mania, in which the mental condition of the accused persons at the time of perpetrating the acts of murder is such as to justify their acquittal on the ground of insanity. We can, at all events, say that we have applied the law, as it stands, to the facts. The case is one where future symptoms may, perhaps, throw more light on the accused's state of mind, and possibly justify a commutation or reduction of sentence, if not pardon.

Conviction confirmed, and sentence of death commuted to one of transportation for life.

APPELLATE CIVIL.

Before Mr. Justice Birdwood and Mr. Justice Jardine.

KHEMJI BHAGVA'NDA'S GUJAR, (ORIGINAL PLAINTIFF), APPELLANT, *v.* RA'MA' AND ANOTHER, (ORIGINAL DEFENDANT), RESPONDENTS.*

1886. *March* 2.

Limitation Act (XV of 1877), *Arts.* 132 *and* 147—*Suit for sale of immoveable property by a creditor who has a right to realise a charge not amounting to a mortgage.*

The special provision of article 147 of the Limitation Act (XV of 1877) applies to all suits properly brought by a mortgagee for foreclosure or sale, while the general provision of article 132 applies to suits for sale by a creditor having a right to realise a charge not amounting to a mortgage.

Where immoveable property is made by act of parties security for the payment of a debt, but no power of sale, without the intervention of a Court, is given to the creditor, there is no transfer to him of an interest in the property until a decree for sale has been made in his favour, and the transaction does not amount to a mortgage. When immoveable property has been so made security for the payment of a debt, there can be no foreclosure by the creditor, unless the terms of the contract admit of it.

Pestonji Bezonji v. *Abdul Rahiman*(1), *Lalubhái* v. *Náran*(2) and *Rámdín* v. *Kálkaprasad* (3) referred to.

THIS was a second appeal from the decision of C. B. Izon, District Judge of Ratnágiri, confirming the decree of Ráv Sáheb Mániklál Narotamdás, Second Class Subordinate Judge of Dápoli.

The plaintiff sued to recover Rs. 90, being the amount of principal and interest due on two bonds, (exhibits 5 and 3), dated the

* Second Appeal, No. 119 of 1884.

(1) I. L. R., 5 Bom., 463. (2) I. L. R., 6 Bom., 720. (3) L. R., 12 I. A., 12.

1886.

KHEMJI BHAGVÁNDÁS GUJAR v. RÁMÁ.

25th April, 1861, and 8th October, 1866, respectively, and payable, respectively, in ten years and two years from those dates. Both bonds purported to be mortgage-bonds.

The plaintiff prayed either for foreclosure or for sale of the properties mortgaged and for a decree against the defendants personally. The suit was brought on 10th August, 1882. The defendants denied the execution of the bonds in dispute, and contended that the suit was barred by the law of limitation.

Both the lower Courts found that the bonds were executed by the defendant's father. As to the plea of limitation, they held that the personal remedy against the defendants was barred; that as neither bond provided, expressly or impliedly, for foreclosure and sale, the plaintiff could not claim the sixty years' period of limitation laid down by article 147, Schedule II of Act XV of 1877; and that the plaintiff's claim under the bond of 1866 (exhibit 3) was barred by article 132. They awarded the claim under the bond of 1861 (exhibit 5), and directed the principal and interest due thereon to be realised by the sale of the property hypothecated.

The following is a translation of the bonds in question:—

Exhibit 5.

"Mortgage-bond. The 1st of the month of *Chaitra Vadya* in *Shake* year 1783 (25th April, 1861). On this day this *mortgage-bond* is given in writing to the creditor, Khimji Bhagvándás Mehtá Gujar, mortgagee *khot*, of the village of Karjani, by the debtor, Arjunji Náik bin Tátáji Náik Kalekar Khot. The amounts due by me to you on account of your bond and the decree, &c., together with the sum this day received in cash are:—

Particulars.

On account of decree	...	...	... Rs. 29
On account of bond	...	...	... „ 11
On account of interest and the amount this day received in cash in all			... „ 4
			Total Rs. 44

"In all Rs. 44, in letters forty-four. The interest for the same is agreed to be paid every year in five maunds of rice, which I will pay from year to year and obtain a receipt (for the same). According to this stipulation regarding interest I will pay the amount together with interest within the period of ten years. Should you demand the amount, I will pay the same in full according to the above stipulation regarding interest without pleading the excuse of the period (fixed). For repayment of the aforesaid amount this mortgage-bond is passed. I having admitted the claim in the written statement which I put in on the 23rd October, 1855, in the suit which you had brought against me in the year 1885, you obtained a decree therein. Under the said decree you attached the whole of my share, *viz.*, one hundred and fiftieth share in the entire village and (my) *khud, dhára* and other lands. And I now give in writing that I have mortgaged the *khoti*, the *khud dhára*, the rice land, the *varkas*, the *pátasthal*, irrigated land, &c., together with the trees; should you not agree to receive interest, and should you ask me to put the lands under your management, I will give the same into your possession. If I fail to do so, I will pay your amount on demand. If my kinsmen and others raise disputes and quarrels after your entering on the management, I will answer for the same. Should I not do so, the costs in respect of (such) disputes and the produce which you may not get owing to the resistance, &c., the whole of the said amount, whatever it may come to, I will pay together with interest at one per cent., on your demanding the same, and then I will redeem my share and the *dhára*. I will pay the amount at the harvest time; you are to receive the produce for that year. On your entering on the management, the land is to bring (me) no produce, and the amount is to bear no interest. The abovementioned two papers, *viz.*, the decree and the bond, are deposited with you as proofs. This mortgage-bond I have of my free will and pleasure duly given in writing."

Exhibit 3.

"Bond for debt dated the 30th of *Bhádrapad Vadya* in the *Shake* year 1788 (8th October, 1866). On this day this bond is given in writing to the creditor Rájeshri Khimji Bhagvándás Gujar, mortgagee *khot* of village Karjani by the debtor Arjunji

1886.

KHEMJI BHAGVÁNDÁS GUJAR v. RÁMÁ.

Náik bin Tátáji Náik Khot. I owe you Rs. 44. The mortgage-bond for the same is of the *Shake* year 1783 (1861-62 A.D.); five maunds of rice are to be given as interest for the same every year. I have received credit for the rice already paid, and, as to the balance of rice due, I agree to pay you a lump sum of Rs. 19 as the price thereof. The interest for the same is to run at one per cent. I will pay the principal and interest on making an account thereof until payment. There is a mortgage-bond for Rs. 44 whereby certain land is mortgaged to you. The said land stands also security for this amount (Rs. 19). When I will come to pay the amount of the bond of the *Shake* year 1783 (1861-62 A.D.) I will pay the amount of both bonds on making an account, and I will redeem the property mortgaged in *Shake* 1783 (1861-62 A.D.). The time fixed for the repayment of the amount of this bond is two years. If I give the amount before the time (fixed), you are to receive the same. As to the amount of Rs. 44, due on the bond of the *Shake* year 1783 (1861-62 A.D.), the interest thereof has been paid off up to the 1st of April, 1866. This bond I have of my free will and pleasure duly given in writing."

Mánekshá Jehángirshá for appellant:—The ruling in *Mahábleshvarbhat* v. *Ratnábái*[1] concludes this case.

Shámráo M. Rele for respondents:—This case does not rest on article 147, schedule II of Act XV of 1877. It is governed by article 132. The bonds sued upon are not mortgage-bonds. They create a 'charge' as distinguished from a 'mortgage.' The Transfer of Property Act (IV of 1882), sec. 58, shows that one common characteristic of all kinds of mortgages in this country is the power of sale given to the mortgagee expressly or impliedly for the realization of the mortgage debt. Both the bonds sued upon do not give any such power of sale, or foreclosure. They are, therefore, instruments creating a mere "charge" as defined by section 100 of Act IV of 1882, and as explained in Macpherson on Mortgage. See his notes to that section. This suit should, therefore, be regarded as one brought to enforce a "charge" upon immoveable property. It, therefore, falls under article 132—*Rámdin* v. *Kálka Persád*[2] and *Lalubhái* v. *Náran*[3].

(1) Printed Judgments for 1884, p. 29. (2) L. R., 12 I. A., 12.

(3) I. L. R., 6 Bom., 719.

1886.

KHEMJI BHAGVÁNDÁS GUJAR v. RÁMÁ.

Mánekshá Jehángirshá in reply:—*Rámdin's* case[1] does not apply, as it is under Act IX of 1871. Article 147 of Schedule II of Act XV of 1877 is a new provision introduced for the first time into the law of limitation. It is a specific provision controlling the general provision in article 132. Cases of equitable mortgage, of maintenance charged upon immoveable property, or of bequests payable out of immoveable property, would fall under section 132, whilst article 147 should be limited only to suits by mortgagees for sale or foreclosure. Under the old Limitation Acts, sixty years was the period fixed for a redemption suit, whilst a mortgagee had only twelve years within which he could bring a suit for foreclosure. To remove this anomaly, article 147 was inserted in the present Limitation Act for the sole benefit of mortgagees. As this is a suit for foreclosure or sale, based upon bonds which both parties treated and named as mortgage-bonds, article 147 applies.

BIRDWOOD, J.:—The plaintiff sued on two bonds, (exhibits Nos. 5 and 3,) dated respectively the 25th April, 1861, and 8th October, 1866, and payable respectively in ten years and two years from those dates. Both bonds purport to be mortgage-bonds; and the remedies sought on both were—(*a*), a money decree for the whole of the mortgage debts against the defendants personally; (*b*), a foreclosure decree; (*c*), a decree for the sale of the mortgaged property; and (*d*), a money decree for the deficit, if any, after appropriation of the sale proceeds to the satisfaction of the mortgage debts. The suit was instituted in 1882. Both the Courts below have awarded the claim on exhibit No. 5, but have held that the claim on exhibit No. 3 is barred by article 132 of Schedule II of the Limitation Act, XV of 1877. It is not contended that the personal claim under exhibit No. 3 is within time; and the questions for our decision are, whether the claims for foreclosure and sale, brought on exhibit No. 3, are maintainable in this suit; and, if so, whether article 132 or article 147 of Schedule II of the Limitation Act of 1877 is applicable to those claims.

We will deal with the latter question first. And we are of opinion that, if the suit has been properly brought by the plain-

(1) L. R., 12 I. A., 12.

1886.

KHEMJI BHAGVÁNDÁS GUJAR v. RÁMÁ.

tiff, *as mortgagee*, for foreclosure or sale, then the claims (*b*) and (*c*) on exhibit No. 3 would be within time under article 147; but that, if exhibit No. 3 does not amount to a mortgage, the claim would be barred by article 132. Article 147 was not contained in the Limitation Acts of 1859 and 1871. Under Act XIV of 1859, a suit for foreclosure or sale was held to be a suit "for the recovery of immoveable property or of an interest in immoveable property," and, therefore, governed by the twelve years' rule. (See *Lallubhái* v. *Náran*(1).) Act IX of 1871 contained a similar provision, in article 145 of Schedule II, regarding suits "for possession of immoveable property or any interest therein, not * * otherwise specially provided for." That article would, apparently, have been applicable to a suit by a mortgagee for *foreclosure*; for which express provision has now, for the first time, been made by article 147 of Schedule II of the Act of 1877, the period of limitation for such a suit being now extended from twelve to sixty years. According to the proper construction of the Act of 1871, it would appear also that the twelve years' rule would have been applicable to a suit *for the sale* of mortgaged property under article 132 of Schedule II of that Act, which relates to suits "for money charged upon immoveable property." In Regular Appeal No. 6 of 1877, decided on the 16th July, 1877, it was held by Westropp, C.J., and Melvill, J., that that article was applicable as well to the personal liability of the debtor *as to the liability of the immoveable property charged*. See *Lallubhái* v. *Náran*(2). In *Pestonji Bezanji* v. *Abdul Rahiman*(3), the present Chief Justice of this Court, while deciding that the corresponding article of the present Act, which applies to suits "to enforce payment of money charged upon immoveable property," has no application to a suit by a mortgagee for a money decree only, expressed also the opinion that the article applies only to suits to enforce "*against the land*" payment of money charged on it. Sir Charles Sargent remarked, at the same time, that article 132 does not contain the words, "secured by mortgage," which are found in 3 and 4 William IV, c. 27, s. 40. Both these decisions are referred to in the Full Bench decision in *Lallubhái* v. *Náran*(4),

(1) I. L. R., 6 Bom., 719. (2) I. L. R., 6 Bom., 719, 723.
(3) I. L. R., 5 Bom., 463.

1886.

KHEMJI BHAGVÁNDÁS GUJAR v. RÁMÁ.

which, though no longer of authority, since the decision of the Privy Council in *Rámdin* v. *Kálka Persád*[1], as regards the point decided in it,—*viz.*, the applicability of the twelve years' rule to a claim by a mortgagee for a money decree,—is yet of value as illustrating the difficulties with which the Courts have had to contend in dealing with the changes in the law introduced from time to time. In *Rámdin's* case, which was decided under Act IX of 1871, the Privy Council applied the three years' rule to the personal remedy sued for by the mortgagee, as was done by Sir Charles Sargent in *Pestonji's* case[2], under the Act of 1877. There was no dispute, in *Rámdin's* case[1], as to the right of the plaintiff to have the mortgaged property sold. That part of the claim was within time; but their Lordships of the Privy Council expressed the opinion that article 132 of Schedule II of Act IX of 1871 had reference only to suits for money charged on immoveable property, to raise it out of that property. Their Lordships would clearly have applied the twelve years' rule, prescribed by article 132 of Schedule II of Act IX of 1871, to a suit by a mortgagee for sale in a case falling under that Act.

The present case, however, falls under Act XV of 1877, and, although the only construction which it would be possible to put on article 132 of that Act, if it stood by itself, would be the construction approved of in *Rámdin's* case[1], we must now read the article with the new article 147, the enactment of which gives effect to the evident intention of the Legislature to extend the period of limitation to suits by a mortgagee for foreclosure or sale to sixty years. As regards suits for sale to enforce payment of money charged upon immoveable property, the general provision contained in article 132, which is wide enough to embrace mortgages, must be held to be subject to the special exception, as regards suits *by mortgagees*, contained in article 147. The construction of article 132 of the present Act, which was referred to by the Full Bench of this Court in *Lallubhái's* case[3], as a possible construction, would appear, therefore, to be correct, *viz.*, that by "the introduction of a special provision for the enforcement of a mortgage by foreclosure or sale

(1) L. R., 12 Ind. Ap., 12. (2) I. L. R., 5 Bom., 463.
(3) I. L. R., 6 Bom., 719.

1886.

KHEMJI BHAGVÁNDÁS GUJAR v. RÁMÁ.

(article 147)" the Legislature intended the word "charge" in article 132 to bear the same meaning as in section 100 of the Transfer of Property Act IV of 1882 (which says that "where immoveable property of one person is by act of parties or operation of law made security for the payment of money to another, *and the transaction does not amount to a mortgage*, the latter person is said to have a *charge* upon the property"). We are of opinion, therefore, that the special provision of article 147 must now be applied to all suits properly brought by a mortgagee for foreclosure or sale, and the general provision of article 132 to suits for sale by a creditor having a right to realize a charge not amounting to a mortgage.

The question, however, remains in the present case, whether the plaintiff was entitled to either or both of the remedies (*b*) and (*c*) prayed for in his plaint, as regards his claim under exhibit 3. That bond may be read with the earlier bond No. 5, which is referred to in it. Both the loans to the debtor were made on the security of the same property. The earlier bond recites the mortgage of certain land to the plaintiff for Rs. 44. It recites, further, that the interest should be 5 maunds of rice *per annum*, and that the mortgage debt should be paid in ten years. The instrument then contains a stipulation that if the mortgagee should not (that is, apparently, at any future time,) agree to receive interest, he was to have the management of the land, and that if the mortgagor failed to give possession, he would pay the amount (apparently of the interest) to the mortgagee, on demand. The mortgagor also made himself responsible in respect of any disputes which might arise, on the part of his kinsmen, after the mortgagee had obtained possession. The profits of the land were, in the event of the mortgagee taking possession, to be taken in lieu of interest. The later bond does not contain these details. It seems to have been passed for the value of the interest, in kind, due for one year on the original loan. The stipulation for the entry of the creditor into possession, under certain circumstances, is not contained in exhibit No. 3; and, as a matter of fact, the defendants are still in possession. Neither bond contains any provision, express or implied, as to foreclosure or empowering the creditor

to sell the property without the intervention of a Court of Justice. Neither contract would, apparently, come within any class of mortgage, defined in section 58 of the Transfer of Property Act, IV of 1882, in which a remedy by foreclosure or sale would be permissible under section 67. In his note on clause (*a*) to section 67, Mr. Macpherson observes, in his latest edition of the "Law of Mortgage in British India," that the effect of the limitations on the section made by that clause would seem to be in accordance with the existing law. (See Macpherson on Mortgage, pp. 667, 441, 443). The Act has not been extended to this Presidency; but the definitions in section 58 include, probably, most of the forms of mortgage in common use. It would probably be right, in construing article 147 of Schedule II of Act XV of 1877, to consider whether its application ought not to be limited to mortgages which fall within those definitions. That point, however, it is not necessary for us to deal with; for exhibits Nos. 5 and 3, in the present case, cannot, we think, be treated as mortgages. They are not mortgages, simply because they are styled so. Even if exhibit 5 approaches the form of a usufructuary mortgage, it does not strictly answer to that form, as there was no delivery of possession; and even if there had been, the mortgagee in such a case would have had no remedy by foreclosure or sale (Macpherson on Mortgage, 667). And exhibit No. 3, with which we are more immediately concerned, simply recites that the land "stands security" for the money due under it. The property is also spoken of as mortgaged; but the word must be construed as meaning only that the land has been made security for the payment of the money, so that the creditor has a charge upon the property, within the sense of section 100 of the Transfer of Property Act IV of 1882. He has the right to have his charge realized by sale under a decree; but he is not a mortgagee, as no power is given him, expressly or by implication, to sell the property out of Court. Until he obtains a decree against the land, no interest in it is transferred to him such as is transferred by a power of sale in an ordinary mortgage—*Gopál Pándey* v. *Parshotam Dás*[1]. He must, therefore, bring his suit for sale within twelve years, under article 132 of the Schedule to the

(1) I. L. R., 5 All., 121.

1886.

KHEMJI BHAGVÁNDÁS GUJAR v. RÁMÁ.

Limitation Act, and cannot be allowed the extended period under article 147. In *Gopál Pándey* v. *Parshotam Dás*(1), Sir R. Stuart remarks that "it matters not whether the security may have the name of a simple mortgage or usufructuary mortgage or a conditional sale;" "in all cases, foreclosure may take place if the terms of the contract admit of that remedy." In the present case, the terms of the contract do not admit of foreclosure; and the remedy by sale through the Court is barred.

We, therefore, confirm the decree of the Courts below, with costs.

Decree confirmed.

(1) I. L. R., 5 All., 121.

ORIGINAL CIVIL.

Before Mr. Justice Scott; and, in appeal, before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

1886. *April* 9, 10, 13, 16.

JUGMOHANDA'S MANGALDA'S, (ORIGINAL PLAINTIFF), APPELLANT, *v.* SIR MANGALDA'S NATHUBHOY AND OTHERS, (ORIGINAL DEFENDANTS), RESPONDENTS.*

Hindu law—Partition—Right of a son to claim partition of moveable as well as immoveable property in his father's life-time—Son's right to partition of property come to the possession of his father before the son's birth—Property acquired by litigation—Self-acquired property devised by a father to his son is taken by the son under the will and is self-acquired in his hands—Earnings of father as mill manager not ancestral—Property left by testator to be held moveable or immoveable according to its condition at testator's death—Kápoli Baniá caste, custom of, as to partition—Accounts in partition suit.

Per APPEAL COURT:—There is no distinction between moveable and immoveable property as regards the right of a son in an undivided family governed by the Mitákshara law to partition in the life-time of the father.

Per SCOTT, J.:—Where the law of the Mayukha applies, a son is entitled to demand partition of moveable as well as immoveable property in his father's life-time.

Defendant's great-grandfather (M.) died in 1792, leaving a will, dated 1789, whereby he directed his property to be equally divided among his five sons, of whom R., (the grandfather of defendant), was one. The property became the

* Suit No. 444 of 1881.