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to assimilate other documents of title to bills of lading for the purpose of determining the right of stoppage in transit in favour of a *bona fide* purchaser for value, it should not have by section 103 intended to do the same in favour of a *bona fide* pledgee for value. Under these circumstances little importance can be attached to the fact that one section employs the word "document" and the other the word "instrument," more especially as the use of the two expressions, "document showing title" and "document of title" in the same sense shows that the draughtsman was not very careful in his use of language.

For the foregoing reasons their Lordships are of opinion that these appeals fail, and should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors for the appellant : Messrs. *Hughes & Sons*.

Solicitors for the respondents : Messrs. *T. L. Wilson & Co.*

*Appeals dismissed.*

J. V. W.

## ORIGINAL CIVIL.

*Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Heaton.*

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February 1.

ISMAIL ALLARAKHIA (PLAINTIFF-APPELLANT) v. DATTATRAYA R. GANDHI (DEFENDANT-RESPONDENT).<sup>5</sup>

*The Indian Contract Act (IX of 1872), sections 20 and 65—Fraudulent representation and impersonation by one of the executants of a deed—Mistake as to a matter of fact essential to the agreement—A person fraudulently mortgaging property not his own—Mortgagee believing in good faith the mortgagor to be owner of property—Transfer of mortgage by mortgagee in*

<sup>5</sup> Appeal No. 59 of 1915.

*favour of a third party—Deed of transfer signed by the mortgagor as a concurring party. the mortgagor again fraudulently representing to be owner —Transferor and transferee acting under the belief that the real owner concurred in the transfer—Failure of consideration—Avoidance of contract.*

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Under the will of their father, J. F. and L. M. became entitled as tenants-in-common to equal moities of a house at Mazagaon in Bombay. The third son C was given a right of residence in the house so long as he lived in harmony with his brothers and sisters. C, however, fraudulently representing himself to be his brother, L. M., purported to create a mortgage of a moiety of the said house in favour of the defendant. Subsequently the defendant in consideration of a sum of Rs. 1,770, paid to him by the plaintiff, transferred the said mortgage in favour of the plaintiff. The plaintiff having insisted that the said L. M. should be a party to the deed of transfer, C fraudulently representing himself to be L. M. joined in executing the said deed as a concurring party. The plaintiff having discovered that the mortgage and the transfer deeds were not executed by L. M. but by a forger in his name, sued the defendant as transferor for return of the purchase money, as on a total failure of consideration. The trial Judge applied the maxim "*caveat emptor*" and dismissed the suit. The plaintiff thereupon appealed :

*Held*, that the defendant was bound under section 65 of the Indian Contract Act to repay the purchase money to the plaintiff inasmuch as both parties being in the belief that the real owner had joined in the transfer were under a mistake as to a matter of fact essential to the agreement which was, therefore, avoided under section 20 of the Indian Contract Act.

ONE Louis Mary Valladares, a Native Christian, died at Bombay on or about the 2nd of June 1902, leaving a will dated the 30th of May 1902, by which he bequeathed his house situate at Mazagaon to two of his sons, Joseph Francis Valladares and Louis Mary Valladares as tenants-in-common.

The material provisions of the said will ran as follows :—

"I give and bequeath unto my two sons, Joseph Francis Valladares and Louis Mary Valladares as tenants-in-common in equal shares and not as joint tenants, the family house belonging to me situate at Mazagaon....Each of my two unmarried daughters Mary Leopoldina and Julia Josephia to live in the said house free of rent until her marriage or death whichever shall first happen. If either of the said Joseph Francis Valladares and Louis Mary Valladares shall die without leaving a widow or issue his share shall devolve

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on the survivor of them. My son, Calisto Valladares, shall be entitled to live in the said family house free of rent during his life. He must live in harmony with his brothers and sisters and when he marries he must do so with a respectable lady belonging to a respectable family, and when the said Calisto fails to live in harmony as aforesaid and acts contrary to the directions hereinbefore contained, he shall forfeit his right to live in the said house. Joseph Francis Valladares and Louis Mary Valladares to pay to him Rs. 1,000 each on his giving a release."

On the 13th of June 1914, the third son, Calisto, fraudulently representing himself to be Louis Mary Valladares and so entitled under the said will to an equal moiety of the said house mortgaged such equal moiety to one, Abdul Latif Haji Sumar, for a sum of Rs. 1,000.

On the 10th of September 1914, the said Calisto again fraudulently representing himself to be Louis Mary Valladares created a second mortgage of the same moiety of the house in favour of the defendant for Rs. 1,600.

Both the first mortgage and second mortgages were registered, the said Calisto fraudulently representing himself to be the said Louis Mary Valladares before the Sub-Registrar of Assurances at Bombay.

On the 19th of July 1915 the defendant, by a deed of transfer, transferred his second mortgage to the plaintiff in consideration of a sum of Rs. 1,700. The plaintiff having insisted that Louis Mary Valladares should be a party to the said deed to concur in the said transfer, Calisto fraudulently representing himself to be Louis Mary joined in executing the said deed as a concurring party.

In the month of August 1915, the plaintiff discovered that none of the deeds of mortgage nor the deed of transfer had been executed by Louis Mary Valladares and that all had been executed by Calisto who had been guilty of forgery.

The plaintiff, thereupon, claimed to recover from the defendant the sum of Rs. 1,770 with interest at 6 per cent. from the 19th of July 1915, saying that under the circumstances aforesaid the defendant had nothing to transfer to him and that there was consequently a total failure of consideration. The defendant pleaded *inter alia* that he took a second mortgage of the property believing in good faith that the person who mortgaged the said property to him was Louis Mary Valladares, and that he transferred the said mortgage to the plaintiff in the *bona fide* belief that the person who mortgaged the said property to him was Louis Mary Valladares.

The case was tried by Macleod J. who dismissed the suit. The learned Judge delivered the following judgment:—

MACLEOD, J.:—Under the will of one Louis Mary Valladares, dated the 30th May 1902, his two sons, Joseph Francis and Louis Mary Valladares, became entitled as tenants-in-common of a house situate at Mazagaon. A third son, Calisto, representing himself to be his brother, Louis Mary, purported to mortgage one equal moiety of the said property to one Abdul Latif Haji Sumar, for Rs. 1,000 and executed a mortgage-deed on the 13th June 1914. On the 10th day of September 1914, Calisto purported to create a second mortgage of the said property in favour of the defendant for Rs. 1,600.

On the 19th July 1915, the defendant transferred his second mortgage to the plaintiff in consideration of Rs. 1,770. Calisto was a party to the deed of transfer which he signed in the name of his brother Louis Mary.

The plaintiff having discovered the fraud of Calisto filed this suit against the defendant to recover the

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sum of Rs. 1,770 and interest thereon, on the ground that the defendant had nothing to transfer, and that, therefore, there had been total failure of consideration.

The defendant, in his written statement, said that he took this second mortgage from Calisto in good faith believing him to be Louis Mary and with the same *bona fide* belief transferred the second mortgage to the plaintiff and submitted that the suit should be dismissed. At the hearing it was not disputed that Calisto had signed the mortgage and transfer, fraudulently passing himself off as his brother Louis Mary.

Under the deed of transfer, the transferee is entitled to the full benefits of the covenants, power of sale and other powers and conditions contained in the deed of the second mortgage, but there is no covenant by the transferor that he guarantees the genuineness of the second mortgage. It was argued on behalf of the plaintiff that either section 55 (2) or section 65 (1) of the Transfer of Property Act applied and that, therefore, such a covenant was implied, but this is not the case of a sale or a mortgage, and, in my opinion, the principle laid down in the cases of *Bree v. Holbech*<sup>(1)</sup> and *Clare v. Lamb*<sup>(2)</sup> must be followed. The facts in the former case were on all fours with the facts in this case. The executors of a deceased person found amongst his papers a mortgage-deed and this they transferred to the plaintiff. It was afterwards discovered that the deed was a forgery. The Court held that the maxim "*caveat emptor*" applied and dismissed the suit.

This suit must, therefore, be dismissed with costs.

The plaintiff appealed.

*Jinnah*, for the appellant.

*Kanga*, for the respondent.

<sup>(1)</sup> (1781) 2 Doug. 654a.

<sup>(2)</sup> (1875) 23 W. R. 389.

SCOTT, C. J. :—Under the will of Louis Mary Valladares two of his three sons, namely, Joseph Francis and Louis Mary, became entitled as tenants-in-common to equal moieties of the testator's house at Mazagaon. The third son Calisto was, by the will, given a right of residence in the house so long as he lived in harmony with his brothers and sisters.

On the 13th of June 1914, Calisto fraudulently representing himself to be his brother Louis Mary and so entitled to an equal moiety in the house purported to mortgage such moiety in favour of Abdul Latif Sumar.

On the 10th of September 1914, Calisto again fraudulently representing himself to be his brother Louis Mary purported to create a second mortgage of the said moiety in favour of the defendant, Dattatraya R. Gandhi.

Both the first and second mortgages were registered as Calisto fraudulently represented himself to be Louis Mary before the Sub-Registrar.

On the 19th of July, Calisto again fraudulently representing himself to be the said Louis Mary purported, as Louis Mary, to join in a transfer executed on that date by the defendant to the plaintiff in consideration of the sum of Rs. 1,770. By the transfer Calisto personating Louis Mary purported to consent to the transfer for the sum of Rs. 1,770, agreed to be the amount owing to the defendant by the mortgagor under the second mortgage of the 10th September 1914, of the second mortgage debt and the full benefit of the covenants contained in the second mortgage and to the transfer of the moiety and all the estate, right, title and interest of the mortgagee and the mortgagor therein.

The mortgagee covenanted expressly that he had not incumbered. The covenants of which the transferee was expressed to get the benefit with the consent

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of the mortgagor included the mortgagor's covenant for title that he had power to transfer.

The intention of the transferee was clearly to have the settlement of the mortgage debt and the mortgagor's covenants for title in the second mortgage confirmed by the mortgagor. For this purpose the mortgagor was a necessary party. The transfer was, however, never executed by him but by a forger in his name.

The result was that the transferee had no recourse against the mortgagor after discovering that the second mortgage was a mere fictitious security.

He now sues the defendant as transferor for return of the purchase money as on a total failure of consideration.

The learned Judge being of opinion that the case could be disposed of on the authority of *Clare v. Lamb*<sup>(1)</sup> and *Bree v. Holbech*<sup>(2)</sup> applied the maxim "*caveat emptor*" and dismissed the suit. We are unable to agree in the conclusion arrived at by the lower Court.

In *Clare v. Lamb*<sup>(1)</sup> the Court recognized the correctness of the following statement of the law in Sugden's *Vendors and Purchasers*<sup>(3)</sup>: "Although the purchaser has paid the money, yet if he is evicted before the conveyance is executed by *all* the necessary parties, he may recover the purchase-money in an action for money had and received," and in *Dart on Vendors and Purchasers* that—"Until the conveyance is executed by all necessary parties the vendor remains liable in respect of all defects of title. He must, for instance, refund the purchase money if the purchaser having

<sup>(1)</sup> (1875) L. R. 10 C. P. 334 at p. 340.

<sup>(2)</sup> (1781) 2 Doug. 654a.

<sup>(3)</sup> Page 549 (14th Edn.)

paid it, even although having taken possession, be evicted by an adverse claimant."

In *Johnson v. Johnson*<sup>(1)</sup> where a conveyance of property of a testator required execution by three trustees under the will and was only executed by two, the purchaser on eviction under a superior title for one of the parcels conveyed was held entitled to recover the purchase money in respect of that parcel.

In the case before us the supposed Louis Mary was rightly deemed a necessary party to the transfer and the deed was prepared upon that footing but the transfer was never executed by Louis Mary. The defendant cannot successfully rely upon the transfer till it has been executed as drawn. The purchaser cannot be made liable on the maxim of *caveat emptor* if the owner from whom he believed he was to get a confirmation both of the covenant for title and of the transfer of the mortgagor's estate in the premises never in fact joined in the transfer.

If the stage of complete execution by all necessary parties is not reached there is no reason for not applying the rule of the Indian Contract Act, section 20, "where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void." Here both plaintiff and defendant believed that Louis Mary was agreeing to the amount due on the mortgage and confirming the covenants contained therein, and agreeing to the transfer of the mortgagor's estate in the mortgaged premises whereas in fact he was no party to the negotiations. The defendant is, therefore, under section 65, bound to repay the transfer money.

It is unnecessary in the view we take to discuss the arguments addressed to us on the covenants for title

<sup>(1)</sup> (1802) 3 B. & P. 162.

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implied under section 55 (2) of the Transfer of Property Act.

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We set aside the decree dismissing the suit and pass a decree for the plaintiff for the sum claimed with interest and the cost of suit throughout.

Solicitors for plaintiff : Messrs. *Mulji & Thakurdas*.

Solicitors for defendant : Messrs. *Amin & Desai*.

*Decree set aside.*

G. G. N.

## APPELLATE CIVIL.

*Before Mr. Justice Batchelor and Mr. Justice Shah.*

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July 25.

TANGYA FALA (ORIGINAL PLAINTIFF), APPELLANT v. TRIMBAK DAGA AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.\*

*Indian Contract Act (IX of 1872), section 70—Payment made for another—Non-gratuitous payment—Obligation of person enjoying the benefit—Mortgage—Stranger paying off a subsisting mortgage—Subrogation.*

The defendant No. 1 mortgaged his lands in 1893. In 1904, the mortgagee sued on the mortgage and obtained a decree for the mortgage amount, or in default, the sale of the property. The mortgagee applied in 1905 for sale of the mortgaged property. About that time, the plaintiff went into possession of the lands on a ten years' lease from defendant No. 1. Shortly afterwards, defendant No. 2, who held a money-decree against defendant No. 1, brought the property to sale and purchased it himself. In 1907, the property was put up to sale in execution of the mortgagee's decree. But defendant No. 1 borrowed a sum of Rs. 2,463 from the plaintiff and paid off the mortgagee. Subsequently, defendant No. 1 sold a portion of the property mortgaged to plaintiff for Rs. 4,000, the consideration being made up of Rs. 2,463 with other sums lent to defendant No. 1 personally. In 1908 defendant No. 2 sued plaintiff to recover possession of the land; and obtained possession. The plaintiff filed the present suit to recover the amount of Rs. 4,000 from the defendants personally or by sale of the property.

\* First Appeal No. 29 of 1915.