Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Khagoolee Sing and others v. Hossein Bux Khan, from the High Court of Judicature for the North-Western Provinces of Bengal; delivered 20th January, 1871.

Present:—

LORD CAIRNS.
SIR JAMES W. COLVILE.
SIR JOSEPH NAPIER.

SIR LAWRENCE PEEL.

THIS Appeal having been heard *ex parte*, their Lordships were desirous, before they determined it, carefully to read and consider the evidence in support of the case of the absent Respondents, the Plaintiffs in the suit.

The suit was in the nature of a redemption suit, and was brought to recover from the Appellants certain property, on the allegation that their title was originally that of mortgagees by way of conditional sale; that the mortgage debt had been satisfied; and that, accordingly, the Plaintiffs were entitled to recover possession of the land with mesne profits from the date of such satisfaction.

The case of the Appellants was that they, or those whom they represent, had been in possession of the lands for upwards of twenty years under two deeds of absolute sale, executed in consideration of Rupees 9800 on the 12th of March, 1843, and confirmed by two decrees of the Civil Court passed on the confession of their vendors, the Plaintiffs in the present suit.

The Plaintiffs, not denying that this was the ostensible title of the Appellants, insist that the true transaction was a mortgage by conditional sale for securing the sum of Rupees 4000 with interest, and that this was effected by the Ekranamah of even date with the deeds of sale, which is at page 10 of the record.

It was therefore essential to the Plaintiffs' case to establish the validity of this Ekranamah.

The Zillah Judge who tried the cause in the first instance decided that it was not a genuine instrument, and dismissed the suit. But the High Court of Agra, on Appeal, reversed his decision, and decided in favour of the Plaintiffs, upon the ground which their Lordships will next consider.

This Judgment of the High Court does not profess to proceed upon a review of the general and conflicting evidence given in the cause. It is founded solely upon the omission of the Judge below to give due weight to the fact that the Ekranamah had been declared to be valid and genuine by the Deputy Collector of Futtehpore in proceedings which will be afterwards considered, and it treats that finding as *res judicata* between the parties.

Those proceedings are referred to on the face of the Plaint, and their Lordships will therefore assume that the point, though not made the subject of a formal issue, was sufficiently raised on the pleadings.

Their Lordships, however, are of opinion that the Judgment of the High Court reversing that of the Zillah Judge cannot be supported on this ground.

In the course of the argument, one of their Lordships quoted from the opinion delivered by the Judges in the Duchess of Kingston's case the following passage:—"From the cases relative to "Judgments being given in evidence in civil suits, "these two deductions seem to follow as generally "true: first, that the Judgment of a Court of con- "current jurisdiction directly upon the point is, as a "plea, a bar, or as evidence, conclusive between the "same parties upon the same matter directly in "question in another Court; secondly, that the "Judgment of a Court of exclusive jurisdiction, "directly upon the point, is in like manner conclu- "sive upon the same matter, between the same par- "ties, coming incidentally in question in another "Court for a different purpose. But neither the "Judgment of a concurrent or exclusive jurisdiction "is evidence of any matter which comes collaterally "in question, though within their jurisdiction, nor "of any matter incidentally cognizable, nor of any "matter to be inferred by argument from the Judg- "ment."—1 Smith's 'Leading Cases,' p. 424.

There is nothing technical or peculiar to the law of England in the rule as so stated. It was recognized by the civil law, and it is perfectly consistent with the second section of the Code of Procedure under which this case was tried, which says,—

The civil Courts shall not take cognizance of any suit brought on a cause of action which shall have been heard and determined by a Court of competent jurisdiction in a former suit between the same parties or between parties under whom they claim.

Now, what were the proceedings which in this case were assumed to afford evidence in favour of the validity of the Ekranamah which the Appellants were not at liberty to dispute? They are at pages 6 and 7 of the record. It appears from them that the Appellants in March, 1863, brought a summary suit for arrears of rent before the Deputy Collector against one of the Plaintiffs in the present suit. They alleged that he was an occupier of a small portion of land not exceeding 37 beegahs, being part of the land in question, under a Pottah and Kuboolyat. The Defendant in that summary suit denied the case of the Plaintiffs (the present Appellants), alleged that the transaction of 1843 was a conditional sale, produced the Ekrahnamah, and contended that under a particular stipulation in it he and the other vendor or mortgagor were entitled to hold 75 beegahs rent free. The Appellants then, as now, denied the validity of this Ekranamah. Evidence was taken on both sides; and the Collector, holding that the Appellants had failed to prove their case, and that the Defendant in the summary suit had proved the Ekranamah, dismissed the claim. On Appeal to the Zillah Judge this dismissal was confirmed, but on the ground that the Appellants had failed to prove that the Defendant was a cultivator paying rent, and that their claim was barred by limitation. And the Judge remarked that the Deputy Collector had made a lengthy inquiry with reference to the papers filed by both parties which had no connection with the present claim.

On special appeal to the Sudder Court the dismissal of the claim was again confirmed, the Court observing that the question whether the Plaintiffs

(the Appellants) were out-and-out purchasers or only conditonal purchasers under the deeds of the 12th March, 1843, did not arise in the case.

From this statement it appears that the ultimate decision of this claim for rent did not turn upon the validity of the Ekrahnamah. But if the Judgment of the Collector had been final in the matter before him, his incidental finding that the Ekrahnamah was a valid instrument would not be conclusive between the parties in the present litigation. For the question before him was not the issue now raised between the parties; and his decision was not that of a Court competent to adjudicate on a question of title. He had only a special jurisdiction to try summary suits for the recovery of rent.

The *eadem causa petendi*, and the Judgment of a Court of competent or concurrent jurisdiction, are both wanting here. Their Lordships, therefore, being of opinion that the Decree under appeal cannot be supported on the only ground which the Judges of the High Court have assigned for it, will promise to consider whether the evidence in the cause, taken as a whole, affords any sufficient reason for disturbing the Decree of the Zillah Judge.

It is not denied that on the 12th of March, 1843, the deeds of absolute sale were executed; that on the 14th of March they were produced in the Civil Court, where decrees were passed upon them; and that on the 1st of May, 1843, the proceeding for the mutation of names, which is set forth at page 27, took place. The last was not without opposition. One Furzund Hossein Khan put in objections founded on the right of pre-emption under the Muhumadan law, and on a claim to a small portion of the property sold. The former objection was overruled; but it could only have been made to an absolute sale; and the fact that it was made is an additional proof that the transaction was then treated as, and understood to be, an absolute sale. In the Plaint, indeed, it is alleged that the transaction was represented to be an absolute sale, and not, what it really was, a mortgage, in order to avoid any claim founded on the right of pre-emption. But this statement appears to their Lordships to be founded on a misconception of the law of pre-emption, and

therefore to afford an argument against the truth of the Plaintiffs' case. Three years later, in September, 1846, part of the property was seized by a judgment creditor of the vendors. The Appellants came in as objectors, claiming as absolute owners; and their objection prevailed, though the Ekrahnamah, according to the Plaintiffs' case, had then been registered, and, if a valid document, would have left in them an interest capable of being taken in execution.

The Plaintiffs have given no explanation whatever why they consented to the Decrees. Although, in 1846, there was this execution against them, there is no suggestion that in 1843 they had any interest for making that which was in fact a mortgage appear to be an absolute sale. The probabilities of the case, therefore, resulting from the history of the *res gestæ* are all against the validity of the Ekrahnamah.

But what is the direct evidence of the execution of that instrument? The evidence of the two first witnesses, Jhoo Khan and Khadir Bux, who are not subscribing witnesses, appears to their Lordships to be worthless. The evidence of the attesting witnesses who are called is not consistent. Sheadun Putwarry, who from his position might have been a more trustworthy witness, is not called. In addition to the discrepancies and other circumstances tending to cast suspicion on the testimony for the Plaintiffs which have been stated by the Zillah Judge, their Lordships have to observe that the document impeached purports to have been executed on the same day as the undisputed deeds of sale; that by several witnesses it is sworn to have been executed at the house of Mahomed Sidiq, the writer of the Bills of Sale; yet all these witnesses say that they saw no instrument but the Ekrahnamah executed. It is difficult to see why, if the Ekrahnamah was really executed on the 12th of March, 1843, and in the house of the Appellants' agent, it was not executed with the deeds of sale, and attested by the same witnesses. Again, as the Judge has observed, the witnesses for the Plaintiffs fail to prove the payment of the Rs. 4000 which they allege to have been the consideration for the mortgage; whilst the witnesses for the Appellants have proved, to the satisfaction of

the Judge, the payment of the 9800 rupees which they allege to have been the consideration for the sale. It lay on the Plaintiffs to prove the validity of the instrument on which they rely. The oral evidence was conflicting, and the Zillah Judge came to a clear conclusion that the witnesses for the Plaintiffs were not to be believed, and that the witnesses for the Appellants were trustworthy. Their Lordships would, for obvious reasons, be slow, in any case, to overrule the opinion expressed by the Judges in whose presence the testimony was given touching the credibility of native witnesses. In the present case, their own conclusion, formed upon a perusal of all the evidence in the cause, is substantially in accordance with that of the Zillah Judge. They are of opinion that he was right in holding that the Plaintiffs had failed to establish the validity of the Ekrahnamah, which was the foundation of their case, and in dismissing their suit. Their Lordships will accordingly advise Her Majesty to allow this Appeal, to reverse the Decree of the High Court, and to direct that in lieu thereof a Decree be made dismissing the Appeal against the Decree of the Zillah Judge with costs. If the Appellants have paid any costs under the order reversed, these costs must be refunded, and they must also have their costs of this Appeal.