the special

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endorsements two of these instruments are endorsed in blank and are so held by the plaintiff.

The conclusion to which I come is that the plaintiff on the payments made by him became entitled to the benefit of the security created by the mortgage-deed, and that by taking promissory notes from Mahomedali for the amounts paid by him he did not intend to abandon and in fact did not give up this security.

The learned Judge considered that *Wallwyn* v. *Coutts* (1) and *Garrard* v. *Lord Lauderdale* (2) furnished an answer to the plaintiff's claim, but in my opinion they do not in any way govern the present case, and it cannot be said that the mortgage-deed was a voluntary trust-deed. The recitals show what the consideration was: loans were procured by the plaintiff in accordance with what was contemplated, and one of those by whom money was paid has stated in evidence that the plaintiff told him that he had got a deed.

Moreover, the facts as to the Rs. 6,200 mentioned in the recitals show that the deed was not even in its inception voluntary. There can be no doubt that it was intended to secure this sum. But of this amount Rs. 3,400 had actually been paid at that date by the plaintiff in respect of hundis or notes on which Mahomedali was liable, and of this Mahomedali must have been aware inasmuch as he had given the plaintiff a note for the amount.

This also serves to show that it was the intention of the parties that the plaintiff was to have the benefit of the security for all amounts subsequently to be paid by him in discharge of Mahomedali's liability to those who had discounted notes or hundis for him through the plaintiff.

If the plaintiff is, as I hold, entitled to the benefit of the mortgage it is not disputed that the power of sale is exercisable, so it only remains for me to deal with the defendant's contention that the power can only be exercised subject to the charge in her favour in respect of unpaid purchase money.

(1) (1815) 3 Mer. 707. (2) (1830) 3 Sim. 1.

Section 55 (4) (*b*), on which the defendant relies, is in these terms:—

"The seller is entitled—where the ownership of the property has passed to the buyer before payment of the whole of the purchase-money, to a charge upon the property in the hands of the buyer for the amount of the purchase-money, or any part thereof remaining unpaid, and for interest on such amount or part."

Notwithstanding the difference between the language of this sub-section and that of sub-section 6, I will assume that the defendant, under section 55 (4) a seller, has a charge upon the property transferred not only in the hands of the buyer, but also of one who claims under the buyer, and that the decision in *Webb* v. *Macpherson*[1] did not turn on the special circumstances of that case.

But is not the defendant estopped from relying on the facts necessary to the establishment of her charge?

Section 115 of the Evidence Act provides that:

"When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing."

In the instrument of transfer of the 3rd of April 1903 executed by the defendant to Mahomedali it is stated that the consideration of Rs. 9,000 had been paid on or before the execution of the instrument, and endorsed on it was a receipt for this amount signed by the defendant, and the title-deeds in the defendant's possession were delivered to the buyer.

The plaintiff has sworn that if he had known the purchase-money of the property had not been fully paid up he would not have taken the mortgage, and in the mortgage it is recited that Mahomedali was seized of the property free from incumbrances.

Why then should not the defendant be estopped by the statement in the deed and the endorsement and her act of handing over the title-deeds?

(1) (1903) L. R. 30 I. A. 238 at p. 244; 5 Bom. L. R. 838.

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If the plaintiff knew the true facts then he would not be entitled to rely on section 115, but on the evidence I hold it is not proved that in fact he had such knowledge. In the correspondence before suit it is distinctly said that the first intimation to the plaintiff of the defendant's claim was her attorney's letter of the 13th of September 1905 (see letter of the 16th September 1905), and this statement was not questioned.

The plaintiff in his evidence by implication denies knowledge of non-payment of the purchase money, and the learned Judge does not find that he had this knowledge. All he does hold is that the defendant was aware of circumstances in connection with the defendant's claim which put him on inquiry before the mortgage was executed to ascertain whether Mahomedali was in possession or not, and that having made no inquiry of any sort he cannot now be said to be a mortgagee without notice of her claim. What these circumstances are does not appear from the judgment but all it comes to is that he ought to have made enquiries as to the mortgagor's possession, and failure in this respect deprives him of saying that he is a mortgagee without notice of her claim. It is argued that the learned Judge has found that the plaintiff had notice within the definition contained in section 3 of the Transfer of Property Act. But that does not appear from his judgment: the issue on which the defendant relies is the 20th, but that falls short of the requirements of the section, and I can discover nothing in any part of the judgment which amounts to a finding of actual knowledge, wilful abstention or gross negligence as required by section 3.

And on a consideration of the evidence I hold that no case within that section has been established, so that it is unnecessary to consider whether anything short of actual knowledge would disentitle the plaintiff from relying on section 115 of the Evidence Act.

Much reliance has been placed on the evidence of Moreshwar Yeshwant, N. F. Creado and Anandrao Ramchandra. Moreshwar's evidence is directed to showing that the plaintiff must have learnt of the claim on the 28th of February 1904, about five weeks before the execution of the mortgage.

One naturally asks how could he in September 1907 have remembered that the plaintiff was present at a conversation between him and Mahomedali on the 28th of February 1904 over three and half years before. The date was evidently obtained from the endorsement of payment, and the witness' version in examination-in-chief was that the plaintiff had found the money. If that had been true there would have been a reason for the witness' recollection of the circumstance. But the plaintiff denies the incident, and it was not suggested to him that he had made any entry of the Rs. 130 said to have been found by him on that occasion. Before us the plaintiff's books were produced for examination by the defendant's advisers with the result that no trace could be found in them of any such payment having been made. I do not believe that the Rs. 130 was found by the plaintiff, and that being so I am unable to attach any value to Moreshwar's story of the 28th of February.

Creado too speaks to this same day, but I am equally unable to believe his story. He is more cautious than Moreshwar, because he does not commit himself to the statement that the plaintiff found the money. But how he comes to remember the plaintiff's presence on that occasion I cannot understand and it would not be safe to rely on his evidence for the purpose of bringing home to the plaintiff knowledge that the purchase money had not been paid.

Anandrao's evidence, if it means anything, means that the plaintiff had actual knowledge, a comment which applies to the evidence of the two witnesses I have already discussed. But it is clear that the learned Judge did not believe actual knowledge was brought home to the plaintiff; the furthest he goes is to hold that the plaintiff was aware of circumstances in connection with Kashibai's claim which put him on inquiry to ascertain whether Mahomedali was in possession or not, and that having made no inquiry of any sort he cannot now be said to be a mortgagee without notice of the claim. This appears to me to mean that he ought to have made enquiry, and if he had done so, then he would have had actual knowledge. I think the learned Judge went to the furthest limit possible, and I certainly will go no further; for Anandrao's evidence as well as that of

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Moreshwar and Creado fails to convince me that the plaintiff knew that the facts stated in the receipt and implied by delivery of the title-deeds were untrue.

No reliance has been placed on the other evidence of knowledge which has been disbelieved by Macleod J.; therefore, I need not discuss it.

Then Mr. Mirza has urged on behalf of the defendant that the learned Judge has found against estoppel; and we, therefore, ought not to disturb his finding.

The issue framed on this point is "whether the allegations in para. 7 of the plaint are true." The case of estoppel is made in that para. and the finding of the learned Judge is in the negative. But nowhere does he discuss the matters to which I have referred and I am unable to see that he has come to any definite finding on the facts necessary to the determination of this question.

The conclusion to which I come is that the defendant by her declarations as to receipt of the whole purchase-money and her act in delivering to the buyer the title-deeds intentionally caused the plaintiff to believe it to be true as recited in the mortgage that Mahomedali was seized of the property in fee simple in possession free from incumbrances so far as she was concerned, and that the plaintiff acted on that belief.

It follows, therefore, that the defendant cannot be allowed in this suit to deny the truth of this.

The decree of the first Court must, therefore, be reversed and a decree must be passed making a declaration in the terms of prayer (*a*) to the plaint, granting an injunction restraining the defendant from asserting, continuing or insisting on her objection so as to prejudice the exercise by the plaintiff of his power of sale and from interfering with the plaintiff's exercise of his power of sale contained in the mortgage-deed.

There will also be a decree for possession in the terms of prayer (*c*) and the respondent must pay the plaintiff his costs of the suit and appeal and the plaintiff will be entitled as against the defendant to add his costs to the mortgage security.

Interest on the mortgage must be calculated for the purpose of this decree at six per cent.

BATCHELOR, J.:—On 3rd April 1903 the property in suit was sold by the defendant to one Mahomedali Abdul Husein for Rs. 9,000, and a receipt for the full sum was endorsed on the deed by the defendant. In fact, however, only Rs. 5,000 had been paid and the balance of Rs. 4,000 remained due by Mahomedali to the defendant. On 7th April 1904 the property was conveyed by Mahomedali under an instrument which the plaintiff describes as a mortgage-deed in his favour. Thus the present controversy is between the plaintiff as mortgagee and the defendant as mortgagor's vendor. The learned Judge below has dismissed the plaintiff's suit upon two grounds, namely, first, that the plaintiff was affected with notice of the defendant's charge as unpaid vendor, and, secondly, that the so-called mortgage-deed was a mere voluntary instrument of trust in favour of unspecified creditors and gave the plaintiff no beneficial interest. The plaintiff appeals, and the judgment of the Court below is attacked on both the grounds on which it was based.

Dealing first with the character of the deed of 7th April 1904, Exhibit B, we find that the learned Judge was of opinion that it fell within the class of instruments discussed in *Wallwyn* v. *Coutts*[1] and *Garrard* v. *Lord Lauderdale*,[2] being merely a revocable settlement in favour of creditors. I am inclined to doubt whether decided cases are of very much direct assistance in this appeal, which must be determined in accordance with the true meaning of the particular deed Exhibit B, but if reference to authorities be desirable, it seems to me that the deed here approximates more closely to that considered in *Siggers* v. *Evans* [3] than to that dealt with in *Garrard* v. *Lord Lauderdale*[2].

But I think that this deed should be construed upon its own terms in the light of the actual relation there shown to have been existing between the parties, and it may be well to recall the direction of the Privy Council in *Hunoomanpersaud's* case [4]

(1) (1815) 3 Mer. 707.
(2) (1830) 3 Sim. 1.
(3) (1855) 5 El. & Bl. 367.
(4) (1856) 6 Moo. I. A. 393 at p. 411.

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that "deeds and contracts of the people of India ought to be liberally construed. The form of expression, the literal sense, is not to be so much regarded as the real meaning of the parties which the transaction discloses."

Now the deed on its face purports to be a deed of mortgage for the purpose of securing a sum of Rs. 6,200 due on loans already procured by the plaintiff and any further sum up to a limit of Rs. 7,000 which the plaintiff may procure as advances to the mortgagor. It is true that the plaintiff is not referred to as the person *by* whom, but only as the person *through* whom the moneys are to be advanced; but it is proved, though proof was hardly needed beyond the internal evidence, that the deed was drawn by an inexpert clerk, and it appears further that the Rs. 6,200 were then treated as owing to the plaintiff, partly on outstanding *hundis* and partly on promissory notes executed by Mahomedali. It is the fact that this particular sum of Rs. 6,200 has since been paid off, but a further liability of Rs 5,700 has been incurred by Mahomedali towards the plaintiff in respect of *hundis* which the plaintiff has met on behalf of Mahomedali who has given promissory notes for the amount. The deed purports to be a security for all persons who may accept, pay or discount any *hundis*, bills, notes or drafts or make loans, credits or advances to Mahomedali. I agree with Mr. Raikes that it would be a harsh construction to exclude the plaintiff who was the only creditor when the deed was executed and who is a creditor still in respect of such payments as the mortgage contemplated. Unless the deed be read with an abstract technicality which in my opinion would be inappropriate, there is nothing in it which debars the plaintiff from making the advances himself, and, having done so, from claiming the benefit of the security. There was ample consideration moving from the plaintiff, and the deed was clearly not one which it lay within Mahomedali's power to revoke. I am of opinion that the plaintiff as creditor is entitled to claim the benefit of this security. Though promissory notes were taken from Mahomedali, there is nothing to suggest that the plaintiff intended to abandon the security of the mortgage; indeed the evidence shows that he had no such intention.

The same result follows if we have regard to the plaintiff's position as surety under section 141 of the Indian Contract Act. For the evidence shows that the *hundis* now in question were paid by the firms of Wadhuram and Ussarali on the assurance of the plaintiff, and that, upon their being dishonoured subsequently the plaintiff made good the amounts to the holders on behalf of Mahomedali. If, then, these holders would be entitled to the benefit of the security furnished by Exhibit B—and that, I understand, is not denied—the plaintiff, who has paid them off, becomes similarly entitled in their place. I may add that, despite certain phrases to which Mr. Mirza has called our attention in the account entries Exhibits J and K, I am of opinion on the evidence that these moneys were paid by the plaintiff, who is shown to have referred at least in the presence of one of the shroffs, to the mortgage-deed as his security. It is suggested that the plaintiff put forward no claim as surety in the Court below, but the judgment of Macleod, J., clearly indicates that the point was mentioned and discussed before him.

Then there is the question whether the plaintiff's claim under the mortgage should be postponed to the charge over the property which is given by sub-section (4) (*b*) of section 55 of the Transfer of Property Act. The section gives the charge over the property "in the hands of the buyer," but for the purposes of this case we may assume, though the point is by no means clear, that in *Webb* v. *Macpherson* [1] it was intended to decide that the charge was extended to persons claiming through the buyer. Even upon this construction the defendant is not, I think, entitled to rely upon her charge as against the plaintiff, for she is estopped from doing so under section 115 of the Evidence Act by reason of the receipt for the full purchase-money which she endorsed upon the deed of sale. That was a declaration by the defendant which intentionally caused the plaintiff to believe that the entire price had been paid and to act upon that belief. The declaration was made "intentionally" within the meaning of the section, as the word has been explained in *Sarat Chunder Dey* v. *Gopal Chunder Laha* [2], that is, the declaration was so made that a

(1) (1903) L. R. 30 I. A. 238 ; 5 Bom. L. R. 838. (2) (1892) 20 Cal. 296.

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reasonable man would take it to be true and believe that it was meant that he should act on it; and the evidence proves that in fact the plaintiff did believe the representation to be true and did act upon it. In my opinion, therefore, the defendant is estopped from relying upon this charge. Though the statutory charge given to the seller in India differs from the unpaid vendor's lien under English Law, it may be observed that the conclusion I have reached as to the effect of estoppel is consistent with the English decisions which have held that a vendor of immoveable property who endorses upon the purchase-deed a receipt for the purchase-money cannot set up a lien for unpaid purchase-money as against a mortgagee for value without notice under the purchaser. See *Rice* v. *Rice*[1]. And as against a clear estoppel, such as we have here, I can see no reason to suppose that the statutory charge occupies any higher position than the unpaid vendor's equitable lien in England.

As to the argument that the plaintiff should be affected with notice of the defendant's charge, I am clearly of opinion that it must fail.

Under section 3 of the Transfer of Property Act the plaintiff can be said to have had notice only if he had actual knowledge, or if he wilfully abstained from inquiry or if he was guilty of gross negligence. It is plain from the evidence that actual knowledge of the defendant's charge cannot be said to have been possessed by the plaintiff and that apparently is the finding of the learned Judge. But the Judge has held that plaintiff was aware of circumstances which should have put him on inquiry and that, since he made no inquiry, he must be affected with notice. But, in the first place, it seems to me that the plaintiff was not bound to make inquiry, but was entitled to rely upon the representation in the sale-deed: see *Redgrave* v. *Hurd*[2]. Then I find difficulty in ascertaining how far the learned Judge did in fact believe the witnesses called for the defendant on this point. He says plainly that in his opinion it is quite possible that they have made additions to their story which are not founded upon facts, but in the main he finds that they were

(1) (1853) 2 Drew. 73.

(2) (1881) 20 Ch. D. 1.

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telling the truth. But it is in the main that he has disbelieved them, for the point of their story is that the defendant had actual knowledge. If that be disbelieved, I think it is impossible to give effect to the other vague evidence given after a lapse of over three years by witnesses who had no special reason to recollect the commonplace events in question and who are not free from the imputation of being interested in the cause. It should be observed further that the allegation now under consideration was not made against the plaintiff until a very late stage, and the evidence on which it is now sought to be supported is, in my opinion, insufficient. I, therefore, come to the conclusion that it cannot be said that the plaintiff was guilty either of wilful abstention from inquiry or of gross negligence. It follows that his claim under the mortgage is not subject to the defendant's charge. The decree of the Court below must, therefore, be reversed and there must be a decree in the terms stated by the Chief Justice.

Decree reversed.

Attorneys for the appellant: *Messrs. Jehangir, Gulabbhai and Bilimoria.*

Attorneys for the respondent: *Messrs. Mirza, Mirza & Mangaldas.*

B. N. L.

ORIGINAL CIVIL.

Before Mr. Justice Beaman.

RUKHANBAI, PLAINTIFF, *v.* ADAMJI SHAIK RAJBHAI AND OTHERS, DEFENDANTS.*

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April 3.

Suit for administration—Reference to Commissioner—Parties agreeing orally to submit to Commissioner's decision—Commissioner's award—Civil Procedure Code (Act XIV of 1882), s. 375—Adjustment of suits, what is—Written submission necessary.

The parties to an arbitration suit consented to it being referred to the Commissioner to take the usual accounts and to determine their respective shares. In the usual course, the matter came before the Assistant Commissioner for taking accounts, and a large mass of accounts, objections and sur-

* Suit No. 77 of 1906.