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entrusted with making lots put up all the documents, which had the appearance of being valuable securities, in sixteen packets, of which the defendant drew six and the plaintiff ten. Very unfortunately, I think, one of those lots contained the sale-certificate of 1895, and the other the mortgage-deed of 1894. The former was drawn by the defendant, who has ever since been in actual possession of the property. The latter was drawn by the minor plaintiff, who now seeks to enforce it against the defendant, as though the relations subsisting between them were the ordinary relations of mortgagor and motgagee.

In our opinion, it is clear that after what has occurred in 1895, Govind could have had no right to sue himself in a double capacity as mortgagee under the mortgage of 1894, and mortgagor under the sale-certificate of 1895. We think that as he could have had no cause of action against himself, it is impossible that those who claim under him as heirs should have any cause of action against each other upon the same materials. For these reasons, we are of opinion, that the decision of the lower appellate Court is right and ought to be confirmed with all costs.

Decree confirmed.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Macleod.

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BEHRAM RASHID IRANI (ORIGINAL DEFENDANT), APPELLANT, *v.* SORABJI RUSTOMJI ELAVIA (ORIGINAL PLAINTIFF), RESPONDENT.*

Transfer of Property Act (IV of 1882), section 59—Equitable mortgage—Deposit of title-deeds of property situate in mofussil—Intention to create charge, proof of—Registration.

The plaintiff deposited with the defendant in Bombay title-deeds of his property situate at Nasik and borrowed a sum from the defendant.

* Second Appeal No. 236 of 1912.

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The defendant also at the same time executed in favour of the plaintiff a writing setting forth the clear intention of the defendant that the deposit of title-deeds should be security for the loan from the plaintiff and binding the defendant to execute on demand a proper legal mortgage of the property covered by the title-deeds deposited. This writing, which was the only evidence available of the defendant's intentions in making the deposit of title-deeds, was not registered.

Held, that the deed required registration as it created a charge upon the property; that in its absence there was no evidence whatever of intention to connect the deposit of title-deeds with the debt; and that the mere fact that there was a subsequent or contemporaneous loan was not sufficient in law to warrant a presumption apart from any other evidence that the contemporaneous or antecedent deposit of title-deeds was necessarily made as security for the loan.

SECOND appeal from the decision of C. E. Palmer, District Judge of Nasik, reversing the decree passed by Gulabdas Laldas, First Class Subordinate Judge at Nasik.

Suit on mortgage.

The defendant deposited with the plaintiff in Bombay the title-deeds of his property situated in Nasik. At the same time, he borrowed Rs. 300 from the plaintiff. The defendant also executed an unregistered deed in favour of the plaintiff acknowledging the equitable mortgage by deposit of title-deeds and agreeing that his property was security for the loan.

The plaintiff sued to recover the amount he had lent with interest. The Subordinate Judge held that the equitable mortgage sued on could be enforced in Nasik, that the deed was compulsorily registrable. He found the mortgage not proved and dismissed the suit. On appeal, the District Judge came to the conclusion that the deed did not require registration and that the mortgage was proved. He, therefore, decreed the suit.

The defendant appealed to the High Court.

P. B. Shingne, for the appellant.

K. N. Koyajee, for the respondent.

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BEAMAN, J. :—In February 1907 the defendant deposited title-deeds of certain property in the Zilla of Nasik with the plaintiff. The plaintiff advanced to the defendant a sum of money and the present suit has been brought upon the *footing of the said deposit* which was made in the City of Bombay being an equitable mortgage of the Nasik property. I doubt much whether the Legislature ever intended to extend the doctrine of equitable mortgage by mere deposit of deeds in Bombay to lands lying anywhere outside Bombay. But as the section is worded I will not press that doubt here. Now, an equitable mortgage under section 59 of the Transfer of Property Act needs three facts to be proved : (1) a debt, (2) deposit of title-deeds, and (3) an intention that the latter should be security for the former. I have often had to notice in these Courts the growth of the doctrine of equitable mortgage which was very summarily introduced by *three judgments of* Lord Thurlow given in rapid succession. The doctrine thus created, amounted at that time to very much what the law now is, as I have just expressed it, although the learned Chancellor, I think, lent strongly to the supposed legal presumption arising from the fact of indebtedness and the contemporaneous or subsequent deposit of title-deeds. Then for the better part of a century, the Courts in England virtually adopted this presumption as a presumption of law and the need of proving intention almost disappeared. Latterly, however, the legal doctrine in England veered in the opposite direction and the Courts began to insist more and more strongly upon the proof of intention as a question of fact, and that has been embodied in our own statute law and that is the law we have to administer.

Now, the difficulty in the present case arises out of the manner in which the plaintiff has sought to discharge

the burden of proof upon this question of fact. He has offered in evidence a contemporaneous writing or agreement which does no doubt fully set forth the very clear intention of the defendant that the deposit of the title-deeds should be a security for the loan to be advanced on or before the signature of that agreement, and the paper goes on to bind the defendant to execute upon demand a proper legal mortgage of the property covered by the title-deeds deposited. It appears to me that having regard to the opening part of that document, it does in itself create a charge upon the property and is, viewed in that light, compulsorily registrable. I am not disposed here to go into the very nice questions which arise and have often been discussed in this and the other High Courts upon contemporaneous writings of this kind, the question being usually whether these writings do in themselves create a mortgage or are merely subsequent records of it or anticipatory statements leading up to it. But I may observe speaking generally that no equitable mortgage is ever "created" by a writing. It is of the very essence of the equitable mortgage that it comes into being without any writing by the mere conjunction of certain facts. The inclination of my own mind has always been very strongly against any conclusion which implies that an equitable mortgage needs any such contemporaneous writing for its complete legal effect and consequences, and I think, rightly and logically viewed, this writing can never be put higher than proof of the intention of parties. Where it is limited to an agreement to execute a legal mortgage, if called upon to do so, I should doubt myself whether it would ever be compulsorily registrable. But as I say that question is one of much nicety and opinions have differed widely upon it. I do not consider it necessary to go further into it here because in my opinion this agreement requires registra-

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tion in itself, because it creates, very clearly creates, a charge upon the property to the extent of more than Rs. 100, and that being so, it is compulsorily registrable and cannot be received in evidence of any transaction relating to or affecting that immovable property. Now, if this document be excluded on this ground, as I think it must be, there remains no evidence whatever of intention to connect the deposit of title-deeds with the loan borrowed by the defendant from the plaintiff, and the mere fact that there was a subsequent or contemporaneous loan is not now in my opinion sufficient in law to warrant a presumption, apart from any other evidence that the contemporaneous or antecedent deposit of title-deeds was necessarily made as security for the loan. That is to say, on the question of fact there is absolutely no evidence, apart from this writing, which cannot be admitted to discharge the onus of proof which lies upon the plaintiff, and that is the ground to which I would prefer to restrict myself in reversing the decree of the lower appellate Court, restoring the decree of the Court of first instance and dismissing the plaintiff's suit with all costs.

MACLEOD, J. :—I agree with my brother Beaman that this appeal must be allowed, and that the decree of the lower Court dismissing the suit must be restored, the plaintiff paying the costs throughout. It has been held by the High Courts of Calcutta and Allahabad that in the case of deposit of title-deeds actually made in the towns mentioned in section 59, the mortgage can be effected irrespective of the situation of the property to which the title-deeds refer. I do not think there is anything in the contention, that in the case of an equitable mortgage, property in the mofussil cannot be affected by a deposit of title-deeds in Bombay. In this case it appears to me that the plaintiff in order to prove his mortgage must rely on the document of the 9th of

February 1907. That is the only evidence of the contract, and, as it requires registration, a contract of mortgage cannot be proved. Plaintiff therefore must fail.

Decree reversed.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Heaton and Mr. Justice Shah.

TULJARAM HARICHAND GUJAR (ORIGINAL PLAINTIFF), APPELLANT, *v.* SITARAM NARAYAN KUSAR AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

1913. *October* 31.

Civil Procedure Code (Act V of 1908), Order V, Rule 5—Suit on mortgage—First summons to be for settlement of issues and not for final disposal—Practice and Procedure.

In 1910 a mortgage suit was filed. The plaintiff having died, the name of his son was substituted in place of his name on the 13th April 1912. On the same day, the Court issued summons for the first time to the defendants, for final disposal. On the day fixed for hearing, the Court raised issues, and as neither party had witnesses ready, the Court found the claim not proved in absence of evidence. The plaintiff having appealed :—

Held, reversing the decree, that there was a miscarriage of justice in the way the case had been disposed of. The scheme of the Civil Procedure Code required, in cases like the present, that the parties should have the opportunity to produce evidence relevant to issues framed after ascertaining matters as to which the parties were in dispute.

Held, further, that the summons to the defendants should have been for settlement of issues and not for final disposal.

SECOND appeal from the decision of W. T. W. Baker, Acting District Judge of Satara, confirming the decree passed by V. R. Kulkarni, Subordinate Judge at Rahimatpur.

Suit on mortgage.

* Second Appeal No. 810 of 1913.