ORIGINAL CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Batchelor.

1908. *October* 13.

ARDESIR BEJONJI SURTI, APPELLANT AND PLAINTIFF, *v.* SYED SIRDAR ALI KHAN AND OTHERS, RESPONDENTS AND DEFENDANTS.*

Lease unregistered when admissible in evidence—Conduct of parties to lease —"Collateral purpose"—Transfer of Property Act (IV of 1882), section 107—Lien—Charge—Assignment.

Where a lease which requires registration is not registered it cannot be put in evidence. But if the parties to it have acted upon its terms, whatever they were, or if a certain course of conduct has been pursued by either party which in point of fact constitutes the relation of landlord and tenant between them, and if in pursuance of that relation one party has paid certain moneys from time to time to another as a deposit to secure the performance by the former of the covenants and conditions of the lease, then a person suing to recover the money so deposited may give the lease in evidence for the purpose of proving his right to recover the deposit.

Such admission of the lease would not contravene the provisions of the Registration Act because it would in that case be put in evidence not for the purpose of affecting any immoveable property but for a collateral purpose, *i.e.*, for the purpose of proving a money debt arising from the conduct of the parties.

Pullbrook v. *Lawes*(1) referred to.

Section 107 of the Transfer of Property Act does not say that if the parties without any such instrument (*i.e.*, a lease) conduct themselves towards each other as if they were landlord and tenant and moneys pass from one to the other in pursuance of that conduct upon the understanding that it would be repaid in a certain event, there shall be no right to recover that money. In such a case the right to recover arises not upon the lease because according to law no lease exists, but upon an independent equity arising from the conduct of the parties and founded upon the law of estoppel.

Cornish v. *Abington*(2) referred to.

The mere fact that parties have described a transaction as a "lien" or "charge" cannot deprive it of its real nature if in substance the transaction was in the first instance an assignment. Where a creditor purports to create a lien or charge on the debt due to him in favour of another person the words lien or charge have no meaning except as giving the latter a right to recover the debt from the debtor. The transaction is in reality one whereby the owner of what in English law is called a *chose in action* transfers it to another.

APPEAL from the decision of Russell, J.

* Suit No. 159 of 1907.
Appeal No. 29 of 1908.

(1) (1876) 1 Q. B. D. 284. (2) (1859) 4 H. & N. 549.

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The appellant Ardesir Bejonji Surti brought a suit to recover from Syed Sirdar Ali Khan (respondent No. 1) moneys alleged to have been deposited with him by Ruttonji Sorabji Munshi (respondent No. 3) as security for the due performance of the covenants of a lease (dated 3rd October 1906) of certain premises executed by the former in favour of the latter for a period of ten years.

The appellant claimed the deposit money amounting to Rs. 25,554 under an assignment (dated 8th of January 1907) from (respondent No. 3) of which notice had been given to respondent No. 1, alleging that the lease had been determined by respondent No. 1 re-entering the premises on the 5th January 1907; that on such determination he, as assignee, was entitled to recover the deposit after deducting from it Rs. 5,000 in respect of municipal taxes and ground-rent which respondent No. 3 was bound to pay under the terms of the lease; and that respondent No. 1 was not entitled to forfeit the said deposit as he had no right of action or remedy except for breaches of covenant antecedent to his re-entry.

Respondent No. 1 denied appellant's right to recover the deposit. Mirza Abbas Ali Baig (respondent No. 2) in his written statement stated that respondent No. 3 was much pressed by a creditor named Haji Jakeria Ahmed Patel and requested him to assist him (respondent No. 3); that respondent No. 3 had given him to understand that Haji Jakeria had a lien on the deposit (Exhibit 14) and that if he advanced moneys to pay off Haji Jakeria he would be secured by a lien on the said deposit which respondent No. 3 would give him; that Haji Jakeria was paid off with the money advanced by him; that prior to Haji Jakeria being paid off he had a lien or charge on the said deposit for the moneys advanced by him subject to the lien of Haji Jakeria: that on Haji Jakeria being paid off he had the first lien or charge on the deposit; that the lien and charge of Haji Jakeria was transferred to him by a document (Exhibit 14A); that respondent No. 3 had passed a promissory note to him for the amount he had paid and that he had obtained a decree against respondent No. 3 for the said amount; that he claimed a lien and charge on the said deposit in priority to the appellant as he had

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advanced money on the security of the said deposit; and that the appellant was the managing clerk of respondent No. 3's solicitors and that as the appellant attended to respondent No. 3's affairs he believed that the appellant was well aware of all facts and took the assignment from respondent No. 3 with notice of his claim.

Exhibits 14 and 14A, referred to above, were in the following terms:—

Exhibit No. 14.

I hereby give you a lien on the amount of Rs. 18,666, deposited by me with Syed Sirdar Ali Khan, sole Executor of the estate of Nawab Sirdar Diler Jung Bahadur, C. I. E., as security for the due fulfilment of the agreement to lease dated the 3rd April 1906 and under the lease of the said Watson's Hotel Annexe to be executed hereafter in consideration of your renewing my Hundies to the extent of Rs. 15,000 (fifteen thousand) in the event of my failing to pay the said amount of such Hundies on their respective due dates.

Exhibit No. 14 A.
On the back of Exhibit 14.

At the request of Mr. R. S. Munshi, I have transferred the within charge or lien on the sum of Rs. 18,666 within mentioned to Mirza Abbas Ali Baig in consideration of Rs. 18,121-11-0 advanced by him to Mr. R. S. Munshi, the said R. S. Munshi has agreed to execute a formal deed of charge in favour of the said Mirza Abbas Ali Baig when prepared.

As regards the claim of respondent No. 2 the appellant admitted that respondent No. 3 had passed to Haji Jakeria a writing in which reference was made to the said deposit but did not admit that any charge was thereby created in favour of Haji Jakeria. Further he stated that even if a charge ever came into operation it ceased to be operative on respondent No. 3 duly paying off Haji Jakeria; that respondent No. 2 had advanced money on the personal security of respondent No. 3: and that no lien or charge on the deposit was ever given to respondent No. 2.

The following are the two interlocutory judgments delivered by Russell, J., in the course of the hearing of the case.

RUSSELL, J.—The question that I have to determine in this case has arisen certainly in an unusual way. It is not necessary for me to go into details with regard to the plaintiff's claim as

framed. Suffice it to say for the present purpose, however, that the plaint starts by setting out the details of a certain lease dated the 3rd October 1906 between the first defendant and the third defendant and the claim of the plaintiff put very shortly is that he may be declared entitled to a prior lien or charge in respect of certain moneys as to which he became liable as a surety for the third defendant for the payment of the rent and performance of the lease. I am purposely putting this as concisely as possible because really the matter is or may be a good deal more complicated.

Now it appears that when the plaint was filed the plaintiff was under the impression that this lease was duly registered; but since then it has been discovered that the lease has not been registered. In consequence Mr. Lowndes very properly asked that the plaintiff's case might be opened so that, having regard to this altered state of circumstances caused by the non-registration of the lease, he might know what case he has to meet before he raised the issues, and accordingly Mr. Tarapurvala began to open the case. In the course of that opening the question has arisen whether or not the particular clause, which is 17 in the lease, is admissible without registration, and I have heard very lengthy arguments on the part of the plaintiff and also a concise one on the part of the defendants on the point. I apprehend that the lease must be looked at as a whole. It commences:—"In consideration of the rents, covenants and conditions hereinafter reserved and contained and on the part of the lessee to be paid, performed and observed, the lessor doth hereby demise unto the lessee" etc. Now clause 17 says:—"By way of deposit for the due performance by the lessee of the covenants hereinbefore contained the lessee shall deposit with the lessor the sum of Rupees thirty-three thousand three hundred and thirty-three, which amount shall remain with the lessor as security till the determination of the term hereby granted." Then it provides for the payment. Then clause 19 says:—"Provided always and these presents are upon this condition that if the said yearly and other rents hereby reserved or any of them or any part thereof shall at any time be in arrear or unpaid for the space of three calendar months

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after the same shall have become due whether any formal or legal demand shall have been made or not or if the lessee at any time fail or neglect to perform and observe any of the covenants, conditions and agreements herein contained and on his part to be performed and observed, then in any such case it shall be lawful for the lessor, or any person or persons duly authorized by him in that behalf into or upon the said hereby demised premises or any part thereof in the name of the whole to re-enter."

The question that arises, therefore, is:—Can it be said that these clauses "evidence a transaction affecting a right to immoveable property?"

It appears to me that the right to rent is an interest in immoveable property. Therefore an instrument, which creates the right to rent, is an instrument, which creates a right or interest in immoveable property; and inasmuch as the payment of the rent is secured by clause 17, it appears to me that the transaction which secures that payment must necessarily be a transaction which affects this interest, namely, the rent, immoveable property. I cannot see how I can read the words in the Act "transaction affecting the immoveable property" in any other way.

Of the cases cited to me it appears that *Gurunath* v. *Chenbasappa*[1] is binding on me and is very similar to the present case: the judgment of Sir Charles Sargent being very applicable. In my opinion therefore the document in question does require registration.

The case will therefore continue to be opened so that Mr. Lowndes may know how the plaintiff intends to put it and then frame the issues.

RUSSELL, J.:—I have taken time to consider the question as to whether clause 23 of the agreement in this case requires registration. The material portion of that clause runs as follows:—

"The lessee agrees to pay Rs. 33,333 as deposit for the due performance of the lease. This amount to remain with the

(1) (1893) 18 Bom. 745.

lessor as security until the termination of the tenancy." The rest of the clause is immaterial.

Now it appears to me that my decision upon this point must follow that upon the question of the registration of the lease itself. I do not propose to go over the grounds of my judgment on that point but I should like to refer to the judgment of Sir Charles Sargent in the case of *Gurunath Shrinivas Desai* v. *Chenbasappa*,[1] where he says: "The District Judge was wrong in holding that the term in the lease on which the plaintiff sued could be looked at although the lease itself required registration. That term cannot be separated from the lease itself, as the lease must necessarily be looked at to determine whether the defendant had incurred liability under it." It appears to me that looking at clause 23 of this agreement the lease must necessarily be looked at to determine what would be liabilities of the lessee under it, and therefore the judgment is binding on me and governs the present case.

Mr. Lowndes, however, raised another point with regard to this matter, and that is, he relied upon the judgment of Lord Justice James in *Leggott* v. *Barrett*[2] and this raises, as far as I am able to discover, a novel point because with the exception of this case which Mr. Lowndes referred to me I have been unable to find any authority or statement in any of the text books exactly in point, or which marks so clearly the distinction between an agreement for a deed or executory contract and the actual deed itself. [His Lordship quoted the judgment of Lord Justice James, at pages 309-310 in full.] Now it certainly did seem to me a somewhat startling proposition that although the Court had held the actual lease itself to be inadmissible on the ground of registration it could go behind the lease and hold that the agreement for the lease which was afterwards carried out by the deed might be admitted under the Registration Act. To do so would be to give an effect to the agreement which James, L.J., says cannot be given, so it appears to me. His judgment as I read it prevents me from looking at or taking into consideration the agreement for the lease, because it was afterwards embodied in the lease itself, the governing document. If that cannot be

(1) (1893) 18 Bom. 745. (2) (1880) 15 Ch. D. 306, at p. 309.

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admitted in evidence, I fail to see how the document which it governs and supersedes can be admitted. I have not been able to find any case in India on the point. I may observe that it is only for the purpose of the Registration Act that the lease is not admissible. For all other purposes it is a deed and exists as a deed between the parties.

For these reasons, in my opinion clause 23 of this agreement of lease does require registration and I must therefore hold that it is not admissible as I held the lease not to be certified to be a true.

Russell, J., dismissed the plaintiff's suit. After stating the facts and discussing the evidence his Lordship proceeded as follows:—

It now becomes for me to consider the legal aspects of the case as put before me by Counsel respectively for plaintiff and defendants 1 and 2 and it will be desirable to deal first with the legal aspects of the case as between the plaintiff and defendant 1.

Mr. Lowndes' argument is that by reason of defendant 3rd's failing to carry out certain conditions the nature of which, owing to the lease and agreement for lease not being registered, I cannot discover, the deposit was wholly forfeited to defendant 1, and therefore, the plaintiff who stands in the shoes of Munshi, cannot recover it. In support of his argument he relied on the following cases:—

Reynolds v. *Bridge*[1], *Wallis* v. *Smith*[2], *Cooper* v. *London and Brighton Railway Co.*[3], *Howe* v. *Smith*[4]. But in *Reynolds* v. *Bridge*[1] it was expressly provided that if the defendant should make default in the amount, he should pay to the plaintiff £2,000 as ascertained liquidated damages. So in *Wallis* v. *Smith*[2], the defendant was to pay £5,000 if he committed a substantial breach of the contract. In *Cooper* v. *London and Brighton Railway Co.*[3] the deposit on the season-ticket being bought was expressly to be forfeited on the breach of any of the conditions. In *Howe* v. *Smith*[4] the deposit was a guarantee for

(1) (1856) 6 El. & Bl. 528.
(2) (1882) 21 Ch. D. 243 at p. 257.
(3) (1879) 4 Ex. D. 88.
(4) (1884) 27 Ch. D. 89.

the performance of a contract. In this last case Bowen, L. J., cites (p. 97) *Palmer* v. *Temple*[1], where at p. 520 it was said that in the absence of any specific provision, the question whether the deposit is forfeited depends on the intention of the parties to be collected from the whole instrument. Now in the case before me I am not entitled to look at the whole instrument, so I cannot gather the intention of the parties from it. In my opinion however the true principle to be applied to the present case according to English Law is to be found in *Lord Elphinstone* v. *Monkland Iron and Coal Company*[2] and *Willson* v. *Love*[3].

The headnotes in these two cases are as follows :—

"When a lease is not assignable without the landlord's assent, the fact that the landlord did not object to the assignees taking possession cannot, irrespective of all other circumstaces, be held sufficient to imply his recognition of the assignees."

"Where a lease of a farm contained a covenant by the lessees not to sell hay or straw off the premises during the last twelve months of the term, but to consume the same upon the premises, and provided that an additional rent of 3*l.* per ton should be payable by way of penalty for every ton of hay or straw so sold, and it appeared that there was a substantial difference between the manurial value of hay and that of straw :—*Held* that the sum so made payable was a penalty and not liquidated damages."

The principles in *Lord Elphinstone* v. *Monkland Iron and Coal Company*[2], have been applied in *Clydebank Engineering and Shipbuilding Company* v. *Don Jose Ramos Yzquierdo Y Castaneda*[4] and *Diestal* v. *Stevenson*[5]. See also *Pye* v. *British Automobile Commercial Syndicate, Limited*,[6] where it was held that to ascertain whether the sum payable for compensation is a penalty or liquidated damages, the Court must take all the circumstances into consideration to ascertain the intention of the parties.

Suppose defendant 3 was suing defendant 1 for the return of the deposit, I should feel great difficulty in holding (as I would have to hold if Mr. Lowndes' argument is correct) that it would be a good defence for defendant 1 to say you have not performed

(1) (1839) 9 Ad. & E. 508.
(2) (1886) 11 App. Cas. 332.
(3) [1896] 1 Q. B. 626.
(4) [1905] A. C. 6 at p. 15.
(5) [1906] 2 K. B. 345.
(6) [1906] 1 K. B. 425.

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all the conditions of the lease and therefore all the deposit is forfeited and I am entitled to retain the whole of it.

But, in my opinion, the law is most clearly stated by Lord Macnaghten in the case of *Soper* v. *Arnold*[1]:

> There was a contract for the sale of some real property. There were the usual conditions of sale. There was a deposit paid, and there were the ordinary provisions as to the forfeiture of the deposit. An abstract was delivered: the vendors' title was fully disclosed; that title was duly accepted and approved; the conveyance was prepared, and everything seemed ready for completion; but when the time came for paying the price the balance of the purchase-money was not forthcoming. The purchaser had to abandon the contract; the deposit was forfeited, and the matter was apparently closed. Everybody knows what a deposit is. The purchaser did not want legal advice to tell him that. The deposit serves two purposes—if the purchase is carried out it goes against the purchase-money—but its primary purpose is this, it is a guarantee that the purchaser means business; and if there is a case in which a deposit is rightly and properly forfeited it is, I think, when a man enters into a contract to buy real property without taking the trouble to consider whether he can pay for it or not.

No doubt under the Transfer of Property Act, a lease is a transfer of property, as is a sale, but I do not think it follows from that, that the same principles apply to a deposit for the performance of the terms of a lease as to a deposit for the purchase of property. It is well known that a lease contains covenants of very various importance.

The purchaser says I "mean business," that is to say, "I am going to buy"—one single act—"and I deposit so much to guarantee that one act." The lessee means business and says "I deposit so much as a guarantee that I will perform a number of acts of more or less importance." Of course, I am not at liberty in this case to look at the terms of the agreement of the lease. A deposit on account of purchase-money is a well-known phrase but as far as I know, one has never heard of a deposit on account of a leasehold. I can quite understand a man saying "I deposit so much as a guarantee that I will buy your property" but I cannot understand him saying "I deposit so much as a guarantee that I will carry out all the terms of the lease and if I don't paint a wall or room my deposit is to be forfeited." In

(1) (1889) 14 App. Cas. 429 at p. 435.

the present instance, for instance, it would, I think, be going too far to say that if defendant 3 had failed to paint a part of the Annexe costing say Rs. 500, it could have been intended that he should forfeit the deposit amounting to Rs. 33,333. Upon this point I confess I agree with Mr. Strangman's argument when he relied upon section 74 of the Contract Act which, as Sir Frederick Pollock says, boldly cuts the most troublesome knot in the Common law doctrine of damages, and looking at the terms of that section, it appears to me that it would be impossible to hold that the deposit in the present case has wholly been forfeited. I read the section which is in a Code relating to contracts in India and which, *Bank of England* v. *Vagliano Brothers*(1) followed in *Norendra Nath Sircar* v. *Kamalbasini Dasi*(2) shows, I am bound to follow.

Defendant has sought to prove a number of items, *e. g.*, damage to furniture and crockery, damage to good-will, servants' wages paid by him on third defendant's behalf, Osler's bill of electrical fittings, but in the absence of a lease and agreement for lease, apart from any other consideration I fail to see how he can set up any liability of defendant 3 in respect of these sums. But no doubt in respect of the amounts due to the Port Trust for ground-rent and the Municipal taxes down to 5th January 1907 when defendant resumed possession of the premises, which are admitted by plaintiff, these amounts ought to be allowed to be deducted from the deposit which of course would leave a balance in favour of the plaintiff but for the circumstances I hereinafter set forth.

This leads me, therefore, to defendant 2's case. I have above fully set forth the reasons which have led me to the conclusions of fact upon it.

Mr. Strangman's main argument was upon the wording of the letter of lien, Exhibit No. 14 itself, namely, that the words at the end of Exhibit No. 14—"In the event of my failing to pay the said amount of such hundies on their respective due dates"—governed the whole document and that inasmuch as Jackeria had been paid off in October 1906, his agent Budha had nothing to transfer by

(1) [1891] A. C. 107. (2) (1896) L. R. 23 I. A. 18.

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the endorsement Exhibit 14A, but to my mind the wordings of Exhibit No. 14 is perfectly clear and the words at the end of it which I have above quoted must be held to refer to the prior words "In consideration of your renewing my hundies to the extent of Rs. 15,000" and not to the words at the beginning of it—"I hereby give you a lien on the amount of Rs. 18,666."

Again it appears to me that to hold that Jackeria through his agent had nothing to transfer when the endorsement Exhibit No. 14A was executed would be contrary to the effect of the whole transaction and upon this point the wording of 14A seems to me very material, particularly so if Budha's evidence is correct that it was sent to him typed by defendant 3. It does not say, "I having been paid off the amount hereby transfer the within charge of lien, etc., in consideration of such and such a sum paid to me" but it says "I have transferred the within charge or lien in consideration of rupees so much advanced by Baig to defendant 3," and therefore, upon the wording at the date of the transfer of charge or lien, it must I think be taken to be the living charge or lien and not a dead one. And if my view of the transaction is correct, the effect of it was that Jackeria having a valid and effectual lien or charge upon the deposit, in consideration of Baig's having paid to defendant 3 the amount that defendant 3 owed to Jackeria, Baig stood in the shoes of Jackeria and was entitled to the same rights as to the deposit as Jackeria himself was entitled to, and looking at the terms of Exhibit No. 19, Baig's letter to defendant 1 of the 28th September 1906, it must, in my opinion, be taken that defendant 1 was aware of and agreed to the proposed transfer.

Therefore, in my opinion, the first paragraph of section 130 of the Transfer of Property Act has been complied with.

That section being in a Code, is the only law to be considered *Bank of England* v. *Vagliano Brothers*[1]. It is perfectly clear and intelligible. It sweeps away all the difficult questions regarding privities between transferee dependent on notice being given to the debtor or to the person in whom the property was vested. The transfer, according to this section, is "complete and effectual

(1) [1891] A. C. 107.

on the execution of the requisite instrument, and thereupon the transferee has vested in him all the rights of the transferor. The possibility of a second assignment to another assignee is thus excluded, for the assignee has nothing left to assign."—The Transfer of Property Act by Shepherd and Brown, 6th edition, page 571. And notice to the debtor is not requisite to complete the transfer, as between the transferor, his creditors or executors on the one hand and the transferee on the other (ibid., p. 572).

Moreover, if the assignment to Baig was valid and effectual, the plaintiff's assignment was subject to the liabilities and equities to which defendant 3 was subject in respect thereof on the 8th January 1907. Section 132 of Transfer of Property Act.

Under the above circumstances, it is unnecessary to consider what are the legal and what the equitable rights as between the plaintiff and Baig. Nor is it necessary to decide the point raised by Mr. Strangman as to marshalling in favour of the plaintiff.

I therefore hold that upon the execution of Exhibit 14A, there was a valid transfer of Jackeria's claim to the deposit which became complete and effectual upon the execution of 14A, and thereupon all Jackeria's rights and remedies vested in Baig.

It is admitted by the plaintiff that if the transfer to Baig is a valid one, he can get nothing by this suit.

The plaintiff appealed.

Robertson (with him *Padshah* and *Taraporwalla*) for the appellant.

We are entitled to recover under section 65 of the Contract Act and section 81 of the Trust Act.

Our suit is not based on the lease but is simply to recover the monies deposited by Munshi with Sirdar Ali Khan the lease being only the occasion and the reason for making the deposit. This is clearly shown by the issues raised on our behalf (Nos. 15-16). The fact that the lease was unregistered only deprived the plaintiff of the right to use it in evidence.

As to the admissibility of clause 17 of the lease which relates to the deposit it has been held that though a document cannot

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be admitted in evidence for want of registration in so far as it affects immoveable property it can still be put in for a collateral purpose not affecting land and that even a portion of a document can be put in if it is divisible from the rest of the document. We submit this clause can be separated from the rest of the lease: see Mitter J. in *Lachmipat Sing* v. *Mirza Khairat Ali*[1] followed in *Krishto Lall Ghose* v. *Bonomalee Roy*[2].

The same principal was laid down in *Ulfatunnissa Elahijan Bibi* v. *Hosain Khan*[3].

Section 65 of the Contract Act says that where an agreement is discovered to be void or when a contract becomes void any person who has received any advantage under it is bound to restore it. The lease in this case has become void and therefore the Sirdar is bound to restore the advantage of the deposit which he received under it: see *Casson* v. *Roberts*[4].

Setalvad for Respondent No. 1.

Bahadurji (with him *Jardine*) for Respondent No. 2.

CHANDAVARKAR, J.:—This is an appeal from the decree passed by Russell, J., in Suit No. 159 of 1907 brought by the appellant Ardeshir Bejonji Surti, to recover from the first respondent, Syed Sirdar Ali Khan, moneys alleged to have been placed by the third respondent with the first respondent as deposit or security for the due performance of the covenants and conditions of a lease (dated the 3rd of October 1906) of certain premises known as Watson's Annexe, by the former to the latter for a period of ten years commencing from the 1st of April 1906. The appellant claimed the amount under an assignment dated the 8th of January 1907 from the third respondent, Ruttonji Sorabji Munshi. In the plaint he alleged that the lease had been determined by the first respondent re-entering the premises on the 5th of January 1907, and that on such determination the right accrued to him (the appellant) as the third respondent's assignee to recover the amount of the deposit less certain sums payable by the third respondent to the first respondent under the terms of the lease.

(1) (1869) 4 Ben. L. R. (F. B.) 18 at p. 22.
(2) (1879) 5 Cal. 611.
(3) (1883) 9 Cal. 520.
(4) (1862) 31 Beav. 613.

The first respondent in his written statement admitted that there was a lease, that in accordance with it the third respondent had taken possession of the premises, and that he (the first respondent) had re-entered on account of a breach of certain covenants in the lease: but he denied that the covenants and other terms of the lease were all the same as those set out in the plaint. He also denied appellant's right to recover the deposit on the ground that the third respondent had under the terms of the lease wholly forfeited it.

The second respondent opposed the claim on the ground that the third respondent had assigned to him on a date prior to the assignment in favour of the appellant the right to recover the amount of the deposit from the first respondent.

It was in this state of the pleadings that the parties went to trial before Russell, J. At the commencement of the trial it was discovered that the lease of the 3rd of October 1906, relied on both by the appellant and the first respondent, had not been registered, and that, therefore, neither it nor any oral evidence could be received in proof of its terms. Counsel for the appellant sought at the trial to prove those terms by tendering in evidence an agreement for a lease, but Russell J. disallowed it also upon the ground that it could not be received for want of registration. Evidence was then led on other issues than those relating to the terms of the lease.

Russell, J., held, *inter alia*, that the plaintiff (appellant) had not proved the lease and the covenants and provisions referred to in his plaint, that the third defendant (respondent No. 3) had entered into possession of the premises under the terms of the lease and remained in possession thereof until its determination by the first defendant (respondent No. 1), and that the second respondent had a charge on the deposit prior to that of the appellant. Accordingly the suit was dismissed with costs.

The learned Judge's finding that both the lease and the agreement for a lease referred to in the pleadings of the parties in the Court below required registration has not been impugned before us in appeal. But it is contended for the appellant that the learned Judge ought to have held that the lease having

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become inadmissible in evidence for want of registration, the contract had become void, and that under section 65 of the Indian Contract Act the first respondent was bound to restore any advantage he had received under the contract or to make compensation for it to the third respondent. Under section 2, cl. (*g*) of the Act, an agreement is said to be "void" when "it is not enforceable by law" that is, when its terms being ascertained have no legal effect at all. That cannot be predicated of an agreement which the law declares has no existence because there is no evidence of its terms. "The mere fact of one party having paid money to another, under a contract which he cannot enforce against the latter, because of its non-compliance with the provisions of the Statute of Frauds, will not entitle the party who has paid such money, to recover the same as on a failure of consideration; for in such a case the contract is not void, but there is merely a deficiency in the evidence thereof."(1) Further, there is this to be said that not only the Registration Act but also the Transfer of Property Act created a bar in the way of the appellant's suit as it was launched in the Court below. Section 107 of the latter Act provides that "a lease of immovable property from year to year, or for any term exceeding one year or reserving a yearly rent can be made only by a registered instrument." And the law is that "if an Act of Parliament says that a contract shall be carried into effect in a given way, and such enactment is not by way of direction merely, then the additional words 'that shall not be of any effect either in law or in equity' are superfluous, because if the Act says that is the way all property shall be acquired, you must comply with those provisions, in order to acquire the property—the property is to be given in that mode, and that mode only."(2) Accordingly, it has been held by this Court on the construction of the first paragraph of section 54 of the Transfer of Property Act, which relates to sales of immovable property and the language of which, so far as it is material for our present purpose, is similar to that of section 107, that there cannot be

(1) Chitty Junr. on Contracts, page 581, 8th Edition (12th Edition, p. 93), citing *Sweet* v. *Lee*, (1841) 3 M. & G. 452.

(2) Per Wood V. C. in *Liverpool Borough Bank* v. *Turner*, (1860) 29 L. J. Ch. 827, 830.

a sale except by a registered instrument in the class of cases mentioned in the paragraph[1].

It follows then that the appellant could not in support of his claim rely on the lease referred to in his plaint and prove any cause of action alleged to have arisen from it.

But although that was so, there was enough in the plaint and also in the written statement to show that, though the lease had not been registered, the parties to it had acted upon its terms, whatever they were, that a certain course of conduct had been pursued by either, which in point of fact constituted the relation of landlord and tenant between them, and that it was in pursuance of that relation that the third respondent had paid certain moneys from time to time to the first respondent as a deposit to secure the performance by the former of the covenants and conditions in the lease. The law applicable to this state of facts is summarized by the Editors of Smith's Leading Cases Volume I, 10th Edition* (pp. 307 and 308), as follows on the authority of the cases there cited, of which the principal is *Pulbrook* v. *Lawes*[2] :—

"Although a plaintiff be prevented by the statute from availing himself of his special contract, he may nevertheless be able to recover upon one of the money counts anything in the nature of a debt which has accrued to him by reason of his acting upon the contract."

From this point of view it would be open to the plaintiff to give the lease in evidence for the purpose of proving his right to recover the moneys lodged by the third respondent with the first respondent as a debt due from the latter. Such admission of the lease would not contravene the provisions of the Registration Act, because it would in that case be put in evidence, not for the purpose of affecting any immovable property, but, to borrow the language of Blackburn, J., in *Pulbrook* v. *Lawes*, for "a collateral purpose," *i. e.*, for the purpose of proving a money debt arising from the conduct

[1] (1904) 28 Bom. 466; see also a Full Bench ruling of the Madras High Court to the same effect approving of 28 Bom. 466 in (1904) 29 Mad. 336.

[2] (1876) 1 Q. B. D. 284.

* 11th Edition, p. 321.

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of the parties[1]. Nor would that view contravene the provisions of section 107 of the Transfer of Property Act. All that that section enacts is that if parties enter into a transaction by way of a lease of immovable property, it shall have no operation as a lease and shall not constitute the relation of landlord and tenant between the parties in certain cases unless the transaction is embodied in a registered instrument. But the section does not say that if the parties without any such instrument conduct themselves towards each other as if they were landlord and tenant and moneys pass from one to the other in pursuance of that conduct upon the understanding that it would be repaid in a certain event, there shall be no right to recover that money. In such a case the right to recover arises not upon the lease, because according to law no lease exists, but upon an independent equity arising from the conduct of the parties and founded upon the law of estoppel in section 115 of the Indian Evidence Act. As was said in *Cornish* v. *Abington*[2] :—"If any person by actual expressions, or by a course of conduct, so conducts himself that another may reasonably infer the existence of an agreement or license, and acts upon such inference, whether the former intends that he should do so or not, the party using that language, or who has so conducted himself, cannot afterwards gainsay the reasonable inference to be drawn from his words or conduct."

This view of the case was not presented at the trial in the Court below, where both Judge and Counsel thought that the appellant's case had an insuperable difficulty to meet on account of the non-registration of the lease and that there was the authority of no decided case in point which could be invoked in order to establish his right to recover the moneys in dispute. Having regard to the law which we have stated at some length above, it would become necessary to allow the appellant to amend his plaint and prove the case so stated unless the decree of the Court below should be confirmed upon the ground that he has no right to recover the moneys in dispute from the first

(1) See also *Thakore Fatesingji* v. *Bamanji A. Dalal*, (1903) 27 Bom. 515, at pp. 540 and 541, where Batty, J., has adopted this view of the law, relying upon the case of *Lalla Gopee Chand* v. *Saikh Liakut Hossein*, (1876) 25 W. R. 211.

(2) (1859) 4 H. & N. 549.

respondent, because, as held by Russell, J., the second respondent has a prior and superior right to them.

The second respondent claims the right to those moneys under a transfer to him by one Jakeria of an assignment from the third respondent. The facts in that connection are that, in consideration of Jakeria agreeing to renew *hundis* drawn by the third respondent in the event of non-payment thereof by the latter on their due dates, the third respondent gave on the 23rd of July 1906 "a lien or charge" to Jakeria on the moneys that might be recoverable from the first respondent by the third respondent out of the amount of the deposit now in dispute (see Exhibit 14). Jakeria at the instance of the third respondent assigned that lien to the second respondent by means of an endorsement (Exhibit 14A) made on Exhibit 14. The endorsement bears no date, but Russell J. has found on the evidence that it was made on the 26th of October 1906. The correctness of that finding has not been challenged before us; indeed Mr. Robertson for the appellant candidly admitted that he could not question it. On these facts then it is quite clear that the second respondent has a prior and superior right to the moneys in dispute which are in the hands of the first respondent.

But it is contended for the appellant that what the second respondent relies upon as the basis of his claim is not an assignment of the third respondent's right to recover the moneys from the first respondent but merely a lien or charge of those moneys, subject to a contingency which never occurred.

Now, it is true that by Exhibit No. 14 the third respondent gave to Jakeria what he calls a lien on the amount of Rs. 18,666 deposited by him to the first respondent and that by Exhibit No. 14A Jakeria or rather his authorised agent, Elias Buddha, purported to transfer that "charge" or "lien" to the second respondent. But the mere fact that the parties have described the transaction in each case as "a lien" or "charge" cannot deprive it of its real nature, if in substance the transaction was in the first instance an assignment by the third respondent to Jakeria of the right of the former to recover his moneys in the hands of the first respondent, and, in the second instance, a trans-

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fer of that assignment by Jakeria to the second respondent. The English cases cited before us as making a distinction between a charge and an assignment have no bearing on the question here, which must be decided solely with reference to the intention and conduct of the parties disclosed in the evidence and the provisions of the Transfer of Property Act. The transactions evidenced by Exhibit 14 and Exhibit 14A are substantially transfers of "an actionable claim" dealt with in Chapter VIII of that Act. Where a creditor purports to create a lien or charge on the debt due to him in favour of another person, the words lien or charge have no meaning except as giving the latter a right to recover the debt from the debtor. The transaction is in reality one whereby the owner of what in English law is called a *chose in action* transfers it to another. And that is what the evidence in this case establishes to have been the intention of the parties to Exhibits 14 and 14A.

But it was said that, even assuming that Exhibit 14 was in substance an assignment of the third respondent's right to recover the moneys in the hands of the first respondent, its operation as such depended upon the former renewing the *hundis* of the latter to the extent of Rs. 15,000 and that only in the event of failure by the latter to pay the amount of such *hundis* on their respective due dates; that the *hundis* in question having been satisfied by the third respondent on their due dates, the contingency, on the happening of which alone the assignment was to take effect, having never occurred, the assignment had no operation. This argument assumes a state of things which is not supported by the evidence in the case. According to the third respondent, three *hundis* (Exhibit T.) having become due in July 1906, he requested Jakeria's authorised agent Elias (also called Buddha) to renew them, because the third respondent was unable then to satisfy the *hundis* by payment in cash. Elias Buddha wanted some security besides the endorsements on the *hundis* before he could agree to renew. And it was on that account that the third respondent executed the document, Exhibit 14, with the result that Elias Buddha on its execution renewed the *hundis*. This version of the transaction finds substantial corroboration from the evidence of the appellant

himself. He says that he knew that a letter (that is Exhibit 14) had been given by the third respondent to Jakeria on the 23rd of July 1906; that he himself might have prepared the draft of it; and that Jakeria renewed the *hundis* after he had got his letter of assignment.

It only remains to notice one further argument of appellant's Counsel. It is argued that when Jakeria was paid off, his assignment came to an end and that there was no right existing in virtue of Exhibit 14 which he could transfer to the second respondent. There, again, we must look into the evidence to see what really happened. The moneys which went to satisfy the third respondent's liability to Jakeria came from the pockets of the second respondent. The second respondent supplied the third respondent with those moneys on the distinct understanding that he was to step into the shoes of Jakeria. Accordingly Jakeria through his agent Elias Buddha transferred his right under Exhibit 14 by Exhibit 14A to the second respondent. These are the facts found by Russell, J., and the evidence, which he has rightly believed, supports them.

On the ground, therefore, that the second respondent's assignment, being prior in point of time to the appellant's, defeats the latter, we must confirm the decree of Russell, J., with costs. It was not suggested in the Court below nor has it been suggested in appeal that, after satisfying the second respondent's claim, there would be a balance of the deposit left in the hands of the first respondent to which the appellant would be entitled in virtue of his assignment. Before us, as it had been before Russell J., the appellant's case was fought out on the footing that if the second respondent's assignment was found to be prior in point of time to the appellant's, the latter must fail in the suit.

After the delivery of this judgment Mr. Robertson urges with reference to the last sentence that there would be a balance left, that on that ground his client had asked Russell J. for an order for an account to be taken and to marshal the securities in the hands of the second respondent. Nothing was said about this during the hearing of the appeal before us. In Russell

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J.'s judgment it is distinctly stated that it was admitted before him that if the second respondent's claim was prior he (the appellant) would get nothing. The correctness of that statement in the judgment was not at all assailed before us. And the appellant's deposition (page 82 of the paper book in appeal) confirms Russell J.'s remark as to the admission. We cannot in this state of the pleadings allow the case to be reopened, because that would be encouraging parties to argue their cases piecemeal and shift their grounds of claim so as to prolong litigation. Respondents to have separate sets of costs.

Decree confirmed.

Attorneys for appellant: Messrs. *Wadia, Ghandy & Co.*
Attorneys for defendant: Messrs. *Captain & Vaidya.*

B. N. L.

ORIGINAL CIVIL.

Before Mr. Justice Russell.

BAI MOOLBAI *v.* CHUNILAL PITAMBER.*

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Contempt of Court—Notice of motion for committal—Service of notice—Personal service necessary—Service upon attorneys not sufficient—Appeal pending from order.

Where an application is made for committal of a person to jail for disobedience of the Court's order, it is necessary not only that the order should be served upon the defaulting party personally, but the notice to commit should also be similarly served upon him. Service upon the party's attorneys is not sufficient.

When proceedings are taken for committal of a person for contempt of a Court's order, the Court is not obliged to stay those proceedings merely because an appeal has been filed from such order.

Gordon v. *Gordon*(1) followed.

NOTICE of motion.

The defendant's attorneys were served with a notice of motion in the following terms:—

"Please take notice that on Monday next the 22nd instant or so soon thereafter as Counsel can be heard Counsel will move on behalf of the plaintiff before

* O. C. J. Suit No. 31 of 1909.
(1) [1904] P. 163.