Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Nawab Azimut Ali Khan v. *Hurdwaree Mull and others, from a Decree of the late Sudder Dewanny Adawlut, at Agra, North-West Provinces, Bengal: delivered 12th July,* 1870.

Present:

THE MASTER OF THE ROLLS.
SIR JAMES W. COLVILE.
SIR JOSEPH NAPIER.

SIR LAWRENCE PEEL.

THE Nawab Rooknoodowllah, the original Appellant, has died pending this Appeal, and is now represented by his son, the Nawab Uzmut Ali Khan. The original Appellant will, to prevent confusion between them, be called the Nawab in the observations of their Lordships on this case. This Appeal is brought from a decision of the late Sudder Dewanny Adawlut at Agra, affirming a decree of the Judge of the Zillah Saharunpore, who had affirmed on appeal to him a decree of the principal Sudder Ameen of that place, dismissing the suit of the Nawab against the present Respondents.

The Respondents, by trade bankers, were creditors of a deceased son of the Nawab, named Ruhmut Ali Khan. The debt was evidenced by an instrument in writing, in the usual form there of a bond; but this instrument does not appear to have been a mortgage bond hypothecating any property of the debtor. The Respondents obtained a decree in the Civil Court of Saharunpore for the amount of their demand against Ruhmut, who died before execution was had on that decree. The Respondents, after the death

of Ruhmut, proceeded, agreeably to the law and practice of the Court, to attach the property of their debtor, in order to obtain payment of their debt. They were proceeding to bring to sale the property which is the subject of the present Appeal, when the Nawab intervened in the execution proceeding as an objector, claiming the whole property as his own absolutely, and stating the deceased Ruhmut to have been merely a fictitious or Benamee holder of the property for his father the Nawab. The Judge of that Court, for reasons which it is unnecessary here to state or consider, refused to allow the Nawab to proceed on that objection, and referred him to a regular suit. The Nawab accordingly preferred his claim by a civil suit against the Respondents, viz., the original suit before referred to in the Court of the principal Sudder Ameen of Saharunpore. The properties sought to be recovered are named respectively Binsee and Bakree.

The whole contest in this suit was whether Ruhmut held these properties Benamee for the Nawab, No case was made by the Nawab that the son had a postponed interest or estate in the property. Such a case, even if substantiated, would not have enabled the Nawab, as an opponent of the sale, to defeat by intervention the claim of the creditors wholly. The ordinary mode of conveyance, under such a judicial sale, viz., of the right, title, and interest of the debtor, would have enabled the creditors to realize their debt or some portion of it by a sale of the interest, whatever it might prove to be. The Nawab instituted no suit to protect any alleged life interest in himself against a title derived under the judicial sale. The Court, therefore, had in the Nawab's suit simply to decide whether he had proved his son Ruhmut to have been from the time of the conveyance to Ruhmut until the death of the latter a Benamee holder of these properties for the Nawab.

The title to Bhensee was one derived originally by mortgage. The owner Wuzeer Ali mortgaged this with fifteen other mouzahs to one Bhuwanee Pershad for a certain sum, which, by a second advance and charge, amounted to 26,400 rupees. Bhuwanee Pershad, as the Nawab alleged, submortgaged the whole sixteen mouzahs to him for the same sum, and he, according to his statement,

had the conveyance taken Benamee, in the name of two of his infant sons, of whom Ruhmut was one. The other of these two sons died young; on his death, the Nawab, who was his heir, substituted another son. This son died young, unmarried, and without issue; his father was his sole heir. The interest therefore of Ruhmut, if real, was to a moiety of this share of Bhensee originally conveyed to the two sons. The title to Babree was by conveyance, as upon an ordinary purchase, for a money consideration, and the conveyance was in the name of Ruhmut. Some contest has been made about the real facts of this purchase, and the Respondents deny that it was, what it purports to have been, a purchase at all; but in the view which their Lordships take of this case, it will be unnecessary to advert further to this head of contention, or to distinguish further between the titles of the respective properties, since the explanation of the Nawab as to the reasons for the conveyance to his sons applies alike to both properties.

The case made by the Nawab at the hearing of this Appeal before their Lordships was, that the funds which purchased both properties were exclusively the funds of the Nawab; that a legal presumption thence arose that the proprietary right was the Nawab's, and that the Respondents, who have no better title than that of Ruhmut, have not rebutted this presumption. The Counsel for the Nawab relied on the case of Gosein *v.* Gosein in 6 Moore, which they contended had been disregarded in the decision of this case in the Courts below.

Had this appeared to their Lordships to have been so, they must necessarily have recommended to Her Majesty to reverse the decisions under Appeal, since the law as to Benamee conveyances taken by a father in the name of a son, whether in Hindoo or Mahommetan families, should be considered in all Courts in India as conclusively settled by that decision.

It becomes necessary, therefore, to see what were the real grounds of the decision in the Court of the Principal Sudder Ameen. It appears to their Lordships that that Judge found as a fact that the Nawab purchased the property with his own funds; a conclusion which, on the evidence before him, and

in the absence of all evidence of property at that time in the sons, their Lordships think a reasonable and proper conclusion. Had this fact received no other addition than that the conveyance was taken in the names of the Nawab's sons, the case would have fallen within that of Gosein *v.* Gosein, and the argument for the Appellant must have prevailed with their Lordships: but the Principal Sudder Ameen remarks, and relies on a very important addition to these facts, in the Nawab's own explanation of the cause of the conveyance to his sons; the Court thence inferred that a motive existed for it in the state of his family, the existence of daughters, and his desire, as expressed, to vary the rule of succession between sons and daughters in his family. The Sudder Dewanny Adaulut also, in their judgment, rely on these additional facts.

If the conveyance to the sons was designed to produce an effect thereafter, by changing the amount of shares of the whole property on a succession between sons and daughters, it could not be designed as a mere naked Benamee conveyance, because, as Mr. Bell correctly observed, a mere Benamee conveyance would in no way affect such succession. But if, as the Nawab himself represented the transaction, it was designed to affect the daughter's claims, or interests, it could only so operate as a real transaction; that is, by a conveyance of interest to the sons. It is immaterial in this case to consider whether the legal effect of the arrangement would be to confer a resulting life estate on the Nawab or not, since the only contest made in the suit was whether it was an absolute Benamee transaction. The case admitted, certainly, of being viewed thus, that the conveyances were merely colourable, to be treated as real should it become necessary to defeat a daughter's claim, but fictitious as between father and sons. It is to be observed, however, that this view of the case was not presented to the Judge; and if it had been so presented, the Judge would have been justified in declining to act on such an allegation of fraud against creditors of the son made after the son's decease in favour of the father, alleging his own fraud. Their Lordships, therefore, think that the Principal Sudder Ameen was justified in regarding the whole evidence before him as not sufficient to establish the case of Benamee owner-

ship, which the Nawab advanced. As the decision under review does not appear to conflict with any rule of law, as the question decided is one of fact, as the decision is sustained by sufficient evidence, and establishes the claim of creditors against property of which their debtor was allowed for many years to have, at least, the ostensible ownership, it is one which their Lordships would not disturb, unless it were clearly shown to be wrong. It is the duty of a Court of Justice in such a case to put the objector to the rights of creditors founded on apparent ownership to strict proof of his objection; he must recover, if at all, on the case that he asserts. It would be easy, if such vigilance and jealousy were not exhibited, for a family to place the family property out of reach of creditors. If the father became indebted, the titular right would be then stated to have conveyed the real interest; but if the son were indebted, then the claim would take the form to which this suit is adapted. Views of these dangers to the rights of creditors seem to have been present to the Courts below; and in the present case their Lordships are unable to see that jealousy of a probable fraud has induced an incorrect estimate of the evidence. Their Lordships will, therefore, humbly advise Her Majesty that this Appeal should be dismissed with costs.

PRINTED AT THE FOREIGN OFFICE BY T. HARRISON.—15/7/70.