anomalous that the widow should not be allowed to treat as non-existent an adoption by her husband which is invalid. But I do not think that there is anything anomalous in the widow being required to accept the act of adoption by her husband with all its implications so far as she herself is concerned.

I would, therefore, affirm the judgment appealed from and dismiss these appeals with costs.

FAWCETT, J.:—I concur. In my opinion, the fact that Adgouda adopted defendant No. 1 and treated him as his adopted son till his death amounts to an implied prohibition against the widow adopting another boy during defendant No. 1's life-time, at any rate until his adoption is declared invalid at the suit of some one interested other than the widow.

Appeals dismissed.

R. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

BHIMRAO NAGOJIRAO PATANKAR (ORIGINAL PLAINTIFF), APPELLANT *v.* SAKHARAM BIN SABAJI KANTAK, AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS*.

1921. *August 23.*

Mortgage—Redemption—Contract to lease property to a mortgagee on a permanent tenure—Clog on equity of redemption.

Property in suit was mortgaged to defendant's ancestor by a deed, dated March 17, 1879 and on the same date another document was executed purporting to lease the land to the mortgagee on a permanent tenure at a fixed rent. The plaintiff sued to redeem. The defendant pleaded that the plaintiff was not entitled to redeem as what was mortgaged to him was not the suit land but merely the right to recover the rent secured by the permanent lease.

* Second Appeal No. 644 of 1920.

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Held, that the plaintiff was entitled to redeem as the contract for the permanent lease constituted a clog on the equity of redemption.

SECOND appeal against the decision of N. S. Lokur, Assistant Judge of Satara, confirming the decree passed by P. Shrinivas Rao, Subordinate Judge at Patan.

Suit for redemption.

On the 17th March 1859, the plaintiffs' grand-father mortgaged the land in suit with the defendants' ancestor. The terms of the mortgage bond were :—

"I owe you a debt of Rs. 1,501 in words fifteen hundred and one. In respect of the interest thereon I shall pay every year a sum of Rs. 70 (in words) seventy which is an annual rent of the Inami Seri (*i.e.*, field) belonging to us and situate at Mouje Jade, Peta Kale in the Division of Karad and which is due by you to me in respect of the annual rent. Therefore you should take the same in respect of the interest from year to year. You should pay to me Khand (*i.e.*, fixed rent) in respect of the Seri (*i.e.*, field) from the year when I shall pay to you the principal amount of rupees fifteen hundred and one."

On the same day the mortgagor entered into a covenant to lease the land on a permanent tenure to the mortgagee on condition that the lessee should pay a fixed annual rent of Rs. 70 (Exhibit 45).

In 1916 the plaintiff sued to redeem the land and to recover possession.

The defendant pleaded that he was the mortgagee not of the land in suit but merely of rent payable to the plaintiff as his landlord, he being a *mirasdar* of the land; that the covenant to lease in perpetuity was not simultaneous with the mortgage bond in suit but was far antecedent to it; and that the plaintiff had no right to claim possession of the land.

The Subordinate Judge held, on a construction of the deeds in suit, that only the *inam* rights of the plaintiff in the land were mortgaged but not the land itself. He, therefore, decreed that the plaintiff, on

paying into Court Rs. 1,501 within six months from the date of the decree, should be entitled to claim payment of the annual rent of Rs. 70 year by year from the defendant.

On appeal, the Assistant Judge confirmed the decree. He observed as follows :—

"Exhibit 45 is the *miras patra* and Exhibit 46 is the deed of mortgage. They represent two independent transactions though they happened to be entered into on the same day and possibly at the same sitting. As observed by Lord Halsbury L. C. in the case of *Samuel* v. *Jarrah Timber and Wood Paving Corporation* (1904, A. C. 323 at page 325): 'A perfectly fair bargain made between two parties to it, each of whom was quite sensible of what they were doing, is not to be performed because at the same time a mortgage arrangement was made between them. If a day had intervened between the two parts of the arrangement, the part of bargain which the appellant claims to be performed would have been perfectly good and capable of being enforced; but a line of authorities going back for more than a century has decided that such an arrangement as that which was here arrived at is contrary to a principle of equity, the sense or reason of which I am not able to appreciate, and very reluctantly I am compelled to acquiesce in the judgments appealed from'. It will be noticed that this doctrine of relieving against a clog on the equity of redemption was denounced in the strongest possible terms by the Lord Chancellor,.....'The sense or reason of which he was unable to appreciate.' However, such as it is, the doctrine has been applied in India. The principle of that doctrine was very tersely put by His Lordship Sir Arthur Strachey, C. J., in *Bimal Jati* v. *Biranja Kuar* (I. L. R. 22 All. 238 at page 241), in the following terms. The condition about fettering the right of redemption only means that no bargain made at the time of a mortgage is valid, which prevents a mortgagor from redeeming upon payment of principal, interest and costs. As pointed out by Mr. Justice Shephard, that is the effect of section 60 of the Transfer of Property Act which provides for the right of redemption, but which is not prefaced with any such words as 'in the absence of a contract to the contrary'. But so long as the bargain places no obstacle in the way of the mortgagor getting back his property it is not open to objection as a fetter on the right of redemption. Applying this test, the *miras patra* does not, in my opinion, in the least stand in the way of the mortgagor redeeming and getting back what he had mortgaged, namely, the landlord's right to recover the rent from the permanent tenant."

The plaintiff appealed to the High Court.

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Nilkant Atmaram, for the appellant:—The two transactions, viz., the permanent lease, and the mortgage were entered into on the same day, and at the same sitting. They were written by the same writer, attested by the same witnesses, and presented for registration at the same hour. I would submit that they are not independent transactions, but parts of the same transaction. The contract of lease is void. No contract between a mortgagor and a mortgagee made at the time of the mortgage, and as part of the mortgage transaction, can be valid if it operates as a clog on the equity of redemption: see Halsbury's Laws of England, Vol. XXI, page 143; *Samuel* v. *Jarrah Timber and Wood Paving Corporation*[1]. The latest pronouncement on the point is contained in *Fairclough* v. *Swan Brewery Company, Limited*[2] which is as follows:—"It is now firmly established... that the old rule still prevails and that equity will not permit any device or contrivance being part of the mortgage transaction or contemporaneous with it to prevent or impede redemption."

See also, *G. & C. Kreglinger* v. *New Patagonia Meat and Cold Storage Company, Limited*[3].

A. G. Desai, for respondents Nos. 1 to 3:—I do not dispute the proposition of law as stated. But in the present case the facts are different. These are two separate transactions. First, there was the lease fixing the annual rent at Rs. 70 a year; and then by another transaction, the lessor's right was mortgaged to secure the loan of Rs. 1,501. The lower Court also finds that they are separate transactions, though entered into on the same day and possibly at the same sitting. The proposition of law relied on has therefore no application to the present case.

(1) [1904] A. C. 323. (2) [1912] A. C. 565 at p. 570.
(3) [1914] A. C. 25 at p. 61.

MACLEOD, C. J.:—The plaintiff sued to redeem and recover possession of the plaint land which was mortgaged by his grandfather to the defendant's ancestor by a mortgage dated 17th March 1859. The plaintiff admits that at the same time as the mortgage another document was executed purporting to lease the land to the mortgagee on a permanent tenure on condition that the lessee paid a fixed rent of Rs. 70. The defendant pleaded that he was a mortgagee not of the land in suit, but merely of the fixed rent payable to plaintiff as his landlord, he being Mirasdar of the land of long standing.

Both the lower Courts have decided on that point in favour of the defendant and have passed a preliminary decree to the effect that if the plaintiff pays into Court Rs. 1,501 (there is a misprint right through in the print "150" for "1501") within six months from the date of the decree, the plaintiff should be entitled to claim payment of the annual rent of Rs. 70 year by year from the defendant.

The question is what is the true effect to be given to the documents Exhibits 45 and 46, which were executed at the same time on the 17th March 1859. No doubt if we look merely at what is stated in those documents, the mortgagor first purported to lease to the mortgagee the suit land at an annual rent of Rs. 70 on Mirasi tenure. Then by Exhibit 46 he purported to mortgage, not the land, but the annual rent which was secured by Exhibit 45. Before these documents were executed the mortgagor was the owner of the land, and as we read the documents, their real effect was that the mortgagee got the land as security for the loan, and at the same time obtained a contract from the mortgagor that he, the mortgagee, should be a permanent tenant of the land paying a yearly rent of Rs. 70. The mortgagee, therefore obtained a contract whereby the

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mortgagor lost the right to get back his property on repaying the loan, so that it must be admitted that that contract constituted a clog on the equity of redemption. If the mortgagee had got a contract for the sale of the land, undoubtedly a Court of Equity would not allow him to take advantage of that contract (see *Samuel* v. *Jarrah Timber and Wood Paving Corporation*[1]). It seems to us there is very little difference between a contract by the mortgagee to buy the mortgaged premises out and out for a consideration, and a contract by a mortgagee to take the premises on a permanent tenure at a fixed rent, which in effect makes him the owner of the premises, the consideration being satisfied by deferred payments.

It has been strenuously argued that what is mortgaged is not the suit land but merely the right to recover the rent secured by the permanent lease. But we do not think that the Court will be so blind to the real effect of these documents, Exhibits 45 and 46, that it should refuse to apply the principle of equity which, as has been pointed out by Lord Halsbury in the case we have referred to, has been applied by the Courts for certainly more than a century. The learned appellate Judge, in refusing to apply this principle of equity, says: "The lease and the mortgage were not treated as parts of the same arrangement. In the words of Lord Halsbury quoted above 'if a day had intervened between the two parts of the arrangement, the part of the bargain (impeached as a clog) would have been perfectly good and capable of being enforced.' If so, I do not see why it should fail if the period intervening be a few minutes instead of a 'day.'"

[1] [1904] A. C. 323.

If that argument were to prevail then the principle of equity could never be applied at all. It is the plain fact that these two documents were parts of the same transaction which enables us to apply the principle of equity; and we need not consider what our decision would have been if the lease had been executed a day or two previously to the mortgage. In our opinion, therefore, the appeal must succeed, and the plaintiff must be held entitled to redeem. We pass a preliminary decree to the effect that if the plaintiff pays into Court Rs. 1,501 within six months from the date these proceedings reach the lower Court, he will be entitled to ask the Court to pass a final decree for possession. No order as to costs throughout.

Decree reversed.

J. G. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

1921.
August 30.

KESHAVLAL MAGANLAL TRIVEDI, KULMUKHTYAR OF ŞHRI SHANKARACHARYA MAHARAJ SHRI RAJ RAJESHWARASHRAM SWAMIJI, OF SHARDA MATH (ORIGINAL APPLICANT), APPELLANT *v.* AMBALAL VENIRAM AND OTHERS (ORIGINAL OPPONENTS), RESPONDENTS*.

Guardians and Wards Act (VIII of 1890), section 8—Minor daughter four years old—Agreement for marriage—Application made to deprive the father of the custody of the minor—Rules of caste and practices prevailing in the community to be considered.

The appellant applicant applied to the District Court under the Guardians and Wards Act to deprive opponent No. 1, the father, of the custody and the natural guardianship of his minor daughter on the ground that she was about to be married at an early age of four, which would expose her to the risk of premature widowhood. It was found that such a marriage would be in

* First Appeal No. 318 of 1920.