party, and by the decision of the Bombay Court in *Bhugwan Golabchund* v. *Kriparam Anundram* (1). The decision of this Court in *Madho Singh* v. *Bindessery Roy* (2) it is true is opposed to these authorities, but in our judgment that ruling cannot be supported.

BEFORE A FULL BENCH.

1875.
August 27.

Mr. Justice Turner, Officiating Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, and Mr. Justice Oldfield.

DAIA CHAND AND OTHERS (DEFENDANTS) *v.* SARFRAZ AND OTHERS (PLAINTIFFS.)*

Redemption of Mortgage—Limitation—Acknowledgment of Title of Mortgagor or of his right to Redeem—Act IX. of 1871, *sch.* ii, 148.

Where the defendants attested as correct the record-of-rights prepared at a settlement with them of an estate in which they were described as mortgagees of the estate, but which did not mention the name of the mortgagor, *held* (SPANKIE, J. dissenting) that there was an acknowledgment of the mortgagor's right to redeem within the meaning of article 148, sch. ii, Act IX. of 1871.

Per PEARSON, J.—That there was also an acknowledgment of the mortgagor's title.

Per SPANKIE, J. *contra.*

THE plaintiffs sued to redeem a mortgage of the entire 20 biswas of mauza Pal, pargana Jauli Jansath, zila Saharanpur, alleged to have been made in 1811 for Rs. 241 by their ancestors to the ancestors of the defendants. The latter denied the mortgage, alleging that they were the proprietors of the estate. From the evidence adduced it appeared that in 1863 the plaintiffs applied to the revenue authorities to record their names as the mortgagors of the estate, but the application was refused. In May, 1872, at the instance of the defendants, the entry of the word "mortgagee" opposite the names of the defendants in the *khewat* annually prepared by the patwári was directed to be discontinued. The first Court, looking at these circumstances, treated the suit as one for the possession of land and dismissed it, holding that it should have been valued at five times the revenue payable to Government in respect of the property in suit, instead of according to the principal amount

(1) 2 Borr. 39. (2) H. C. R., N.-W. P., 1868, p. 101.

* Appeal under cl. 10 of the Letters Patent, No. 4 of 1875.

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of the mortgage-money. The lower appellate Court held that the suit was correctly valued. It disallowed a plea taken by the defendants to the effect that the suit was barred by the law of limitation, as it appeared that the defendants' ancestors had signed the *khewat* and the *khatáuní shara asámíwár* prepared at the settlement of the estate with them under Regulation IX. of 1833 in 1841, in which they were described as mortgagees, which it held amounted to an acknowledgment of the plaintiffs' title as mortgagors, and remanded the suit to the first Court for disposal on the merits.

The *khewat* of 1841 made no mention of the nature of the mortgage and none of the mortgagors. The parties who signed it were described as holding certain shares and as mortgagees. There was no record of the names of the owners of the shares. The *khatáuní shara asámíwár* showed the rates of rent payable by tenants. The parties who signed that paper were also described as mortagees. There was a note by the officer making the settlement that "the parties in possession are mortgagees, but the amount of the mortgage and its duration are unknown: it occurred before British occupation." The parties did not, in affixing their signatures to either document, add the word "mortagees" The *khewat* was not confined to a record of the distribution of the shares and the interest of the parties as mortgagees. It contained the *ikrár-náma*, or *wájib-ul-arz*, being a record of agreement between the coparceners amongst themselves, on various matters, and a detail of customs &c., prevailing in the estate. The signatures were affixed at the foot of the document. The tahsíldár recorded that, after all the particulars of the *ikrár-náma* and the amount of rupees had been read out to the parties, they affixed their signatures and marks with their own hands. Similarly with the *khatáuní shara asámíwár*, the tahsíldár recorded that the parties, after hearing the rates of rent, had affixed their signatures and marks, and verified all the particulars entered in the document.

On special appeal to the High Court from the order remanding the case the defendants contended that the signatures of their ancestors to the documents did not amount to an acknowledgment of the plaintiffs' title as mortgagors or of their right to redeem, within the meaning of Act IX. of 1871, sch. ii, 148. They also contended, with reference to an order passed in the settlement department in

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January, 1864, which refused an application by the plaintiffs for the entry of their names in respect of certain unculturable lands and trees in the village and referred them to a Civil Court, that the suit was barred by limitation, not having been instituted within three years from the date of that order.

The learned Judges of the Division Court (Pearson and Spankie, JJ.) before which the appeal came on for hearing differed in opinion.

The following judgments were delivered :—

PEARSON, J.—This is a suit for the redemption of a mortgage said to have been made in favour of the defendants' ancestors by the ancestors of the plaintiffs in 1811, and was dismissed by the Court of first instance improperly on the ground of insufficient valuation. The lower appellate Court has rightly held the valuation to be correct, and, disallowing a plea set up by the defendants to the effect that the suit was barred by the law of limitation, has remanded the case to the first Court under s. 351, Act VIII. of 1859, for trial and disposal on the merits. The plea of limitation has been disallowed with reference to an acknowledgment of their mortgage tenure recorded in the settlement record of 1841, which is signed by the defendants or their forefathers. In that record they described themselves, or allowed themselves to be described, as mortgagees of the estate in question ; and by so doing admitted by implication the title of the mortgagors, whoever they may be, and their right to redeem the property. Whether the plaintiffs' ancestors were the mortgagors, and whether the mortgage was made by them in 1811 for a consideration of Rs. 241, are questions which must be determined before it can be decided whether the suit can be maintained. Even if it be established that the plaintiffs' ancestors were the mortgagors, unless it be shown that the mortgage was not made before 1811, it may be found that the suit is barred by limitation. But although the Subordinate Judge's decision is open to this objection, that he has somewhat precipitately declared the suit not to be barred by limitation, while not quite consistently remarking that, " if the plaintiffs can prove the mortgage to have been effected by their ancestors in favour of those of the defendants in 1811, they will obtain a decree, if not, their claim must be reject-

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ed," there is nothing objectionable in his remand order on the assumption that the materials on the record were not sufficient to enable him to decide satisfactorily himself. There is no force in the grounds of appeal. Nothing is shown to be a bar of the suit in the proceedings of 1864, which referred to a claim of certain manorial rights only. The admission of the mortgage tenure in the settlement record of 1841, if it can be referred to the plaintiffs' ancestors, and the mortgage be found to have been made by them in 1811, is sufficient to give a new period of limitation from the date of the admission. With these remarks, the appeal is dismissed with costs.

SPANKIE, J.—Article 148, sch. ii., Act IX. of 1871, provides that time shall run from the date of the mortgage, unless when an acknowledgment of the title of the mortgagor or of his right of redemption has, before the expiration of the prescribed period, been made in writing, signed by the mortgagee or some person claiming under him and, in such case, the date of the acknowledgment.

It is argued in this case that some of the ancestors of the defendants, appellants, attested as correct the *khewat* and *khatáuní shara asámiwár* prepared at the settlement under Regulation IX. of 1833 in 1841, in which they are described as mortgagees. Their signatures, it was contended, are an acknowledgment of the mortgage tenure, and take the case out of the operation of the limitation law. (The learned Judge, after stating the facts relating to the *khewat* and the *khatáuní shara asámiwár*, continued) :—It will be seen from what I have stated that the parties who signed have not acknowledged any particular fact, but their signatures must be taken as an admission of the general accuracy of the *khewat* and *khatáuní*, the one containing a variety of matter, the other having the special object of showing the rent payable to the landlords by their tenants.

I may also mention that there did not appear to be any recognized owners in 1841, the entire 20 biswas being in the possession of persons described as mortgagees. I attribute this description to be due to some report regarding an earlier settlement and the state of the village then, obtained from the office when the settlement under Regulation IX. of 1833 was made.

I do not regard the signatures of the ancestors of the defendants, under the circumstances described, as amounting to an acknowledgment of the title of the mortgagor or of his right of redemption, within the meaning of article 148, sch. ii., Act IX. of 1871. The record shows that the appellants did not acknowledge any right of redemption anywhere. They contested in 1863 an attempt of the heirs of the mortgagors to establish their right of redemption, and ultimately in 1872 they succeeded in obtaining an order from the revenue authorities for the erasure of the word mortgagees.

If we look at the effect of an acknowledgment in writing in respect of a debt or legacy (s. 20, Act IX. of 1871), we find that no promise or undertaking would take the case out of the operation of the Act, unless the promise or acknowledgment amounts to an express undertaking to pay or deliver the debt or legacy, or to an unqualified admission of the liability as subsisting. So I think that any one who desires to take his claim out of the operation of article 148, sch. ii., must show a clear and express acknowledgment in writing of the title of the mortgagor or of his right to redeem, that this acknowledgment must be unqualified and made touching the mortgage. It cannot be implied from a general admission of the accuracy of certain settlement records dealing with a great variety of matters.

I, therefore, would decree the appeal, reverse the judgment of the lower appellate Court and restore that of the first Court, with costs.

The defendants appealed to the Full Court, under the provisions of cl. 10 of the Letters Patent, against the judgment of Pearson, J.

Munshi *Hanumán Parshád* (with him Babu *Jogindro Náth Chaudhari*), for the appellants, contended that the mere signatures of the mortgagees to a document, in which they were described as mortgagees, and which did not show who the mortgagor was, or the nature of the mortgage, or the amount of the mortgage-money, did not amount to an acknowledgment of the title of the mortgagor or of his right to redeem. There is no written acknowledgment touching the mortgage, signed by the mortgagees, which expressly, or by implication, acknowledges the title of the mortgagor or of his right to

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redeem. The entry in the documents was made by the settlement officer.

Pandit *Bishambar Nâth* for the respondents.—The mortgagees were in possession of the property. They assigned to themselves at the settlement of the estate the position of mortgagees. The entries were made on their representation, and are signed by them. The statements recorded are accepted by them. This amounts to an acknowledgment of the title of the mortgagor, whoever he may be.

TURNER, OFFG. C. J., and OLDFIELD, J. concurred in the following opinion :—

The question which arises in this appeal is whether or not there has been a sufficient acknowledgment of the mortgagor's title or his right to redeem to prevent the operation of the law of limitation, or rather to give the representatives of the mortgagors a new period from which limitation should be computed.

The terms of the law, an acknowledgment of the mortgagor's title or an acknowledgment of his right to redeem, were not, it may be presumed, intended to be mere tautology. An acknowledgment that a certain person, or his representative, is the proprietor of the estate is an acknowledgment of his title. An acknowledgment that the mortgage is a subsisting mortgage would be an acknowledgment of his right to redeem, if he established his title.

The provisions of the English Statute 3 & 4 Will. 4, c. 27, s. 28, require, in order to enlarge the statutary period of limitation, that an acknowledgment of the title of the mortgagor or of his right to redemption shall be given to the mortgagor or some person, claiming his estate, or to the agent of such mortgagor or person, in writing signed by the mortgagee or the person claiming. It appears to be the law that any acknowledgment, which before the passing of the English Statute would have been sufficient, will satisfy the requirements of the Statute if it be given in writing to the mortgagor or to a person claiming his estate, or to the agent of such mortgagor or person.—Fisher on Mortgages, 2nd ed. vol. i, 502, page 288. Before the Statute was enacted it was held that an acknowledgment of the mortgage as a subsisting mortgage was an acknowledgment of the mortgagor's right to redeem; and in a case

quoted by Lord Hardwicke it was held by Sir J. Jekyll that, where a testator described an estate in his will as my "mortgaged estate", it was a sufficient acknowledgment of the mortgagor's right to redeem (1). This ruling appears never to have been over-ruled: it is quoted in Tudor's Leading Cases, vol. ii, 4th ed., 1065. We are not, indeed, bound by English cases, but we may usefully consult them.

With the exception that it requires the acknowledgment to be in writing, the law of limitation in this country, so far as it applies to the question before us, appears to be analogous to the English law as it was established by the practice of the Courts of Equity before the Statute above referred to was enacted. The law of British India does not require that the acknowledgment should be given to the mortgagor, but, in other respects, it follows the language of the English Statute and the practice of the Courts of Equity before that Statute was enacted. The acknowledgment must be in writing, signed by the mortgagee or a person claiming under him, and it must acknowledge the title of the mortgagor or his right to redeem. In the case before us the settlement officer had prepared the record-of-rights, a record which by law he was bound to prepare, showing the interests in the village of which he found persons in possession. From the records of preceding settlements he ascertained that the appellants, or rather their predecessors in title, had obtained possession in virtue of a mortgage, and he entered them accordingly in his record as mortgagees. To this record, for the purpose of certifying to its correctness, he obtained the signature of those whom he found in possession, and, amongst others, of the appellants. This appears to be a stronger case than that decided by Sir J. Jekyll. Here there is not a mere description of the estate as a mortgaged estate, but a subscription to a record purporting to show the extent of the rights which the persons in possession enjoyed. For this reason we hold the acknowledgment sufficient, and would dismiss the appeal with costs.

PEARSON, J.—There can be no doubt that the settlement record of 1841 does not contain an express acknowledgment of the title of any particular persons as owners of the estate in question in this

(1) 3 Atkyn's Rep., at p. 114.

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suit or of their right of redemption, for the mortgagors or their representatives are not named. If, therefore, such an express acknowledgment be required by the terms of article 148, sch. ii, Act IX. of 1871, the present suit, instituted in 1874 for the redemption of a mortgage alleged to have been made in 1811, is liable to be dismissed as barred by the law of limitation. I still adhere to the opinion intimated in my judgment of the 8th April last, that such an express acknowledgment is not required, and the acknowledgment of a subsisting mortgage tenure is by implication an acknowledgment of the title of an owner and of his right to redeem, and sufficiently for all practical purposes complies with the terms of the law. It is not reasonable to suppose that any one would allow himself to be described as the mortgagee of a property of which the mortgage had ceased to be redeemable at law, and the names of the owners thereof had been lost to knowledge by lapse of time, without any mention of those circumstances. In the present case there are no grounds for supposing that in 1841 there was any doubt or dispute as to who were the owners, or whether they were entitled to redeem the property in suit. The addition of their names, though it would have completed the statement of the facts, was hardly necessary, and the omission of their names was presumably accidental. An acknowledgment of a mortgage tenure not including the title of a mortgagor and of a right to redeem appears to be meaningless, useless, and absurd. The main point is whether the tenure is that of a mortgagee; it can make no difference to the mortgagee whether the owner is A. or B. If it be held that an entry describing C. as mortgagee of a share, acknowledged by C., would be an acknowledgment that would satisfy the requirements of the law, it cannot plausibly be contended that an entry describing C. as a mortgagee does not describe a subsisting mortgage tenure. But if there were any real doubt as to whether the acknowledgment implied in a man's description of himself as a mortgagee referred to a subsisting mortgage, or one which had ceased to be redeemable, the doubt might easily be removed by an enquiry as to whether the mortgage had or had not ceased to be redeemable at law at the date of the acknowledgment.

The view which I have taken as to what constitutes a sufficient acknowledgment is apparently not at variance with English law.

In page 288, vol. i., Fisher's Law of Mortgage, it is stated that "any expression referring to the estate as mortgaged will be a sufficient acknowledgment." The description by a man of himself as the mortgagee of an estate is surely a reference to the estate as mortgaged to him. In the case of *Stansfield* v. *Hobson* (1), cited in support of the doctrine, the reference to the estate, as one of which the mortgage was redeemable, did not express the name of the party entitled to redeem, which was ascertained by external evidence. This case establishes both the points for which I contend; first, that an acknowledgment of a mortgage tenure is by implication an acknowledgment of the title of an owner; and secondly, that other evidence may be admitted to show who is the person possessing that title to whom the acknowledgment referred. In that case the evidence indicating the owner may have been nearer at hand than in the present case; but that difference does not affect the principle that an acknowledgment of a redeemable mortgage may be connected by evidence with the person entitled to redeem it. On the other hand, it is observable that the acknowledgment in that case not only did not specify any particular person as the owner, but that it did not specify any particular property as the subject of the mortgage; and further, that it was apparently made after the lapse of the period of the limitation, when the right of redemption, *if it had not been extinguished, could not be enforced at law.* The acknowledgment, indeed, which was deemed sufficient to take the case out of the ordinary operation of the law of limitation was no more than an answer by the mortgagee to a proposal on behalf of the mortgagor for a meeting for the purpose of considering the matter of the debt, to the effect that, unless some one was prepared to pay the debt, a meeting would be useless. It was held that, by that answer, a right of redemption had been admitted; and the admission was supplemented by evidence which pointed out the mortgagor and the mortgaged property. In the present case the acknowledgment takes the form of a description by the defendants' ancestors of themselves as mortgagees of the property in question on the public and solemn occasion of a settlement, the mortgage not being known to have been irredeemable at law at the time, and a

(1) 3 De G. Mac. & G. 620; s. c. 16 Beav. 236; 22 L. J. Chanc. 657.

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clue to the names of the owners being found in the settlement records.

At page 314 of Atkyn's Reports mention is made of a case in which Sir J. Jekyll decreed a redemption upon the circumstance of the person who was in possession of an estate originally in mortgage calling it by the name of the mortgaged estate in his will. This case supports my judgment not less than that of *Stansfield* v. *Hobson* above quoted.

SPANKIE, J.—I am under the impression that my honorable colleagues take a different view of this case than I do. I, therefore, would simply say that I adhere to my former judgment. Nothing was stated at the hearing which shows me that my opinion was wrong, and I can add nothing to what I have already put on record.

APPELLATE CIVIL

1875
December 15

(*Mr. Justice Pearson and Mr. Justice Turner*)

CHUNNI (DEFENDANT) *v.* THAKUR DAS AND OTHERS (PLAINTIFFS)*

Mortgage—Condition against Alienation—Auction-purchaser

A transfer of mortgaged property made in contravention of a condition not to alienate is not absolutely void, but voidable in so far as it is in defeazance of the mortgagee's rights.

Where, in contravention of a condition not to alienate, the mortgagor had transferred his proprietary right in the mortgaged property to a third person for a term of years, the Court declared that such transfer should not be binding on a purchaser at the sale in execution of the decree obtained by the mortgagee for the sale of the property in satisfaction of the mortgage-debt, unless such purchaser desired its continuance.

DALGANJAN mortgaged to the plaintiffs, by a deed dated the 24th November, 1870, a share in a certain village as security for the repayment of a loan made to him by the plaintiffs. The mortgage-

* Special Appeal No. 1060 of 1875, from a decree of the Judge of Bareilly, dated the 3rd August, 1875, reversing a decree of the Subordinate Judge, dated the 23rd February, 1875.