

mortgages in this case were entitled to no particular privilege by force of custom, and that as the registered mortgage competing with them was executed since Act III of 1877 was passed, and the execution sale in which the appellant Bechardás bought the property took place subsequent to the registered mortgage, the appellant Bechardás was very properly ordered by the lower Court to pay off the encumbrance, subject to which the sale must be held to have taken place.

As regards the contention that the *san*-mortgages merged in the decree, and that section 50 exempts decrees from competition with registered mortgages, the authorities are clear that no such exemption can be claimed. In *The Hamalaya Bank, Limited, v. The Simla Bank, Limited*⁽¹⁾, it was expressly held that a mortgage registered under Act III of 1877 was entitled to priority over a decree obtained subsequently to the registration of such deed upon a prior unregistered bond. The principle of that decision is that the decree and the sale only give effect to the rights under the bond, and cannot confer any higher right. See also *Dullabhdás v. Lakshmandás*⁽²⁾.

We accordingly reject the appeal, and confirm the decree with costs.

Decree confirmed.

(1) I. L. R., 8 All., 23.

(2) I. L. R., 10 Bom., 88.

ORIGINAL CRIMINAL.

Before Mr. Justice Jardine, Chief Justice (Acting).

EMPRESS v. LESTER.

Evidence—Evidence Act (I of 1872), Sec. 26—Statement of accused—Custody of police—Statement made in temporary absence of police.

1895.

July 1.

A person under arrest on a charge of murder was taken in a tonga, from the place where the alleged offence was committed, to Godhra. A friend drove with her in the tonga and a mounted policeman rode in front. In the course of the journey, the policeman left the tonga and went to a neighbouring village to procure a fresh horse, the tonga meanwhile proceeding slowly along the road for some miles without any escort. In the absence of the policeman, the accused made a communication to her friend with reference to the alleged offence. At the trial it was proposed to ask what the prisoner had said, on the ground that she was not then in custody, and that section 26 of the Evidence Act (I of 1872) did not apply.

1895.
 EMPRESS
 v.
 LESTER.

Held, that, notwithstanding the temporary absence of the policeman, the accused was still in custody, and the question must be disallowed.

THE prisoner Emily Lester was charged with the murder of her husband at Navlak Kota near Pavagadh, in the Panch Maháls, on the night of the 8th May, 1895. Mr. Lester was District Superintendent of Police.

Professor Littledale, who was then in camp at some distance, heard of Lester's death. He at once sent word to Bháskarráv Rámchandra Heblíkar, who was a Magistrate of the First Class, and both of them went to Navlak. After some inquiry it was determined to remove the prisoner to Godhra.

Mr. Littledale in his evidence said :—

“At 9-15 we started, and I drove her into Godhra with one pair. During the day I had said ‘I'll drive her in, but I won't take any responsibility for her custody, but will see to her being treated humanely.’ I said this to Heblíkar, I think, and to the Maháلكari of Hálol. In consequence, a mounted savár accompanied me and Mrs. Lester. He rode in front. About 14 miles from Chámpaner, in a village call Kálol, I said to him there ‘You had better go in and get another savár. Your horse will be tired.’ He said yes and turned into Kálol off the road, and I with only Mrs. Lester and the coachman went on slowly. But till we had gone two miles, we were overtaken by the savár. During his absence, I remember something said by her (the prisoner) about the shooting of Lester.”

Macpherson (Acting Advocate General) for the prosecution :— I propose to ask the witness what the prisoner said. No policeman was present. The savár had gone away. The prisoner was no longer in custody. Section 26 of the Evidence Act (I of 187), therefore, does not apply.

Lowndes for the prisoner objected.

JARDINE, C. J. (Acting) :—I think the prisoner must be regarded as still in the custody of the police, and that the question ought not to be put.

Question disallowed.

Attorney for the Crown :—Mr. A. Little.

Attorneys for the prisoner.—Messrs. Crawford, Burder & Co.