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to the effect that the debt was to be repaid one month after the date of the account; and contended, therefore, that the cause of action arose on 2nd February 1881.

The question referred for decision was:—

Whether a simultaneous verbal agreement could bring within time a claim based on an account stated?

The opinion of the Subordinate Judge, with Small Cause Court powers, at Amalner was in the negative.

There was no appearance of parties in the High Court.

Per Curiam—Assuming this to be a case of an account stated, as to which we are not called upon to express any opinion, we think that the question referred to us must be answered in the negative. The Limitation Act of 1877, Sch. II, art. 64, is too clear to admit of any doubt on the point. As provided therein, the ordinary period of limitation for a suit on an account stated within the meaning of that article is three years from the date of the statement of account. The only thing which extends such period is a simultaneous *written agreement* "signed by the defendant or his agent....." making the debt payable at a future time. The "simultaneous *verbal* agreement," therefore, though held proved in this case, cannot have the effect of extending the three years' limitation.

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Nánábhái Haridás.

GOVINDRA V DESHMUKH, DECEASED, BY HIS SONS (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* RA'GHO DESHMUKH (ORIGINAL DEFENDANT), RESPONDENT; AND RA'GHO DESHMUKH (ORIGINAL DEFENDANT), APPELLANT, *v.* GOVINDRA'V DESHMUKH (ORIGINAL PLAINTIFF), RESPONDENT.*

June 30.

Mortgage—Redemption—Evidence given of other mortgage than the mortgage in respect of which suit brought—Evidence Act I of 1872, Sec. 35—Statement of a survey officer as to entry as occupant how far admissible.

The plaintiff sued to redeem certain lands alleged to have been mortgaged by his ancestor to the ancestors of the defendants in 1823. At the hearing the deed

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of mortgage, in respect of which the suit was brought, was not produced, but another mortgage of about the same date was produced and proved by the plaintiff. The lower Courts passed a decree for the plaintiff. The defendants appealed.

Held (reversing the decree of the lower Courts) that where a particular instrument is sued on as the basis of a right, it is incumbent on the plaintiff to establish his case on that particular cause of action, not on a cause of action merely bearing the same common name or of the same description, and so included in the same class.

Under section 35 of the Indian Evidence Act, I of 1872, a statement by the survey officer that the name of this or that person was entered as occupant would be admissible if relevant, but it would not be admissible to prove the reasons for such an entry as facts in another case.

THESE were cross second appeals from the decision of Khán Báhádur M. N. Nánávati, First Class Subordinate Judge, with appellate powers at Thána.

Suit for redemption. The plaintiffs alleged that certain lands, the subject-matter of the suit, were mortgaged in 1823 by their ancestor to the defendant's ancestor named Báburáv Tátiáji. In their plaint they alleged that the defendant was requested in 1879 to receive the sum of Rs. 37 for which the lands were mortgaged, and to allow the property to be redeemed; and that the plaintiffs were still ready and willing to pay to the defendant whatever might be found due on the mortgage.

The defendant answered that the lands in dispute were his ancestral property, and had not been mortgaged to his ancestor as alleged by the plaintiffs, and that the lands had been in his possession for more than a hundred years. The original mortgage deed was not forthcoming, but another mortgage deed purporting to be made about the year 1823 was produced by the plaintiffs in which the name of the mortgagee (the defendant's ancestor) was mentioned as Báburáv Piráji. The Subordinate Judge of Mahád held the mortgage proved, and decided that the plaintiffs were entitled to redeem the lands (except one field) on payment of Rs. 74 by the plaintiffs to the defendant.

From this decision both the parties appealed to the Subordinate Judge at Thána with appellate powers. In his memorandum of appeal the defendant *(inter alia)* set forth as grounds for appeal that the mortgage deed sued on was fabricated, that it did not

come from proper custody, as it did not come from his (the defendant's) possession, and that the record of the survey superintendent's proceedings, wherein the plaintiff was mentioned as an occupant of the lands in dispute, was not admissible in evidence.

The plaintiffs in their memorandum of cross appeal put forward, among other grounds for appeal, that in the suit before the Subordinate Judge at Mahád they had prayed for the redemption of all the lands, and they ought to have been declared entitled to them, and not to some of them only, and that the decree of the Subordinate Judge directing them to pay the sum of Rs. 74 to the defendant was erroneous in so far as the decree did not direct the redemption of all the lands in dispute.

The Subordinate Judge with appellate powers held the mortgage deed proved on, as he stated, a "very slight *primâ facie* proof", and relied on the evidence contained in an extract from the village register of lands and an official correspondence relating to the entry of the plaintiff's name as occupant of the lands and on a statement in a report made in 1864 by a survey kárkún in which the latter stated that the defendant had admitted to him that he held a mortgage then of forty-five years' standing, and that he occupied the lands in dispute as an occupant. The Subordinate Judge, however, amended the lower Court's decree by directing the plaintiffs to pay the decreed amount of Rs. 74 to the defendant within three months from the date of his decree.

The parties appealed from this decree to the High Court.

Mahádev Chimnáji for the appellant.

Ghanashám Nilkanth for the respondents.

WEST, J.—The suit in this case was for redemption of a mortgage purporting to have been made to the defendant's predecessor in 1823. The Subordinate Judge, in appeal, found that the mortgage deed relied on was not proved. According to the account given by the plaintiffs, it must have been stolen from the defendant's muniments, and might have been instantly reclaimed by the defendant. Nor could any use properly be made against the defendant of a document thus obtained until it had

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been restored, and then called for by notice in the way prescribed by law.

Although the mortgage sued on, however, is not proved, the Subordinate Judge thinks that some old mortgage is proved by the evidence in the case. It might be enough to say that when a particular instrument is sued on as the basis of a right, it is incumbent on the plaintiff to establish his case on that particular cause of action, not on a cause of action merely bearing the same common name or of the same description, and so included in the same class. A defendant sued on a mortgage to A in 1820 cannot fairly be called on to meet a case of some undefined mortgage to B in or about 1820. If there is evidence forthcoming that a mortgage was made, but the particulars are inaccessible to the plaintiff-mortgagor because the documents are in the defendant's hands, he can sift his knowledge by interrogatories, and demand production of the documents as a means towards the ultimate definition of his claim as it is to be set forth in the record and judgment. Should there be reason to suppose that documents are purposely withheld, then the Court may find in this a ground for a strong presumption against the mortgagee who has kept them back, but this does not justify an abstraction of the documents by the mortgagor, nor does it authorize the Court, when a specific mortgage is sued on and not proved, to give a decree on some indefinite supposed mortgage, which, by the hypothesis, the plaintiff cannot have sued on.

The evidence relied on by the Subordinate Judge is contained in exhibit 37, an extract from a village register of lands, and in exhibit 46, a correspondence relating to the entry of the plaintiff's name as occupant of some of the fields in 1864. The original of the former is not shown to have been kept and authenticated according to orders given under any law, nor could it, so far as has been shown to us, be of weight in determining a question of private right between two persons of a kind entirely beyond the cognizance of the kulkarni. The latter contains a statement in a report by a survey kárkún that the defendant had said to him that he had a mortgage of the fields in question of about forty-five years' standing. The kárkún duly appointed might

take a deposition under section 27 of Bombay Act I of 1865, but this Act was not in force in 1864, nor has any law been pointed out to us which gave any special value to the mere report of the kárkún as to a question of the private jural relations of two persons questioned by him. Under section 35 of the Indian Evidence Act, a statement made by the survey officer that the name of this or that person was entered as occupant would be admissible if relevant, but it would not be admissible to prove the reasons for such an entry as facts in another case. The statement, taking it as admissible at all, has no reference to the specific mortgage now sued on, but relates to some other mortgage, which was forty-five years old in 1864, and must, therefore, have been executed in 1819. Such an admission, so recorded and produced, cannot prove a mortgage in 1823, which is otherwise discredited. One witness supports the mortgage-transaction. He says, both parties spoke to him of it. The Subordinate Judge says of this witness: "No doubt his evidence, too, is not reliable *per se*; but taken in connection with Nos. 37 and 46, I think it ought to be believed." These documents do not, however, as we have seen, prove the mortgage sued on. The support requisite to prop up witness No. 13 fails, and there is thus no evidence to establish the case of the plaintiffs. There is a natural presumption against men who lie by for nearly sixty years, and then resort to a dishonest artifice to procure evidence of their case; but without attaching great importance to these circumstances, we must reverse the decrees below, and reject the claim to redeem the mortgage, No. 48 with costs throughout on plaintiffs.

Decree reversed.