Ramkrishore v. *Jayanarayan*(1). The Privy Council has decided that the alienee in possession is liable to be ejected at the instance of the co-parceners who are not bound by the alienation. We are of opinion that the mere fact of a person purchasing a share of a co-parcener in joint family properties would not entitle him to mesne profits as against such other members of the family and that the purchaser would be in no higher position than his alienor who under Hindu law would not under ordinary circumstances be entitled to demand an account of the past profits. The appeal fails and is dismissed with costs.

MAHARAJA OF BOBBILI v. VENKATA-RAMANJULU NAIDU.

WALLIS, C.J. AND KUMARA-SWAMI SASTRIYAR, J.

The memorandum of objections has not been argued and has been dismissed with costs.

N. R.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Tyabji.

1914. September 7, 8 and 30.

P. JAGANNAIKULU *et al* (DEFENDANTS), APPELLANTS,

v.

THE MANAGER OF NANDIGAM ESTATE (PLAINTIFF IN ALL THE CASES), RESPONDENT IN ALL THE CASES.*

Madras Local Boards Act (V of 1884), sec. 73—Mortgagee with possession, whether intermediate holder—His right to recover rent.

A mortgagee with possession is an intermediate tenant-holder within the meaning of section 73 of the Local Boards Act (V of 1884), and is entitled to recover rent by summary process. The tenant's liability to pay him is not abrogated by a contract to which he was not a party.

SECOND APPEALS against the decrees of Diwan Bahadur C. V. KUMARASWAMI SASTRIYAR, the District Judge of Ganjām, in Appeals Nos. 253 to 255, 258 to 262, 286 to 300 and 429 to 433 of 1912, respectively, preferred against the decrees of K. NAGESWARA RAO, the Special Deputy Collector, Estates Land Suits, Chicacole, in Summary Suits Nos. 228, 230, 231, 225, 227, 229, 232, 240, 215, 217, 219, 222 to 224, 226, 233 to 239, 241, 216, 218, 220, 221 and 242 of 1912.

(1) (1913) I.L.R., 40 Calc., 936.

* Second Appeals Nos. 2112 to 2139 of 1913.

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The Court of Wards on behalf of the minor Zamindar of Nandigam filed suits to recover one-half of the land-cess paid by the estate to the Government. The defendant-ryots pleaded that they paid the half-share of the land-cess to the mortgagee in possession and that the zamindar was not entitled to recover it from them. The Court of Special Deputy Collector at Chicacole held that the mortgagee in possession was holder of an undertenure within the meaning of section 73 of the Madras Local Boards Act and by the terms of the mortgage-deed, the right to recover half share of the land-cess was vested in him and dismissed the suits; on appeal the Ganjam District Court held that a mortgagee with possession for a fixed term was not an intermediate landholder or a mortgagee with possession an undertenure so as to give the mortgagee the right to levy land-cess from the ryots. He accordingly reversed the decrees of the lower Court and passed a decree for the plaintiff in each of the suits. The defendants in the above suits preferred these Second Appeals.

K. Srinivasa Ayyangar and *M. Purusholhama Nayudu* for the appellants.

Dr. S. Swaminadhan for the respondent.

OLDFIELD, J.

OLDFIELD, J.—The appellants are defendants, tenants of an estate of which plaintiff is the Court of Wards Manager. The question is whether defendants are bound to pay plaintiff the portion of the road cess, for which they are responsible under section 73, Madras Local Boards Act (V of 1884, amended by VI of 1900) or can and should pay a mortgagee under Exhibit I. The lower Appellate Court has held that they must pay plaintiff with reference to the terms of both Exhibit I and section 73.

The material portions of section 73 provide that (1) every landholder must pay the tax (except that leviable on water tax which is not in question here) directly to Government; (2) the landholder can recover a specified portion of the tax from "any person, holding lands with or without right of occupancy as an intermediate landholder on an undertenure created, continued or recognized by the landholder"; (3) the intermediate land holder can recover from the tenants occupying the land half the tax payable by the landholder in respect of that land.

Some attempt was made to argue that the mortgagee under Exhibit I was a transferee of the title to the mortgaged property

and therefore became the landholder during the term of the mortgage. But this does not appear to have been put forward in the lower Courts. The property is part of a permanently-settled zamindari, and it is not alleged that it has been separately registered. In Exhibit I moreover the mortgagor, plaintiff's predecessor, expressly undertook to continue the payment of peshkash. In these circumstances attention may be confined to the plea that the mortgagee is an intermediate landholder.

The lower Appellate Court has first held generally that the mortgagee is not an intermediate landholder within the meaning of the Act, but has given no general reason for doing so. To us it is clear that a mortgagee with possession is as much a landholder as any lessee and that he is intermediate between plaintiff and his tenants. Our difficulty is caused by the further reference to an undertenure. That expression is not defined in the Local Boards Act; nor, so far as we have been shown, is it part of the legal or revenue phraseology of this Presidency. It is argued on the one hand that an undertenure involves the idea of a tenancy, a holding under a landlord for rent or service, and therefore cannot include a mortgagee with possession. On the other hand it may be said that it involves only a holding and is not restricted to holdings of any particular description. And this is in accordance with the only other use of the word in India, to which we have been referred, that in sections 3 and 5, Bengal Tenancy Act (VIII of 1885), where a tenure is defined as the interest of a tenure holder or undertenure holder, and a tenure holder as meaning primarily "a person, who has acquired from a proprietor a right to hold land for the purpose of collecting rents or establishing tenants on it." This definition is wide enough to cover the mortgagee in the present case, since under Exhibit I he was put in possession to collect rents and profits estimated at an amount, which would extinguish the debt within the term fixed. Mortgagees in possession, equally with lessees, are entitled to recover rent by summary process, *Vellaya* v. *Tiruva*(1); and it is a further reason for adopting defendants' construction that in accordance with it the amendment of the Act in 1900 would afford a comprehensive remedy for the

(1) (1882) I.L.R., 5 Mad., 78.

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mischief, against which that amendment must be supposed to have been directed, by protecting tenants against the landholder's separate demands for cesses in mortgaged as well as leased estates; for no reason has been suggested for the restriction of the protection afforded to the latter. So far then as argument can be based on the wording of section 73, the conclusion must be that the mortgagee is an intermediate landholder and defendants are entitled to pay him.

The learned District Judge next dealt with Exhibit I, laying stress on the absence of reference to payment of cess and the exclusion of the mortgagee's liability for taxes and holding that "assuming the mortgagee is an intermediate landholder within the meaning of section 73, the right to receive one-half of the cess from the tenant is dependent on the liability of the landlord (or presumably the intermediate landlord) to pay it and his having paid the whole cess." But in construing Exhibit I, it is to be remembered that it is dated 1897, before any explicit liability for any part of the cess was placed on the intermediate landholder by Act II of 1900 and before the tenant's right to pay him was recognized by statute; and accordingly no clear recognition of that right is to be looked for in the document. One of its terms is no doubt that plaintiffs' predecessor shall pay the peshkash to Government and it is not contended that that does not cover the payment of cesses payable with it. But, if the landholder is liable directly to Government for cesses under Exhibit I, that is only what section 73 provides; and his being so cannot affect the right of the tenant to pay the intermediate landholder or the landlord's duty to recover from the latter, referred to later in the section. There is further underlying this argument and that based on Exhibits III, IV and VI, to which reference will be made, the fallacy involved in the failure to recognize that section 73 in its amended form confers a right on the tenant. When it has been found that an intermediate landholder, such as the section contemplates, exists, that right cannot be affected by a contract, such as Exhibit I, between plaintiff's predecessor and a third party, the mortgagee. Nor, created (as it is) unconditionally, can it depend on any payment having been made by the former to Government or by the latter to the former. It is accordingly immaterial whether plaintiff is entitled to be reimbursed by the mortgagee the sums, which (it is not

denied) he has paid Government or whether, as defendants contend, he is not entitled to reimbursement under the terms of Exhibit I.

At this point plaintiffs' contention that the change in the law effected by Act VI of 1900 cannot modify the relation between him, his mortgagee and defendants, created by Exhibit I in 1897 calls for notice. It is of course the case that the rights of the parties to a contract are to be judged by their intention at its date and "by that law, by which they intended or rather may justly be presumed to have bound themselves." *Leoyd* v. *Ginberl*(1). But this principle can affect only the parties. It cannot affect strangers to the contract, such as defendants, or deprive them of statutory rights.

Plaintiff relies next on the fact that in Original Suit No. 54 of 1905 he was refused a decree against the mortgagee for the amount of the payments he had made to Government for cess for certain faslis prior to those now in question. It is not clear how this was relied on in the lower Appellate Court. But it is not alleged that this decision is *res judicata* between plaintiff and the present defendants, who were not parties to it. Here argument is based on the principle stated in *Srinivasa Aiyangar* v. *Arayar Srinivasa Aiyangar*(2) and *Ramamurti Dhora* v. *The Secretary of State for India in Council*(3), that judgments, whether *in rem* or *in personam* establishing a relation between the parties to them, are conclusive against third parties in the absence of fraud on the latter; and that principle must be accepted by this Court, though its validity was doubted in *Peeri Mohun Shaha* v. *Durlavi Dassya*(4). There is however the fundamental objection to its application to the present case that it extends only to adjudications, which would be *res judicata* between the parties to them, and that the judgment in Original Suit No. 54 was not of that description. It has not been printed, but the lower Appellate Court's account of it, on which we must depend, shows that the mortgagee, who succeeded, could not have appealed against the merely incidental finding on the point now in question and that that finding dealt, not with defendant's statutory right, but with the existence of an assignment to the mortgagee of the right to collect from them.

(1) (1865) 6 B. & S., 100. (2) (1910) I.L.R., 33 Mad., 483.
(3) (1913) I.L.R., 36 Mad., 141. (4) (1913) 18 C.W.N., 954.

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The existence of such an assignment, as evidenced by Exhibits III, IV, VI is the next matter in issue. The last mentioned document can be dealt with shortly, because the lower Appellate Court found on the evidence that the circumstances, in which it was prepared, were not established. Exhibits III and IV are prior leases of the property, the unexpired term of the former having been transferred to the mortgagee under Exhibit I. The cess was no doubt specified in them as one of the items making up the total payable by the lessee, and it is argued by defendants that this total being the basis, on which the amount of rent Rs. 2,600, to be credited annually against the mortgage debt is estimated in Exhibit I, the cess must be supposed to be included in that amount and appropriated to the mortgagee, plaintiff being therefore bound to pay Government from his own pocket. The lower Appellate Court was, I think, right in holding that this inference was not justified. For the cess is only Rs. 71-1-6 per annum, whilst the total rent under Exhibit III was Rs. 2,391-1-6; and the method, by which the amount fixed in Exhibit I Rs. 2,600, a round figure, was arrived at is beyond conjecture. Plaintiff on the other hand relies on the lower Appellate Court's statement that "the non-mention of the right to get the half share of the cess from the tenants in Exhibit I *primâ facie* suggests that it was not included in the rights conferred on the mortgagee" as a finding of fact, which cannot be contested in Second Appeal. But the very guarded language used by the learned District Judge regarding what is really the construction of a document precludes my taking this view: and on the merits I cannot find that anything is established in favour of either side.

In these circumstances the foundation of our decision must be our conclusions that the mortgagee is an intermediate landholder within the meaning of section 73 and that the tenant's right to pay him, recognised in that section, cannot be abrogated by a contract, to which they were not parties. The appeal must be allowed, the decision of the lower Appellate Court being set aside and that of the Deputy Collector restored with costs in both Courts.

TYABJI, J.

TYABJI, J.—The plaintiff seeks to recover land cess from the defendants claiming that he is landholder and the defendants, his tenants under section 73 of the Local Boards Act (Madras

Act V of 1884). The defence is that the defendants are bound to pay the cess not to the plaintiff but to the person who has a usufructuary mortgage of the land under Exhibit I, dated 3rd November 1897. The material portions of section 73 are as follows:—"Every landholder shall pay to the Collector . . . the local tax . . . ["Provided that in all cases when a person holds lands . . . as an intermediate landholder on an undertenure . . . recognised by a landholder, it shall be lawful for the landholder to recover from the intermediate landholder the whole of the tax . . . less one-half of the tax assessable on the amount of . . . quit rent payable by the intermediate landholder to the landholder"] "Provided [also] that, in the case of the lands occupied by tenants, it shall be lawful for the landholder [or the intermediate landholder, as the case may be], to collect and recover from his tenant one-half of the amount payable by the landholder in respect of the land so occupied." The portion enclosed in [ ] were inserted by Madras Act VI of 1900 and came into force on 1st April 1901 about 3½ years after the execution of the mortgage, Exhibit I.

The scheme of the section is that though the whole of the tax is recoverable by the Collector from the landholder, yet half of the tax has to be borne ultimately by the tenant; and the other half either entirely by the landholder or (where there is an intermediate landholder) partly by the landholder and partly by the intermediate landholder. To effect this division between the two latter, it is provided that wherever there is an intermediate landholder, the one-half tax payable by the tenants shall be recovered by the intermediate landholder and not by the landholder.

It is urged in the first place that the plaintiff has no *locus standi*, because the mortgagee is the landholder: that as stated in one of the grounds of Second Appeal "Exhibit I is in effect an absolute transfer of property for a term." It is admitted however that the plaintiff was, prior to the mortgage, the landholder. There does not seem to have been such a complete transfer of the ownership as to pass to the mortgagee all the rights which the mortgagor had in the property. As pointed out by my learned brother (whose judgment I have had the benefit of reading) though the property is part of a permanently settled Zamindari,

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it is not alleged to have been separately registered and the land tax is specially payable by the mortgagor. The deed refers to itself as "Khanda Gutta [which literally means 'fixed rent'] *deed with possession*" and also as "mortgage with possession." This contention therefore cannot succeed. It does not seem to have been put forward in the lower Courts.

Therefore whether the plaintiff can recover the half cess payable by the tenants depends solely upon whether the mortgagee answers to the description of an intermediate landholder. All the rest of the arguments addressed to us or contained in the judgments of the lower Courts centre round this one question.

The expression "intermediate landholder" appears from section 73 to connote: (*a*) the holding of land, (*b*) as an intermediate landholder, (*c*) on an undertenure, (*d*) created continued or recognised by a landholder, (*e*) payability by him of kattubadi jodi, poruppu or quit rent, (*f*) that when he exists the tenant is his tenant. The last appears from the second proviso.

The expression intermediate landholder indicates *primâ facie* a person who is (1) a landlord of the tenants, (2) a tenant of the ultimate landholder. His dual capacity is recognised in the direct reference to undertenure, and the assumption that rent is payable by him on the one hand and by the fact that the tenants are referred to as his tenants on the other. It is also referred to in *Nallayappa Pillian* v. *Ambalavana Pandara Sannadhi*(1) for another purpose. It is true that, if no rent is payable by the intermediate landholder to the landholder, there is no insurmountable difficulty in working out the provisions of the section; the intermediate landholder will in that case have to pay the whole tax to the landholder, or in other words bear the whole tax himself.

With reference to the expression "undertenure" I have been unable to come across its use or recognition in any English or American text-books on the law relating to landlord and tenant, or anywhere else except in the Bengal Tenancy Act (Bengal Act VIII of 1885). The definition contained in that Act has been cited by my learned brother; it consists of the equivalent of (*d*), (*a*) and (*f*) above, with reference to which there is no dispute before us. The expression "undertenure" is evidently not used in section 73 in a sense cognate to

(1) (1904) I.L.R., 27 Mad., 465 at pp. 469 and 470 (F.B.)

"undertenure," which would mean the holding of a tenant under a tenant, or an underlessee. Still inasmuch as in accordance with the strict terminology of English law even a free-holder is a tenant holding a tenement on a tenancy, an undertenure may with sufficient accuracy be taken to refer to a holding under that of the landholder.

Five other considerations have been suggested to us, three as having some relevance to the connotation of the term intermediate landholder, and two as otherwise affecting the rights of the parties.

First there is a remark of the District Judge on which a good portion of his judgment is based: "Assuming the mortgagee was an intermediate landholder within the meaning of section 73 the right to recover one-half of the cess from the tenant is (he says) dependent on the liability of the landlord to pay it and on his actually having paid the whole cess." This remark has reference to the nature and incidents of the rights concerned. It seems to me necessary to direct attention to the component parts of the three relationships on which the section is explicitly based, and then to annex rights to the holders of the respective relationships. Considered with reference to the two relationships entitling a right to claim half the tax, in the case of the landholder the District Judge's remark may be correct; the first proviso refers to the tax paid by the landholder for payment of which the section specifically provides. But the remark is obviously inapplicable to the intermediate landholder. His right does not depend on his liability to pay the tax. He does not in any case "actually pay the whole cess": he pays the whole less a deduction calculated on the rent payable by him; and he pays not to the Collector, but to the landholder. The learned District Judge's remark, therefore, coupled as it is with the assumption that the mortgagee is an intermediate landholder seems to me, with the greatest respect, to be unsupportable. The Act provides for the payment of the tax and its apportionment amongst the three persons by reference to their bearing certain relationships to the land and to each other. The payment of the tax to the Government is not laid down as an element in the definition or connotation of any of those relationships and the existence of the relationship is the only condition precedent to the right to recover half of the cess. The payment has been imposed on him who

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bears one of the relationships, viz., that of landholder, and the liability on the others is quantified by the amount paid or payable by the landholder. The recovery of half of the cess is not dependent on the landholder's liability to pay it, in any sense except that where no cess is payable the portion recovered from the tenant is half of nothing.

Secondly, in an earlier portion of his judgment the District Judge has remarked that "there is no transfer of property" (to the present mortgagee) "as in the case of an English mortgage or of a mortgage by conditional sale" and that therefore the mortgagee cannot in the present case be considered to be an intermediate landlord. With great respect I am unable to follow this. Assuming that there is no such transfer of property as is referred to, I do not find that as an ingredient in the notion of an intermediate landlord.

Thirdly, it is suggested that if it is shown that as between the mortgagor and mortgagee the former cannot recover anything from the latter, it must be decisive of the question whether the tenants must pay to the one or to the other. That in my opinion is not the case. It is true that the law assumes (1) that the intermediate landholder recovers half of the tax from the tenants, (2) that he pays something to the landholder; and these two matters are connected with each other and (to the extent stated above) with (3) the landholder's liability to pay the whole tax to the Government. But I apprehend that by the terms of his contract with the intermediate landholder the landholder could either release to the intermediate landholder his right to recover the portion of the tax which the law empowers the landholder to recover or reserve that right to himself, and the release or the reservation might be either express or it may be implied from the fact that all rights other than those referred to are either expressly released or reserved [*Cf. Nikka Mal* v. *Gardner*(1)]. If the right to recover half the cess from the tenant had been purported to be reserved by the landholder to himself, there might have arisen a question whether the tenants would not even in that case be justified in paying it to the intermediate landholder. I shall refer to the legal aspect of this question under the fourth head to which I have alluded. But here I must

(1) (1879) I.L.R., 2 All., 193.

state that in my opinion the contract of 1897 contained no reservation express or implied of the right arising from the amendment of the Act in 1900.

On the other hand, the landholder may, it is not disputed validly, agree to allow the intermediate landholder to retain the portion of the tax recovered from the tenant and apply it towards any sum that may be due to him from the mortgagor: and that is what is alleged here on behalf of the tenants. But though the question whether or not such an agreement express or implied relating to the application of the money exists between the mortgagor and mortgagee may affect their pockets, it does not affect the question whether the tenants have to pay to the mortgagee in the first instance or directly to the mortgagor. The District Judge's omission to notice this made him consider that there was here something like an "assignment of the statutory right to contribution," alleged, whereas the question is whether the mortgagee or the mortgagor is the person to collect the tenants' contribution: and that depends solely upon whether the mortgagee became by the contract an intermediate landholder.

The further question whether if he became entitled to collect half of the cess, in his capacity as intermediate landholder he was at liberty to retain it himself or was bound to pay it, or account for it to the mortgagor is not relevant to the rights and liabilities existing between the landholder and the tenant. This is illustrated by *Ramavatar* v. *Tulsi Prasad Singh*(1). The fourth consideration to which I referred above is whether the rights of the parties are affected by the fact that section 73 was amended after the contract (Exhibit A) was entered into. In the case last cited the statutory right of recovering the cess from the tenants came into being after the contract; in our case the inherence of a right existing at the time of the contract was (by an amendment of the law, after the contract) shifted from the landholder to the intermediate landholder. I think it unnecessary to consider the general question whether this shifting can be prevented by contract inasmuch as in the present case there is no attempt to do so. But I may point out that the shifting is brought about by the legislature as the effect of a contractual act. It may be that the legislature intended that the parties should

(1) (1911) 14 C.L.J., 507.

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not be at liberty to contract themselves out of this shifting as an incident of a contract, the effect of which apart from this particular term would be to make one of the parties to it an "intermediate landholder"; and that the reason for this curtailment of the right to contract (if the right is so curtailed) is, as pointed out by my learned brother, to afford a comprehensive remedy for the mischief of the landlord's separate demands for cesses on mortgaged lands. See also *Vellaya* v. *Tiruva*(1). It may be that the legislature left no power to the parties to contract so as to bring about a relationship corresponding in other respects to that of an intermediate landholder without annexing to that relationship the rights under section 73. The question however seems to me to be a large one and I express no opinion on it as it seems to me that it has no bearing on the view I take of the case. My view is that the contract did not expressly or impliedly purport to prevent a shifting of the right, which was brought about by a legislative amendment of the law made three years after the contract had been entered into.

Finally, some arguments before us were apparently based on the assumption (which I cannot grant) that, because in other cases, persons called or calling themselves mortgagees or lessees were, or were not held to be intermediate landholders or farmers of revenue, and because in the present case we speak of a mortgagor and mortgagee, therefore this case must be decided as being governed by those other cases. The decisions cited to us seem to me however to be helpful, not as direct authorities, but as showing in what way the question should be endeavoured to be solved. In *Vellaya* v. *Tiruva*(1), a Full Bench pointed out that the question must depend upon the terms of the particular contract giving rise to the relationship between the parties which in that case also was a mortgage. The fact that a deed refers to itself as a mortgage, does not necessarily make it a mortgage,—*Nidha Sah* v. *Murli Dhar*(2) : nor does every mortgagee become or cease to become an intermediate landholder because one mortgagee has been held to be so or not to be so. I proceed to deal with the facts of the case and to examine whether the mortgagee answers to the description of an intermediate landholder.

(1) (1882) I.L.R., 5 Mad., 76 at pp. 80, 85 and 86.
(2) (1902) 30 I.A., 54 at p. 58.

The mortgage deed in the present case (1) recites that a sum of Rs. 28,000 was found payable to the mortgagee, on a calculation which was no doubt satisfactory to the parties. It is then said (2) that the rents of the lands in question including therein (*a*) kattubadis of inams, (*b*) cists of banjir lands, (*c*) incomes of banjir lands, (*d*) fishing tax, (*e*) etc., are fixed at Rs. 2,600, (3) that the mortgagee "is this day put in possession;" (4) that "the mortgagee shall collect the said lease amount (i.e., the rents above recited) and enjoy the same for twenty-five years . . . bearing the profit and loss thereof; and on the expiry of 25 years put the villages and the document in the mortgagor's possession on the mortgagee recovering the amount due in respect of this bond in full," (5) covenants follow on the part of the mortgagor (i) not to offer to repay the mortgage debt prior to expiry of 25 years, (ii) not to mortgage the villages any further, (iii) to furnish accounts and information, (iv) to transfer an existing lease (which is in evidence as Exhibit III) to the mortgagee. Then after a passage which I shall set out below, (v) the right to sue ryots in his own name is given to the mortgagee, (vi) also to quarry, (vii) finally the mortgagor agrees to pay the peshkash and in default to pay back the mortgagee with interest, (6) the portion above referred to is as follows:—

"As by this khandagutta deed the villages of Dimilada and Lingulapadu have been given to you for khandagutta to be enjoyed by you for 25 years for the said sum of Rs. 28,000, you shall not plead then (i.e., at the end of 25 years) that anything more is due to you under the document nor shall we contend that the debt has been discharged earlier."

It seems to me that every part of the connotation of the term "intermediate landholder" has its equivalent in the status given to the mortgagee. There might be some doubt as to payment of rent. But section 105 of the Transfer of Property Act recognizes the payment of a premium instead of rent for a lease; and I find it difficult to distinguish from a premium the sum of Rs. 10,000 originally paid by the mortgagee to the mortgagor, which by a calculation that the parties seem to have considered satisfactory, was taken to amount to Rs. 28,000. The relationship of a usufructuary mortgagee is always close to that of a lessee, as may be found by reference to the provisions of the

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Transfer of Property Act regarding them respectively and to the numerous cases before the Courts in which it has had to be determined whether the relationship that has arisen between the parties must fall under the one description or the other. I agree with my learned brother that no aid is to be obtained from Exhibits III, IV and VI for the reasons stated by him.

With reference to Original Suit No. 54 of 1905 on the file of the District Court of Ganjām, we have not the judgment before us. Its contents are however referred to in the judgment under appeal and the parties before us had to restrict their arguments on what the District Judge says regarding it. From his judgment I gather that in Original Suit No. 54 of 1905 (1) the present plaintiff contended that the mortgagee was on the mortgage liable to pay the cess and had failed to pay it, (2) the mortgagee contended on the other hand that (*a*) the cess was payable by the mortgagor, and (*b*) that the half cess recoverable by the mortgagee from the tenants was to be reckoned as part of the income. The only part of the judgment which became res judicata was that the mortgagor was liable to pay the land cess. This is irrelevant to the question before us, viz., whether or not the mortgagee is the intermediate landholder.

I hold therefore that the mortgagee in the present case was an intermediate landholder and as such he and not the mortgagor (the plaintiff) has the right to collect from the tenants the half cess referred to in section 73 of the Local Boards Act. The appeal will succeed with costs in this and the lower Appellate Court. The order of the Special Deputy Collector that each party should pay his own costs in the Court of First Instance will stand.

S.V.