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 RUGHUNATH
 PANJAH
 v.
 ISSUR
 CHUNDER
 CHOWDHRY.

We think therefore the Subordinate Judge was right in holding that the decision in the former suit is a bar to this suit.

The appeal must therefore be dismissed with costs.

Appeal dismissed.

ORIGINAL CIVIL.

Before Mr. Justice Pigot.

COGGAN v. POGOSE.

1884
 September 11.

Equitable Mortgage—Deposit of title deeds—Priority—Registration Act—Act III of 1877, s. 48.

A deposit of title deeds of certain property, under a verbal arrangement to secure payment of a debt, is not an "oral agreement or declaration relating to such property" within the meaning of s. 48 of the Registration Act.

THIS was a claim made in the administration suit of *Coggan v. Pogose*, against the estate of the defendant, by the representatives of the late J. P. Wise of Dacca. In 1873 Pogose was indebted to Wise in a sum of Rs. 75,000, being the amount of certain bills of exchange accepted by Wise for the accommodation of Pogose. By a verbal agreement made in 1873 between Wise and Pogose, the latter agreed to deposit, and did deposit, with the former a *Heba-bil-Ewaz* executed in his favour by one Nizamunissa Khatoon, and dated the 17th of July 1864, thereby, as claimed by Wise, "mortgaging to the said Josiah Patrick Wise the said Nicholas Peter Pogose's title and interest in the properties comprised in such *Heba-bil-Ewaz*," to secure payment of the said sum of Rs. 75,000.

By a stamped and registered instrument, dated the 4th day of July 1876, Pogose charged a portion of the same properties in favour of the Agra Bank to secure the payment of a sum of Rs. 25,000. On the 30th of June 1876, a similar charge had been made by him in favour of the Bank of Bengal to secure the payment of certain sums which amounted to upwards of Rs. 70,000. All the properties comprised in the *Heba-bil-Ewaz* had been made over to, and were in the possession of, the Official Trustee of Bengal. The question was, whether Wise's claim had priority over the claims of the Agra Bank and of the Bank of Bengal.

Mr. *Phillips* and Mr. *Trevelyan* for the executors of
Mr. *Wise*.

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Mr. *Bonnerjee* for the Official Trustee.

Mr. *O'Kinealy*, for the Agra Bank and the Bank of Bengal, contended that the banks were entitled in priority to Mr. *Wise*. The oral agreement and deposit of 1873 was an "oral agreement or declaration" within the meaning of s. 48 of the Registration Act. True it amounted to an equitable mortgage, but that was so only because it was in its essence a verbal contract to mortgage, and would be given effect to on that ground alone.

Mr. *Phillips* contra.—Mr. *Wise's* equitable mortgage is not an oral agreement within the meaning of s. 48. Here, had not a word been said, but the deed been simply deposited, the equitable mortgage would have been perfectly good, and it could not have been contended that it would come within s. 48. It cannot be said to be an oral agreement within s. 48, simply because there is an oral agreement in addition to the deposit.

The following judgment was delivered by

PIGOT, J.—The question in this matter, which I thought it worth while to consider, is, whether the equitable mortgage of 1873, as to the factum of which there is no doubt, ought or ought not to be postponed to the subsequent written and registered charge in favour of the plaintiff by reason of the charge being registered under provision of s. 48 of the Registration Act. Or whether such an equitable mortgage, constituted as this was, by deposit of title deeds, is an "oral agreement" under s. 48.

That section enacts that "all non-testamentary documents duly registered, and relating to any property, whether moveable or immoveable, shall take effect against any oral agreement or declaration relating to such property, unless where the agreement or declaration has been accompanied or followed by delivery of possession."

I can find no authority, and none was cited before me, nor am I aware of any authority, under rulings of the Registration Act in which this section is to be found, exactly bearing on this matter.

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In judging of it as a matter, so far as I am aware, of first impression, I have only my own opinion, and that is, that an "oral agreement" under this section must be understood to mean, so far as the present question is concerned, an agreement merely oral; now a mortgage by deposit of title deeds may well be created without any expression of agreement in words at all; the essence of the transaction is the deposit of the deeds, on which mortgage becomes complete. No doubt as one consequence of it the mortgagee may be entitled to a registered conveyance, but that right is an incident of the transaction, and is not of the essence of it, and hence I do not think counsel's argument can govern the decision of this question, *viz.*, that argument in which he contended that an equitable mortgage was an agreement to execute a conveyance. It is in itself a mortgage, and carries with it a right to a conveyance, but that is not the essential character of the transaction. It is a complete act and not an executory agreement. For these reasons I do not think the case comes under s. 48; the matter is of less importance having regard to the provisions of ss. 58, 59, Transfer of Property Act. From the last paragraph of the latter section it would appear that where the Act is applicable, equitable mortgages outside the towns of Calcutta, Bombay, Madras, Karachi and Rangoon are no longer valid.

I therefore decide the question of priority against the Banks, and hold that the claim is established in the amount claimed, and in priority to the claim of the Banks.

The costs will, of course, be added to the claim.

Claim allowed.

APPELLATE CRIMINAL.

Before Mr. Justice Mitter and Mr. Justice Norris.

1885
 January 7.

INA SHEIKH (APPELLANT) v. QUEEN EMPRESS (RESPONDENT.)⁴⁵

Penal Code—Act XLV of 1860, s. 411—Receiver of stolen property—Presumptions as to possession of property after theft—Possession of stolen property.

A common brass drinking cup was stolen in October 1883, and was discovered in the possession of the accused in September 1884; held in a case

⁴⁵ Criminal Appeal No. 667 of 1884, against the order of sentence made by J. F. Stevens, Esq., Sessions Judge of Mymensingh, dated the 7th of November 1884.