Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of A. J. Forbes v. *Ameeroonissa Begum and others, from the late Sudder Dewanny Adawlut of Calcutta; delivered* 1st *February*, 1866.

Present:

LORD CHELMSFORD.
SIR JOHN TAYLOR COLERIDGE.
SIR JAMES W. COLVILE.
SIR EDWARD VAUGHAN WILLIAMS.

SIR LAWRENCE PEEL.

ON the 13th of March, 1850, Shah Ally Reza, the late husband of the present Respondent, executed an instrument which, upon the face of it, purported to be an absolute bill of sale of the talook and lands therein described to the Appellant, in consideration of the sum of 39,500 rupees. On the same day the Appellant executed to Shah Ally Reza an Ikrah or agreement, importing that on payment of the sum of 39,500 rupees with interest at 12 per centum per annum on the 13th March, 1851, the sale should be void; but that in the event of the seller's not paying the principal and interest according to his engagement, the Ikrah was to be null and void, and the purchaser (the Appellant) was to become the absolute proprietor of the property.

The effect of these two instruments was simply to secure the repayment of the sums lent by the Appellant to Shah Ally Reza with interest on the day named, by means of that kind of mortgage which is known in India as Bye-bil-wufa, or conditional sale.

The transaction between the parties, however,

included something more. On the 12th of March, the day before the date of the bill of sale, Shah Ally Reza had granted a lease of the mortgaged premises for three years ostensibly to Mr. Alexander Demetrius Forbes, the son of the Appellant, and had taken the corresponding Kubooleut from him.

The latter, which is at page 45 of the record, shows that the lessee had bound himself, after paying the Government revenue and other charges on the lands, to pay to the lessor by way of rent for the Bengali year 1258, the sum of 2,000 rupees; for the year 1259, 2,332 rupees 9 annas 6 pie; and for the year 1260, 2,399 rupees 2 annas 6 pie.

And it appears on the face of the Ikrah, that Shah Ally Reza had given an order to the lessee to pay by instalments out of this rent to the Appellant the sum of 2,101 rupees in part satisfaction of 4,740 rupees, which would become due on the 13th of March, 1851, for one year's interest on the 39,500 rupees.

It has been proved as a fact, and is not now disputed, that the grant of this beneficial lease was what is called in India a Benamee transaction; that, though taken in the name of his son, it was really a lease to the Appellant, who under colour of it obtained possession of the mortgaged premises.

In April 1851, the time fixed for the repayment of the mortgage money having expired, the Appellant commenced the proceedings which must be taken in order to foreclose a mortgage of this kind, and make the conditional sale absolute.

And the question on this Appeal is whether these proceedings have been effectual, or whether his suit has been properly dismissed by the Decree of the Zillah Judge, confirmed by that of the Sudder Dewanny Adalut.

So many points touching the regularity of these proceedings have been raised at the Bar that it is desirable before going further to state what, in their Lordships' apprehension, the law of foreclosure, as established by the Regulations and the practice of the Courts in Bengal, is.

Up to the year 1806, the rights of the holder of a Bye-bil-wufa were enforceable according to the strict terms of the contract. It was necessary for the mortgagee, if he wished to save his estate from forfeiture, to tender the amount due, or to pay it

into Court, pursuant to the provisions of Regulation I of 1798, within the stipulated period for the repayment of the loan.

Regulation XVII of 1806 first introduced a modification of the strict rights given by the contract analogous to, though by no means identical with, that which Courts of Equity have long imposed on mortgagees in this country. The 7th section of that Regulation extended the period within which the mortgagor might redeem to any time within one year from and after the application of the mortgagee to the Zillah Court under the following section.

And that section, being the 8th, provided that a mortgagee desirous of foreclosing the mortgage and rendering the sale conclusive on the expiration of the stipulated period, or at any time subsequent before the sum lent was repaid, should, after demanding payment from the borrower or his representatives, apply for that purpose by a written petition to the Zillah Judge, who should cause the mortgagor to be furnished with a copy of the application, and notify to him that if he did not redeem the property in the manner provided by the preceding section within one year from the date of the notification, the mortgage would be finally foreclosed, and the conditional sale made absolute.

Hence, when these proceedings have been had, it becomes incumbent on the mortgagor to take within the year the steps towards redemption which are prescribed by the 7th section.

Within that period he must either pay or tender (and the proof of such payment or tender will lie on him) the sum lent, or the balance due if any part of the principal has been discharged, and also in the case in which the mortgagee has not been put into possession of the mortgaged property, any interest that may be due; or (and this is the alternative commonly adopted) he must make a deposit pursuant to Section 2 of Regulation I of 1798.

That enactment, of which the object was to relieve mortgagors seeking to redeem, from the difficulties of proving a tender, by enabling them to pay the proper amount into Court, thus prescribes what the deposit is to be. "When the lender has not obtained possession of the lands, the deposit is to be the principal sum lent with the stipulated interest

thereon; but if the lender has held possession of the land, the principal sum borrowed need only be deposited, leaving the interest to be settled on an adjustment of the lender's receipts and disbursements during the period he has been in possession. In either of these cases the deposit preserves to the borrower his full right of redemption, and entitles him to immediate possession of the land, if that is in the possession of the lender, subject to the adjustment of the accounts." A third case is then provided for as follows:—"If the borrower in any case shall deposit a less sum than above required, alleging that the sum deposited is the total sum due to the lender for principal and interest, after deducting the proceeds of the lands in his possession, or otherwise, such deposit shall be received, and notice given to the lender as above directed, and if the amount so deposited be admitted by the lender, or be established on investigation to be the total amount due to him, the right of redemption shall be considered to have been fully preserved to the borrower, who will not, however, in such cases be entitled to the recovery of the lands until it be admitted or established that he has paid the full amount due from him. The 3rd Section prescribes the manner in which the lender is to account in those cases in which an account shall be necessary.

The general effect of these Regulations is, that if anything be due on the mortgage and the mortgagor makes an insufficient deposit, and *à fortiori* if he makes no deposit at all, the right of redemption is gone at the expiration of the year of grace. The title of the mortgagee, however, is not even then complete. It was ruled by the Circular Order of the 22nd of July, 1813, No. 37, and has ever since been settled law, that the functions of the Judge under Regulation XVII of 1806, Section 8, are purely ministerial, and that a mortgagee, after having done all that this Regulation requires to be done in order to foreclose the mortgage and make the conditional sale absolute, must bring a regular suit to recover possession if he is out of possession, or to obtain a declaration of his absolute title if he is in possession.

In that suit the mortgagor may contest on any sufficient grounds the validity of the conditional sale, or the regularity of the proceedings taken

under the Regulation in order to make it absolute. He may also allege and prove, if he can, that nothing is due, or that the deposit (if any) which he has made is sufficient to cover what is due; but the issue, in so far as the right of redemption is concerned, will be whether anything at the end of the year of grace remained due to the mortgagee, and if so, whether the necessary deposit had been then made. If that is found against the mortgagor the right of redemption is gone.

It has been stated that the Appellant commenced his proceedings to foreclose under the Regulation on the 5th of April, 1851. On the 31st of August, 1852, the Principal Sudder Ameen of the Zillah, in whose Court these proceedings had been had, made an Order which, after stating all that had taken place, including the claims of certain third parties, concluded thus:—"Forasmuch as the term of one year has expired from the date of the issue of notice, and the mortgagor has not deposited the amount of the mortgage, and that the plea of the before-mentioned third parties is not cognizable in this miscellaneous case, therefore considering that Regulation XVII of 1806 has been complied with, it is ordered that this suit be decided, and that the papers of the case be forwarded to the Judge's Court."

Upon this, on the 28th of January, 1853, the Appellant commenced this suit in order to complete his title under the foreclosure. Treating, however, the lease to his son as a subsisting lease to that person, and himself as out of possession, he asked to have possession decreed to him, together with mesne profits from the 13th of March, 1851, calculated upon the rent reserved by the lease.

The answer of Shah Ally Reza, after raising a question touching the sufficiency of the stamp, which it is not necessary to consider here, alleged by way of defence that the Appellant before filing his petition for foreclosure in the Zillah Court had not made the demand required by law; and after stating the circumstances under which the lease was granted, insisted that by virtue thereof the Appellant had fraudulently held possession of the mortgaged property in his son's name. And in order to show what was the value of this possession, the answer contains a passage which after stating the

gross revenue of the various portions of the mortgaged property, amounting in all to 9,601 rupees 7 annas 2 pie, and the charges thereon amounting in all to 3,931 rupees 9 annas 4 pie, proceeds thus, "There remains 5,666 rupees 13 annas 10 pie as annual profit. Out of this amount, deducting 4,740 rupees as interest due on the principal, the remaining sum of 926 rupees 13 annas 10 pie must have been annually received by the Plaintiff on account of the said amount of principal." The answer also insisted that the Appellant was bound to render an account in conformity with sections 10 and 11 of Regulation XV of 1793, and that the Bye-bil-wufa had been vitiated by the fact of his having realized the whole of the interest as well as a portion of the principal from the profits of the mortgaged property; and that the Appellant was bound to render an account in order that the Court might be satisfied how much was due, and from hem.

The material issues settled by the Judge were :—

1st. Whether the Plaintiff had performed the conditions preseribed by section 8 of Regulation XVII of 1806, and was entitled to possession.

2ndly. Whether Plaintiff was or was not in possession.

3rdly. Whether the claim for mesne profits was correct.

4thly. Whether the receipt by Plaintiff of interest on the purchase money invalidated the Bye-bil-wufas.

The cause was tried by Mr. Loch, the Civil Judge of Purneah, on the 18th December, 1854.

The principal point contested on the first issue was whether there had been a sufficient demand, and this issue was found in the Plaintiff's favour. On the third and the last issues the Judge found that the lease was, in fact, taken by the Plaintiff, who must be taken to have been, under colour of it, in possession of the mortgaged property: but that inasmuch as it was not attempted to show that the collections realized by the Plaintiff covered the principal and interest of the debt, and it was, in fact, admitted that when the notice under section 8 of Regulation XVII of 1806 was filed, a balance was dne and that there was nothing to show that the Defendant had paid any part of it, the Bye-bil-

wufa was not invalidated, and that the Plaintiff was then absolutely entitled to the property. On the fourth issue he found, erroneously and inconsistently with his finding on the question of possession, that the claim for mesne profits was correct. The Decree was for possession with the mesne profits claimed.

The Defendant, Shah Ally Reza, appealed to the Sudder Dewanny Adawlut. That Court by its order dated the 22nd of January, 1857, held that the Judge had been wrong in decreeing Wassilât, or mesne profits; and further, that as the Appellant had been found to have been in possession, he was bound, before he was entitled to have his conditional sale made absolute, to render accounts, and to show that the loan had not been liquidated with interest from the usufruct of the property, and it remanded the case, in order that the Judge might call upon the Plaintiff for his accounts, and then, with reference to the above remarks, decide the case according to the results shown by them.

The case went back, the Plaintiff produced accounts, in which he charged himself, not with the gross collections, but with the rents reserved by the lease. The then Acting Judge (Mr. Brodhurst) held that these accounts were insufficient, and that the proper accounts not having been produced he was precluded from deciding as to the balance due to the Plaintiff, and accordingly by his Decree, dated the 29th of March, 1859, dismissed the suit.

Against this Decree the Appellant appealed to the Sudder Dewanny Adawlut, but that Court by its order of the 21st of April, 1862, dismissed the Appeal with costs; refusing to remand the cause again, in order to give the Appellant an opportunity of producing the proper accounts.

He afterwards applied for a review of judgment on affidavits directed to show that he had tendered the proper accounts in the Court below, but this application was also rejected with costs, on the 21st of January, 1863.

The present Appeal is from the Decrees dismissing the suit.

The learned Counsel for the Respondent in the course of their able argument maintained the propriety of this dismissal upon various grounds,

of which some do and some do not directly arise upon the Decrees now under appeal. And it seems convenient to consider the latter in the first instance.

Mr. Rolt insisted that inasmuch as it had been conclusively found that the Appellant was in possession of the mortgaged premises, and the plaint was, nevertheless, for possession and mesne profits; the form of the suit was of itself a sufficient ground for its dismissal. Such, however, was not the view taken in the Courts below. If it be granted that this point is raised, and it is not very clearly raised by the answer, it does not appear to have been among the grounds of the Respondent's Appeal from Mr. Loch's decree; which, though not set out *in extenso* in the record, are noticed by the Sudder Court in its Judgment of the 22nd of January, 1857. The objection, if made, was certainly not treated as a valid one by the Sudder Court; which did not dismiss the suit, but remanded it for retrial on the production of the accounts. That remand implied that the Appellant might succeed. The real object of the suit is to perfect his title as absolute owner of the property; and their Lordships do not see why he should not have that relief, if he be otherwise entitled to it; because, under an erroneous view of the effect of the lease, he has asked for it by his plaint in a somewhat different form, and with something to which he is not entitled.

It was also urged that the Bye-bil-wufa, the Ikrar, the lease, and the Kubooleut must be taken together as one transaction; that the effect of the two latter so qualified that of the two former that the mortgage must be taken to have been in its inception one for the term of three years, and that until the expiration of the term the Appellant was not at liberty to take any step towards foreclosure. Their Lordships have to observe that this was not one of the issues in the cause, and that the point is not even raised on the pleadings, nor do they think that this defence could have been successfully raised. The Respondent cannot both repudiate the obligations of the lease, and claim the benefit of it. That transaction has been held, and properly held, not to effect that for which it was probably designed, viz., to save the Appellant from the liabilities, whilst it gave him the advantages of a

mortgagee in possession. Still less can it be taken to do what it was never meant to do, viz., modify the terms of the conditional sale.

It was further urged that the proceedings in the Sudder Ameen's Court under section 8 of Regulation XVII of 1806 were irregular, both by reason of the insufficiency of the demand, and the non-production of the accounts in the course of those proceedings. One of the issues in the cause when it was before Mr. Loch, was whether the Plaintiff had performed the conditions prescribed by the Regulations, and that issue was found in his favour. As far as appears from the printed record, the Respondent did not appeal from that finding. He had undoubtedly raised in the Zillah Court the question whether there had been a sufficient demand, and the fact had been found against him. He had not taken the point that the accounts ought to have been produced in the preliminary proceedings. Their Lordships are disposed to think that upon the true construction of the Regulations, and of the Circular Order, it is not necessary either that the demand should be for the specific sum ultimately ascertained to be due, or that the accounts of a mortgagee in possession should be produced in these preliminary proceedings, in which they cannot be investigated.

The questions which really arise upon the Decrees under Appeal, and on which the determination of this Appeal depends, are these:—

1st. Whether the Sudder Court was right in requiring the Appellant to produce his accounts, and in remanding the cause for re-trial on the production of those accounts by its Order of the 22nd of January, 1857.

2ndly. Whether if it were wrong in so remanding the cause, the Appellant is not now bound by that Decree, against which he did not appeal.

3rdly. Whether the Zillah Judge and the Sudder Court were right in dismissing the suit, because the Appellant had not produced the proper accounts, or whether they ought to have given him further time for so doing.

Their Lordships, considering the first question independently of the authority of decided cases, are of opinion that, upon the true construction of these Regulations, there was no necessity for calling for the production of the accounts, and, conse-

quently, that the order for the remand was wrong. The issue upon which the determination of the cause depended, and upon which even by the order of remand it was made to depend, was whether the loan had been liquidated, with interest, from the usufruct of the property. Now, not only was there no allegation on the pleadings, or issue raised in the cause, to the effect that the loan had been thus liquidated, but there was an express admission on the face of the Defendant's answer that even on his mode of stating the account, the principal sum of 39,500 rupees had, when the foreclosure proceedings were commenced, and when he ought to have made the requisite deposit, been reduced by no more than 927 rupees. It was therefore clear, upon the face of the proceedings, that the question to be tried could be answered only in one way, and that in favour of the Appellant. And the order of remand can be supported only on the principle that, in all cases, it is imperative upon a mortgagee who has been in possession to produce his accounts. For this position their Lordships can find no grounds in the Regulations. The words of the 3rd section of Regulation I of 1798, from which (if at all) an inflexible obligation to produce the accounts must be inferred, are, "In all instances wherein the lender on a Bye-bil-wufa may have been put in possession of the land, and *an adjustment of accounts may consequently become necessary between* him and the borrower, the lender is to account," &c. Two conditions are expressed, the possession of the mortgagee, and the necessity of an account. And a comparison of this with the preceding section, and with Regulation XVII of 1806, shows that that necessity arises, and need only arise, first, when the mortgagor has deposited the principal, leaving the question of interest to be settled on an adjustment of the account; 2ndly, when he has deposited all that he admits or alleges to be due; 3rdly, when he pleads, and undertakes to prove, that the whole of the principal and interest has been liquidated by the usufruct of the property.

It remains to be seen whether the proposition that the mortgagee, who has been in possession, must in all cases produce his accounts, has been conclusively established by the authority of decided cases.

The cases cited by the Sudder Court in its Judg-

ment, and now relied on by the Respondent, are reported in the decisions of the Sudder Dewanny Adawlut of Bengal for 1852, pp. 678 and 1063. The transactions out of which these cases arose were not mortgages by way of conditional sale, but mortgages of a different character, and governed by different rules. Neither authority, therefore, seems to touch the point now under consideration. On the other hand, in a more recent case, which is reported amongst the decisions of the same Court for 1859, at p. 492, the Court held that there being no averment in the answers that the Plaintiff had paid himself by the usufruct of the property, the objection that the mortgagee had not produced his accounts could not be entertained on the Appeal.

The question, therefore, cannot be said to have been concluded against the Appellant by authority; and their Lordships have already intimated their opinion, that upon principle the obligation to produce the accounts should depend on the circumstances of the case and the nature of the issues raised.

Upon the question whether the Appellant is so bound by the Order of the 22nd of January, 1857, against which he did not appeal, that he cannot impeach the correctness of the remand, their Lordships have to observe that the order was an interlocutory one; that it did not purport to dispose of the cause; and consequently, that upon the principle laid down by this Committee in the case of Maharajah Moheshur Sing *v.* the Bengal Government (7 Moore's Indian Appeals, p. 283), upon which their Lordships have very recently acted in a case from Oude, the Appellant is not now precluded from insisting that the remand for the production of the accounts was erroneous; or that the cause should have been decided in his favour, notwithstanding the non-production of the accounts. In truth, the learned Judges of the Sudder Court, by their Judgment of the 21st of April, 1862 (App. p. 82, line 30), treated the latter point as still open to the Appellant, although, upon grounds which appear to their Lordships to be unsatisfactory, they determined it against him.

The view which their Lordships have taken of the questions already considered renders it unnecessary to determine whether the Appellant ought to have

been allowed further time, or a second opportunity for the production of the accounts required from him. Their Lordships will only say upon this point that the affidavits filed by him on the application for a review are, when contrasted with his grounds of appeal at page 77 of the record, extremely unsatisfactory, and that he appears to have done little to entitle him to the indulgence of the Court.

They are therefore not prepared to say that if the production of the accounts required had been necessary, those delivered were sufficient; or that in that case there would have been any such improper exercise of the discretion of the Court below as their Lordships would have interfered with. But they think that the error of the Court below was in the dismissal of the suit, on the assumption that the production of any accounts was necessary in a case in which there was neither plea nor proof that the usufruct had liquidated principal and interest, and no deposit had been made to cover the balance admitted to be due.

Their Lordships, on the whole case, are of opinion that this Appeal should be allowed, and they will humbly recommend Her Majesty to reverse the decrees appealed against, and also the Order of remand of the 22nd of January, 1857, and to vary the Decree of the 18th of December, 1854, by declaring that the Appellant was entitled to the possession of the mortgaged premises as absolute owner, by virtue of the conditional sale which had been duly made absolute, but was not entitled to a Decree for any mesne profits. Their Lordships think that the Appellant is entitled to the costs of this Appeal, and also to all costs of the suit below, up to and including the costs of the Order of the 22nd of January, 1857.

Considering that he might have appealed against that Order, and that his conduct in the subsequent proceedings in the Court below has not been satisfactory, their Lordships are not disposed to recommend that he should have the costs of those proceedings against the opposite party. He will of course be entitled to a refund of the costs (if any) which have been paid by him under any of the decrees reversed.