present case to set aside the proceedings wholly, but I think it is pre-eminently a case where the proceedings should be stayed pending the disposal of the appeal before the High Court (A.A.O. No. 314 of 1923) from the order of the Subordinate Judge. I accordingly make an order staying the proceedings pending the appeal. At this stage no further order will be necessary.

D.A.R.

PRIVY COUNCIL.*

NARASINGERJI JYANAGERJI (SINCE DECEASED) (DEFENDANT), APPELLANT,

1924, 19th June

v.

PANUGANTI PARTHASARADHI RAYANAM GARU AND OTHERS (PLAINTIFFS), RESPONDENTS.

[On Appeal from the High Court at Madras.]

Mortgage—Ostensible sale and agreement for repurchase—Intention—Evidence—Inadequacy of price—Construction of deeds—Indian Evidence Act (I of 1872), sec. 92—Transfer of Property Act (IV of 1882), sec. 58.

Two deeds of the same date were so phrased as to be ostensibly a sale of certain villages with an agreement for a resale and repurchase at the same price at a certain date. It appeared however that the price named, which was an amount immediately required to prevent a sale under a decree, had been settled without bargaining ; it was absurdly low, less even than what the property would have realized upon a public sale. A clause in one of the deeds indicated that time was not of the essence of

* *Present*: Lord ATKINSON, Lord SHAW, Lord BLANESBURGH, Sir JOHN EDGE and Mr. AMEER ALI.

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the contract for repurchase, and there were other provisions which supported the view that a mortgage was intended.

Held, that the transaction was a mortgage by conditional sale, and that purchasers upon a sale in execution had a right to redeem; that conclusion was arrived at without reference to oral evidence other than such as was held admissible in *Balkishen Das* v. *W. F. Legge* (1900) I.L.R., 22 All., 149 (P.C.); 27 I.A., 58.

Their Lordships observed that, as at present advised, they must not be taken to subscribe to the view that there had been introduced into the law of India such a radical change in the law of evidence as was suggested in the High Court, a change which would have the effect of excluding from the class of mortgages by conditional sale, many transactions which before the Indian Evidence Act would have been held to be within that class.

APPEAL (No. 47 of 1922) from a decree of the High Court (24th February 1921) modifying a decree of the Subordinate Judge of Nellore.

The suit was brought by the respondents and related to certain villages in the zamindari of Kālahasti which were dealt with by two deeds executed by the Raja of Kālahasti upon 4th August 1908. The first deed recited that in order to prevent a sale of the property under a decree the Raja (who was described as "the vendor") had "agreed to convey by private sale the said villages for Rs. 6,00,000," and conveyed them to the appellant subject to conditions and reservations of which those material to the present judgment are therein set out. The second deed was described as an agreement for a reconveyance of the villages to the Raja (referred to as "the purchaser") and provided:

"The vendor agrees to sell, and the purchaser to purchase, the villages mentioned in the conveyance, for Rs. 6,00,000, the said sum to be paid by the purchaser to the vendor on 31st August 1913, or 31st August 1914, and not earlier."

The deed contained material provisions which are stated in the judgment of the Judicial Committee.

In 1914 the villages were brought to sale under a decree, and in February 1915 they were knocked down to the respondents to whom a sale certificate was issued. Meanwhile, namely, on 31st August 1914, the Raja (as was found by both Courts in India) tendered to the appellant the Rs. 6,00,000.

In August 1915, the respondents brought the present suit against the appellant, joining the Raja as a defendant. By their plaint they contended that the transaction was a mortgage by conditional sale and that they were entitled to redeem: alternatively, that if the transaction was a sale they as assignees had a right to a reconveyance upon payment.

The present appellant by his written statement denied that the transaction was a mortgage, and denied that any tender had been made; he also contended that the rights of the Raja were not capable of assignment and that the plaintiffs were not entitled to sue.

The Subordinate Judge found that the property was of the value of 15 or 16 lakhs. Having regard mainly to that fact, and to the circumstance that no bargaining as to the amount had taken place, he held that the transaction amounted to a mortgage. He accordingly made a decree for redemption; and subsequently, the money having been paid into Court by the plaintiffs, he made a final decree under Order XXXIV, rule 8.

Upon appeal to the High Court, the learned Judges (WALLIS, C.J., and OLDFIELD, J.) modified the decree by ordering a reconveyance with payment by the first defendant of mesne profits from 1st July 1914, until possession was given, and that the plaintiffs should pay to the first defendant interest upon Rs. 6,00,000 at 6 per cent

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per annum from 1st September 1914, until 5th March 1919, the date of the deposit of the money in Court. The learned Judges were of opinion that, having regard to the provisions of the deed, the transaction was a sale with a collateral agreement for repurchase though they agreed with the findings of fact of the trial Judge as to the inadequacy of price. They rejected a contention that the plaintiffs had purchased merely a right to sue which by section 6 of the Transfer of Property Act was incapable of transfer. Upon that point they applied the tests laid down by PARKER, J., in *Glegg* v. *Bromley*(1), cited with approval in *County Hotel and Wine Company* v. *London and North-Western Railway*(2) and *Ellis* v. *Torrington*(3), namely, whether the subject-matter of the assignment was property with an incidental right to its recovery, or was a bare right to bring an action either in law or in equity. Reference was also made to section 23 of the Specific Relief Act on this point.

The learned CHIEF JUSTICE in the course of his judgment, after expressing his agreement with the findings of fact on which the trial Judge held that the transaction was a mortgage, said :—

"If we are at liberty to apply the decisions of Courts of Equity in England, I think that these findings would support the inference that the conveyance, Exhibit X, was originally intended as a security for money and must be treated as a mortgage. As observed by the learned Editor of Coke on Littleton 204 (*b*) in a note which is cited by Story 'If the money paid by the grantee was not a fair price for the absolute purchase of the estate conveyed to him ; if he was not let into immediate possession of the estate ; if, instead of receiving the rents for his own benefit, he accounted for them to the grantor, and only retained the amount of the interest ; or if the expense of preparing the deed

(1) [1912] 3 K.B., 474. (2) [1918] 2 K.B., 251.
(3) [1920] 1 K.B., 399.

was borne by the grantor, each of these circumstances has been considered by the Court as tending to prove that the conveyance was merely pignoratitious.' I do not think the decisions referred to in support of these propositions are inconsistent with the later decision in *Alderson* v. *White*(1), but it has been held by the Privy Council, as regards transactions which no doubt arose before the Transfer of Property Act, that these equitable decisions are inapplicable in India: *Balkishen Das* v. *W. F. Legge*(2), where their Lordships, after referring to the provisions of section 92 of the Indian Evidence Act, observed that cases such as these 'must be decided on a consideration of the contents of the documents themselves with such extrinsic evidence of surrounding circumstances as may be required to show in what manner the language of the documents is related to existing facts.' This ruling which was followed in *Jhanda Singh* v. *Wahid-ud-din*(3), and has been approved in *Maung Kyin* v. *Ma Shwe La*(4), which, however, was not a case of sale-deed and agreement to reconvey, clearly refers to the language of proviso 1 to section 92 of the Indian Evidence Act, and the surrounding circumstances referred to in that proviso are circumstances which enable the Court to ascertain and give effect to the full intention of the parties as expressed in the document itself, and evidence of surrounding circumstances is not admissible under the proviso for the purpose of contradicting the terms of the document. Following these decisions this Court has recently held in *Muthuvelu Mudaliar* v. *Vythilinga Mudaliar*(5), that, although section 58 of the Transfer of Property Act recognizes mortgages by conditional sale where the mortgagor ostensibly sells the mortgaged property on condition that on payment of the mortgage money on a certain date the buyer shall transfer the property to the seller, the section has not the effect of raising a presumption that a sale with an agreement to reconvey is a mortgage; and having regard to the decisions just cited I think we are precluded from holding this transaction to be a mortgage

(1) (1858) 2 D.G. & J., 97.
(2) (1900) I.L.R., 22 All., 149 (P.C.); 27 I.A., 58.
(3) (1916) I.L.R., 38 All., 570 (P.C.); 43 I.A., 284.
(4) (1918) I.L.R., 45 Calc., 320 (P.C.); 44 I.A., 236.
(5) (1919) I.L.R., 42 Mad., 407 (F.B.).

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unless it appears on the face of the documents read in the light of the surrounding circumstances that it was the intention of the parties that it should be a mortgage. A strict application of this rule may have the effect of excluding most of these transactions from the class of mortgages by conditional sale, but on the other hand it will have the effect of putting an end to the uncertainty in which these transactions have been involved and the litigation to which they have given rise. This appears to me to be the only alternative if we are precluded from treating transactions of this kind as mortgages on the ground on which I think the Courts of Equity formerly proceeded that it would be inequitable to give effect to them as sales."

Clauson, K.C., and *Narasimham* for the appellant.—The transaction was rightly held to be a sale with a right to repurchase. The right remaining in the Raja was not transferable or attachable in execution.

[Their Lordships directed that the question whether the transaction was a mortgage or a sale should first be argued by both parties.]

The deeds on their face amount to a sale with a collateral agreement for a resale; no extrinsic evidence was admissible to alter their legal effect: *Balkishen Das* v. *W. F. Legge*(1), *Jhanda Singh* v. *Wahid-ud-din*(2) and *Maung Kyin* v. *Ma Shwe La*(3). The transaction was not a mortgage within section 58 (*c*) of the Transfer of Property Act, 1882, because it was not shown to be a case in which "a *mortgagor* ostensibly sells." By section 58 (*c*) a transaction is a "mortgage" only if it is a giving of security for money advanced by way of loan. That the transaction was of that character must be established by evidence admissible having regard to section 92 of the Indian Evidence Act. The transaction

(1) (1900) I.L.R., 22 All., 149 (P.C.); 27 I.A., 58.
(2) (1916) I.L.R., 38 All., 570 (P.C.); 43 I.A., 224.
(3) (1918) I.L.R., 45 Calc., 320 (P.C.); 44 I.A., 236.

was purposely given the form of a sale as that afforded greater protection from executions.

Upjohn, K.C., and *Kenworthy Brown* for the respondents.—The transaction was a mortgage by conditional sale as appears from a consideration of its provisions and the circumstances in which it was entered into. Further, section 58 (*c*) of the Transfer of Property Act provides that a document which ostensibly is a sale may be a mortgage. That a document of that character is really a mortgage can be shown only by extrinsic evidence. Such evidence does not contradict the document because the section recognizes that a document of that form may be a mortgage under the Act. The effect of section 58 (*c*) has never been considered by the Board. *Balkishen Das* v. *W. F. Legge*(1) and *Jhanda Singh* v. *Wahid-ud-din*(2), both related to documents executed before the passing of the Act, and *Maung Kyin* v. *Ma Shwe La*(3) was not a case of a collateral agreement to repurchase. Even upon a strict application of the rule in *Balkishen Das* v. *W. F. Legge*(1), evidence of the inadequacy of the price was admissible and indicated that the transaction was a mortgage.

Clauson, K.C., in reply.—A document is not within section 58 (*c*) unless its terms allow that the relationship of borrower and lender exists. The principles laid down in *Balkishen Das* v. *W. F. Legge*(1), as to the decision in equity not applying, were expressly approved and followed in *Maung Kyin* v. *Ma Shwe La*(3).

Lord BLANESBURGH.

The JUDGMENT of their Lordships was delivered by Lord BLANESBURGH.—This is an appeal from a decree of the High Court of Judicature at Madras, dated the 24th of February 1921, modifying a decree

(1) (1900) I.L.R., 22 All., 149 (P.C.); 27 I.A., 58.
(2) (1916) I.L.R., 38 All., 570 (P.C.); 43 I.A., 284.
(3) (1918) I.L.R., 45 Calc., 320 (P.C.); 44 I.A., 236.

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of the Subordinate Judge of Nellore, dated the 5th of October 1918, and made in Original Suit No. 1 of 1917.

Issues raised by the appellant necessitated in the Courts below, and particularly in the Court of the Subordinate Judge*, whose judgment, their Lordships would at once observe, is conspicuous for its ability, care and completeness, a prolonged investigation and examination of conflicting evidence. Concurrent findings against the appellant on every issue of fact raised by him have, however, greatly narrowed the ambit of the dispute as presented to the Board, and no more than two questions—difficult and important questions it is true —have survived for discussion before their Lordships.

Of these one only has so far been argued. But it raises the fundamental dispute between the parties, which may be described as an issue as to the true nature of the transaction of the 4th of August 1908, between the appellant and the late Raja of Kālahasti (now represented by the respondents his assignees) as a result of which the properties in suit passed to the appellant. The transaction is evidenced by two documents referred to throughout the proceedings as Exhibits X and U. Did it effect, as contended for by the respondents, merely a mortgage by conditional sale of the properties in suit, or was it, as contended by the appellant, an absolute sale of these properties to himself, with an agreement on his part to reconvey on the strict performance by the Raja of certain defined conditions?

In this suit the respondents, who, as already indicated, had succeeded as auction purchasers to the outstanding rights in the properties of the Raja, claimed to redeem them on the footing that the transaction in question was a mortgage. Alternatively, they claimed

* Mr. K. Sundram Chettiar—Ed.

to have the properties reconveyed to them upon payment of the purchase price on the ground, that if contrary to their main contention, the transaction did amount to an out and out sale, the conditions entitling the Raja to a reconveyance had been all complied with by him, and in his shoes they now stood.

In the Trial Court, the respondents succeeded on their main case. In the Court of Appeal they succeeded on their alternative case. The learned Subordinate Judge held that the transaction amounted to a mortgage by conditional sale. The High Court on appeal felt themselves constrained upon the authorities to hold that, in view of the terms of Exhibits X and U, the transaction must be held to have been an absolute sale of the properties to the appellant. But they found also, agreeing in this with the learned Subordinate Judge, that the conditions entitling the Raja to a reconveyance on that footing had been performed and that the respondents, as his successors in interest, were entitled to have the properties assured to them on payment of the prescribed price.

From that order of the High Court, the present appeal is brought. Mr. Clauson for the appellant did not ask their Lordships to review the conclusion of the High Court that all the conditions entitling the Raja to a reconveyance had been performed. That conclusion—strenuously contested in the Courts below—now rested on concurrent findings of fact which he could not before the Board seek to displace. The appellant's sole ground of appeal, indeed, was that the right to a reconveyance reserved by Exhibit U was personal to the Raja and did not pass to any assignee. As, however, the appellant's views on this matter raised very difficult questions of law, and as counsel recognized that no success with them would avail him anything if the

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respondents were to establish before the Board, as they had done before the Subordinate Judge, that the transaction with the appellant did in truth amount to a mortgage, Mr. Clauson, with the approval of the Board, confined his argument to that question, on the understanding that, if their Lordships ultimately accepted upon it, the view in his favour taken by the High Court, the substantive issue raised by the appellant in his appeal would become the subject of subsequent discussion before the Board.

In accordance with that arrangement, the vital question, whether the transaction in question did or did not amount to a mortgage, has been fully argued before their Lordships, and with that problem alone they now propose to deal.

It seems to their Lordships that they can dispose of the present case with no reference to any oral evidence, other than that of surrounding circumstances such as in Lord DAVEY's words in *Balkishen Das* v. *W. F. Legge*(1) is clearly required to show in what manner the language of the documents was related to existing facts.

To a consideration of these circumstances their Lordships now proceed.

The Raja of Kālahasti—party to the transaction in question—succeeded in 1905 to the Taluk of Pamur. The taluk consisted of 223 villages, and at the succession of the Raja it was in a state of the utmost embarrassment.

It had been for some time in the hands of the Court of Wards, but earlier in the same year that Court had handed it back to the Raja's nephew and predecessor. The property was heavily encumbered. It was subject to a mortgage of the 20th of June 1893, in favour of

(1) (1900) I.L.R., 22 All., 149 (P.C.); 27 I.A., 58.

Raja Venugopal, who in 1899 had obtained a mortgage decree in respect of his debt amounting then to about 6 lakhs. In March, 1908, in pursuance of his decree, he had proceeded to a court sale of 27 villages, part of the taluk, and had realized thereby a sum of about 3½ lakhs but that price was being challenged by the Raja for inadequacy, and inadequate it seems to have been. Nor was the decree-holder content with his partial realization, and his purpose was to bring the remaining 196 villages to sale for the balance of his debt which, with interest, then amounted to nearly 6 lakhs, and he had actually obtained an order fixing that sale for the 8th of August 1908.

Such was the position when the transaction now in question was entered into. It was carried out four days earlier—on the 4th of August 1908. Six lakhs were required by the Raja to avert a court sale. The appellant, a rich money-lender of Allahabad, provided that sum. It was provided after very slight, if any, inquiry. The transaction, whatever it was properly called, was not the result either of any bargaining as to the value of the property conveyed or as to the price to be paid. The six lakhs were required and they were found. That was all.

That sum had no relation to the value of the 196 villages comprised in the deed of assurance. On this matter the Board are in full agreement with both Courts below. As the learned CHIEF JUSTICE points out, the 27 villages had in previous March fetched as much as Rs. 3,46,000 and that price was being challenged for inadequacy. There was no evidence and no reason to suppose that the 27 villages differed materially from the 196 villages still remaining unsold, still less that they differed to such an extent as to make the value of these 27 villages equal to two-thirds of the value of the 196.

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The evidence as to the gross income of the 196 villages led to the same conclusion. It was the view of the learned Subordinate Judge that the value of these 196 villages amounted in 1908 to 15 or 16 lakhs at the least. The learned CHIEF JUSTICE had no hesitation in concurring so far in that view as to hold that in August, 1908 six lakhs would have been a most grossly inadequate price and much less than could have been realized by private sale or even by a court sale. Their Lordships have examined the evidence on this subject for themselves and they are in entire agreement with the learned CHIEF JUSTICE as to its result. And that is sufficient. They desire to add, however, that had it been necessary they would have been prepared to endorse in its entirety the finding of the learned Subordinate Judge on this point.

Thus informed of the circumstances surrounding the execution of X and U, their Lordships are now in a position to examine these documents so as to ascertain from their provisions and necessary implications the real nature of the transaction to which they give effect.

Exhibit X, described as an indenture made by way of conveyance,—their Lordships will refer to it as the conveyance—describes the Raja as vendor and the appellant as purchaser. It begins with a recital of the title of the Raja to the 196 villages in question; it goes on to recite the mortgage of June 1893; the decree for sale and the sale of the 27 villages; and the fact that the remaining villages are proclaimed for sale on the 8th of August then current. The final recital is as follows:—

"And whereas the vendor has, in order to prevent the property being sold in public auction and realizing much less than what they are actually worth, agreed to convey by private sale the said villages to the said purchaser for Rs. 6,00,000."

Their Lordships will return to this recital in due course. The conveyance then witnesses that in consideration of Rs. 5,60,445 paid to the decree-holder in satisfaction of his debt and Rs. 39,554-7-0 paid to the vendor, the vendor as beneficial owner grants and conveys the properties, "subject to the conditions and reservations mentioned below," to the purchaser, "his heirs, executors, administrators and assigns in fee simple absolutely." Then follow covenants for right to convey, quiet enjoyment, and further assurance and for indemnifying the purchaser, etc.,

"against all losses, damages, expenses, claims and liabilities whatsoever, if any, which he or they may pay, sustain, incur, or be put to by reason or in respect of the purchase thereof."

The principal conditions and reservations are—

1. All rents are to belong to, and be enjoyed by, the purchaser as from 1st July 1908.

2. The vendor reserves to himself the sole right to the minerals and mineral rights including marble in the villages and the right

"to repurchase the said villages as per the agreement of this day's date executed by the purchaser to the vendor, the said right to be exercised only on or after the 31st August 1912, and on or before the 31st August 1914, and to be in strict accordance with the terms set forth in the document above referred to."

In Exhibit U, the agreement just referred to, the appellant appears as vendor and the Raja as purchaser. It is expressed to be made for the reconveyance of the 196 villages specified in the schedule attached to the conveyance, and clause 1 provides that

"The vendor agrees to sell, and the purchaser to purchase, the villages mentioned in the conveyance for Rs. 6,00,000, the said sum to be paid by the purchaser to the vendor on the 31st August 1912, the 31st August 1913, or the 31st August 1914, and not earlier."

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By clause 2 the vendor is to execute a deed of sale in favour of the purchaser as soon thereafter as the said sum of Rs. 6,00,000 is paid to the vendor, and the vendor is to be entitled solely to the possession and enjoyment of the villages . . . till such sum is paid and a conveyance in due form executed.

By clause 3 it is provided that if the purchaser fails to pay the amount mentioned in clause 2 *before* the 31st August 1914, as above mentioned, the purchaser shall lose all his right of repurchase and that agreement shall then cease to be operative and valid. In case the purchaser pays to the vendor the said sum of Rs. 6,00,000 on the 31st August 1912, 1913 or 1914, as above set forth, and a conveyance in due form is executed, the purchaser is to become entitled to all the rents and profits derivable from the villages as from the 1st day of July 1912, 1913 or 1914, respectively.

Clause 4 is very important. Its terms are these—

"If after the date of this agreement and before the sale deed is executed, the Government take up any portion of the land hereunder agreed to be conveyed, under the Land Acquisition Act and award compensation therefor any compensation so awarded shall, unless Government otherwise expressly provides, be deemed to be equivalent to 20 years' rent of the land acquired, and the vendor and the purchaser shall be entitled each to his proportionate share of the purchase money. The share of the money due to the purchaser being, if need be, given credit for towards the sale price of Rs. 6,00,000 already mentioned and agreed upon."

Their Lordships do not conceal from themselves the fact that the transaction as phrased in these documents is ostensibly a sale, with a right of repurchase in the vendor. This appearance, indeed, is laboriously maintained. The words of conveyance needlessly iterate the description of an absolute interest, and the rights of

repurchase bear the appearance of rights in relation to the exercise of which time is of the essence.

But a closer examination of the documents discloses their real character. Take, for example, the final recital of the conveyance to which reference has already been made. What is its true implication? A consideration of the facts known to both parties makes it, their Lordships think, reasonably plain. The parties knew two things quite well. First, that 6 lakhs was an absurd purchase price. Secondly, that even at public auction the properties could be expected to realize a larger sum than that. What then was the implication? Surely that the transaction in which they were engaging was not a sale but a loan. For, notice how that principle is worked out. The Raja has not only an option to repurchase. He is put under an obligation to buy if the appellant thinks fit to require him so to do. The appellant's 6 lakhs can be recovered by him if he chooses to sue upon the Raja's contract to repurchase, he remaining in possession and enjoyment of the rents and profits of the properties until that price is paid.

Again, is time of the essence of the exercise by the Raja of his rights in this matter? Clause 4 of the agreement already set forth indicates to their Lordships that it is not. That clause seems also to be clear enough although it describes an arrangement very unusual in character. The clause is providing for the possibility of the appellant being compulsorily expropriated by Government from some part of the property in suit, and the receipt by him of the compensation in respect thereof. The compensation is to be treated as the equivalent of 20 years' rent; it is to be treated as belonging to the appellant and the Raja according to what would have been their rights *inter se* to possession of the expropriated lands during these years; the money is to be received

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by the appellant as being in possession, but *if need be*—these are the critical words—credit is to be given to the Raja for his share by a deduction from the 6 lakhs otherwise payable by him on repurchase.

These words show that in certain circumstances such credit will not be his. But what must these circumstances be? They can only be a repurchase more than 20 years after the expropriation. But if time was of the essence for such repurchase it could in no circumstances be postponed beyond six years from the date of the conveyance. Clearly, therefore, and within the intendment of the documents themselves time is not of the essence in this matter; and so soon as that is established all pretence for holding this ostensible sale and repurchase to be anything else than a mortgage by conditional sale disappears, and its establishment reinforces several other considerations leading to the same conclusion such as the reservation of the right in the conveyance itself; the reservation of minerals which is directed, in their Lordships' view, to a restriction on the appellant's usufructuary privileges; the strange covenant of indemnity and the inconsistent and almost unintelligible provisions as to the actual time limited for the exercise of the Raja's so-called right of repurchase. When all these provisions of the documents are viewed in the light of the surrounding circumstances, the inference is, in their Lordships' view, irresistible that here a mortgage and a mortgage only was in the direct contemplation and intention of both parties to the transaction.

Such was the conclusion of the Subordinate Judge. Such was apparently the belief of the learned Judges of the High Court, but they felt themselves precluded from giving effect to that belief by their hesitation to attribute, what their Lordships hold to be their real result,

to the considerations emerging from the terms of the documents to which attention has here been drawn.

In these circumstances, their Lordships find it unnecessary to deal with the numerous authorities upon this subject which they have examined. The case in their view is abundantly clear. They would only observe before parting with it that, as at present advised, they must not be taken to subscribe to the view that there has been introduced into the law of India such a radical change in the laws of evidence as is suggested by the learned Chief Justice, a change which would have the effect of excluding from the class of mortgages by conditional sale many transactions which before the Evidence Act would have been held to be within that class.

The present case with the shifts and devices, to which the appellant resorted, to deprive the respondents of all their rights in the property, if the character of a mortgage could not be attached to the transaction, shows how serious such a conclusion would be.

Without most careful consideration, their Lordships would hesitate to accept a view which would bear so hardly on many mortgagors expressing their contracts of borrowing in long accepted Indian forms.

The respondents, in their Lordships' judgment, are entitled to a redemption decree. They are chargeable with interest at the rate of 6 per cent per annum from the 1st of September 1914, down to the date when the six lakhs were paid into Court. The appellant will be entitled to the interest earned by that sum since it was so paid in.

On the other hand, the appellant must account to the respondents for mesne profits of the properties as from the 1st of July 1914, until actual delivery of

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possession to the respondents. The order of the High Court should be discharged and with these variations the decree of the learned Subordinate Judge should, in their Lordships' opinion, be restored.

Lord BLANESBURGH.

Their Lordships will humbly advise His Majesty accordingly.

The appellant must pay all the costs of the respondents in the High Court and their costs of this appeal.

Solicitor for appellant :—*H. S. L. Polak.*

Solicitor for respondents :—*Douglas Grant.*

A.M.T.

APPELLATE CRIMINAL—FULL BENCH.

Before Mr. Justice Spencer, Mr. Justice Krishnan and Mr. Justice Ramesam.

1924, April 24.

THEETHUMALAI GOUNDER AND OTHERS (ACCUSED 1, 4, 6, 7, 12, 13, 15, 16 and 18), APPELLANTS,

v.

KING-EMPEROR.*

Sec. 149, *Indian Penal Code—Sec.* 537, *Criminal Procedure Code—Liability of every member of an unlawful assembly for offence committed by any one of them.*

Held by the Full Bench (*a*) that when a charge has been framed under sections 326 and 149, Indian Penal Code, a conviction under section 326 alone is not necessarily bad and (*b*) that the legality of the conviction depends upon the question whether the accused was materially prejudiced by any omission in the charge. *Reazuddi* v. *The King-Emperor* (1912) 16 C.W.N., 1077, dissented from.

Obiter: Section 149, Indian Penal Code, creates no offence; it is merely declaratory of a principle of the common law;

* Criminal Appeal No. 1045 of 1923.