Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Sheo Sing v. *Mussumat Miriam Begum, from the Court of the Financial Commissioner of Oude; delivered 20th July* 1872.

Present:

SIR JAMES W. COLVILE.
SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.

SIR LAWRENCE PEEL.

IN this case Sheo Sing, the son of Gunga Sing, deceased, is the appellant, and Mussumat Miriam Begum is the respondent. The petition was filed to redeem a mortgage dated in August 1856, of certain lands which were situated in Durriabad, in Oude, the mortgage having been executed after that province had been annexed by the British Government. A temporary settlement was made with the mortgagee, but on the 29th of May 1866 a question arose on the proceedings for making a regular settlement, as to whether that settlement should be made with the mortgagee or with the mortgagor. The mortgagor by his plaint claimed that he was entitled to redeem. The matter came originally before Mr. Woodburn, the settlement officer of Durriabad. He decided in favour of the applicant, that he was entitled to the equity of redemption of the property upon payment of the sum of Rs. 2,000. That decision was given on the 23rd October 1866, and on the same day the petitioner brought the amount into court. The decision was afterwards brought before the commissioner, and on the 17th of December the officiating commissioner, Mr. Capper, affirmed the decision

of the assistant settlement officer. Subsequently an appeal was brought before the financial commissioner, Colonel Barrow, and he, on the 31st January 1867, reversed the orders of the lower courts. The decision of Colonel Barrow, who at the time when he gave his decision was the officiating financial commissioner, was brought by way of review before Mr. Davies, who then held the office of financial commissioner. The matter wasbrought before Mr. Davies in the same way that it would have been brought before Colonel Barrow if he had continued to be the officiating commissioner. On the 27th of May, Mr. Davies, having reviewed the decision of Colonel Barrow, reversed it. He says, "It " appears to the financial commissioner that " whereas the mortgage was made after the " annexation, the regulation law applies without " question. It must be well understood also by " the parties that such would be the case, and if " the mutinies had not taken place no doubt " could have arisen. The order of the court " under review is therefore reversed, and the " case is remanded in order that the terms on " which the redemption is allowed may be " declared by the court of first instance."

It appears that although the suit was originally so commenced against the Defendant Kooderutoollah Beg, his wife Miriam intervened after the decision of the assistant settlement officer, and at the time of the appeal to the commissioner. Subsequently Mr. Davies ordered the review in order that the terms on which the redemption should be allowed might be declared by the court of first instance. The assistant commissioner had already ordered that the applicant was entitled to redeem upon payment of the Rs. 2,000, and the money had been brought into court, but at that time Miriam had not intervened, although it had been stated that a transfer of the mortgage had been made to her by way of settlement.

The case went back, under the first order of Mr. Davies, to ascertain the terms on which

redemption ought to be allowed. The case then went again before the settlement officer. Miriam then brought in a claim, which is set out at page 28 of the Record. Instead of Rs. 2,000 she claimed Rs. 18,214. Mr. Chamier, the settlement officer, before whom the case was then brought, having heard it, decided that the terms decreed by the assistant settlement officer were all that could be decreed, so that he in fact, after that remand by Mr. Davies, agreed with the decree of the assistant settlement officer. That went from Mr. Chamier, the settlement officer, before Mr. Capper, the officiating commissioner, and he on the 23rd July 1867 said, "The court "observes that in the original petition of appeal "there is no mention of Gunga Sing having "attested the deed of sales."

I should have mentioned that there was a claim made by Miriam under a deed of sale purporting to have been made to her, "or of "Mr. Woodburn having refused to admit it, or "any prayer that it should be put in, examined. "The settlement officer concurs with the origi- "nal judgment of 23rd November 1866, and "submits his proceedings for the final order of "the financial commissioner. Parties have "apparently been informed, so the papers will "be forwarded with the usual docket." Then Mr. Chamier, the settlement officer, having agreed with the original decision of the assistant settlement commissioner, the case went back to Mr. Davies, and then Mr. Davies said that the settlement officer, referring to Mr. Chamier, had assumed that the case had been remanded to him under section 351 of the Civil Procedure Code, "but this court," that is himself, "ought to have "stated that it was remanded under section "354. So much for the technical point. This "court would gladly have closed these pro- "tracted litigations, but on referring to the "proceedings it is to be observed that the sale "was distinctly pleaded by Defendant,"—it is printed "Plaintiff," but it is admitted on both

sides that that is a mistake, for Defendant,— " though omitted from the issues framed by Mr. " Woodburn, an omission apparently explained " by settlement officer."

Finding then that that sale had been distinctly set up and that no issue had been taken upon it, Mr. Davies directed that certain issues should be tried under section 354, stating that he had omitted to state that fact in his original judgment remanding the case, and therefore he directed that certain issues should be tried, and that the following were to be the issues: " Is " the deed of sale valid? Is the signature of " Gunga Sing in it his?" It appeared, or it was alleged, that the sale to Miriam had got Gunga Sing's name written on the back of it, and it was taken that that signature was for the purpose of confirming the sale to Miriam. That was for the purpose of showing that Miriam's case under the deed of sale, with Gunga Sing's assent to that sale to her, stood upon a different footing from that of the original mortgagee. Then, " What is " the effect of his signature as regards any " interest he may have had at the time of herit- " ing it?" Then there was a halufnamah which had been put in, in which it was stated that the mortgagor having given two bonds for Rs. 100 each, agreed not only that the mortgagee should enjoy the usufruct by way of interest, but that in addition to that he was to have 3½ per cent. interest per mensem on the amount of the loan, so that according to that halufnamah he was to have the usufruct of the property by way of interest, and in addition to that the mortgagor was not to be allowed to redeem until he had paid at the rate of 42 per cent.

The case then went down again for the purpose of being tried upon those issues. It originally went before Mr. Harrington, who was the assistant settlement officer at that time. Mr. Harrington having considerable duties to perform in the district, the case was transferred to Captain Hastings. I am not quite certain

whether Captain Hastings took the evidence, but I rather infer that the evidence was taken before Captain Hastings. Captain Hastings was removed from the office of assistant commissioner, at least he went away to some other office, and he was succeeded by Mr. Butts.

The evidence was taken partly by Captain Hastings and partly by Mr. Butts. Upon the evidence having been taken, Mr. Butts came to the conclusion that the deed of sale and the halufnamah were not genuine documents. He says, "I do not think from the evidence that has "been adduced that the validity of these deeds "can be decreed. There is first the circum-"stances mentioned, p. 3 of these proceedings, "that while the signature of Gunga Singh is the "same on the deed of sale as on the halufnamah "written two years previously, both differ from "that on the mortgage deed written only a few "days previous to the halufnamah." So that having compared the signature upon those documents with the genuine mortgage deed, he came to the conclusion, upon the inspection of those signatures, that they differed. That was part of the grounds upon which he decided the issues against the Defendant. Then he says, "More-"over it is clear that when Gunga Buksh sued "for redemption no such plea was raised, that "Gunga Buksh had by his own action admitted "the sale." That is, that it was not set up that Gunga Buksh had put his name on the back of the sale to Miriam for the purpose of confirming it. "No such plea was raised; that Gunga "Buksh had by his own action admitted the "sale, but only that the mortgage deed had "become such." I suppose it means become absolute by efflux of time.

"But only that the mortgage deed had become "such by efflux of time, nor were the deeds "now under trial ever produced, but only the "original mortgage deed for Rs. 1,800, a receipt "for the amount, and a bond for Rs. 100 each, "but the receipt is dated two days after the

" halufnamah, and in it is made mention only of " the original mortgage money, and the court " can come to no other inference than that the " Rs. 200 was never included in the amount " but upon the lien of the village, and that they " formed only bonds for a money debt." That is his conclusion. He came to the conclusion then that only the Rs. 1,800 should be paid. I think on reference to those bonds it will appear not only that the bonds were given as a security for a money debt, but that it was stipulated that the original mortgagee was not to be redeemed until those Rs. 200 due on the two mortgages should be paid. He says, " For this it is clear " that Hossain Buksh was in this case the agent " for all parties, and by Qoodrutoollah's state- " ment," that is the Defendant's statement, " it is clear that he was well acquainted with " the facts, for he was transferred with the " village and had afterwards to manage the " defence for a claim on it. He did not mention " sale but mortgage to the Respondent, and not " only in this case but in the summary case for " the settlement. Moreover, the halufnamah is " dated the very day of the execution of one of " the bonds, and the terms on both the deeds are " not the same, for having engaged for the pay- " ment of a money debt Gunga Singh must have " a few minutes afterwards put his name to a " deed containing very different terms." That is that if he put his name to the halufnamah he not only agreed to allow the mortgagee to receive the usufruct in the way of interest, but he also agreed to pay the $3\frac{1}{2}$ per cent. in addition. " His " signature is not on the bonds but only his seal. " The court thinks in the face of so many doubt- " ful circumstances that it is impossible to " decree these deeds. Since all the transactions " have happened within annexation, it would not " be difficult to get executed apparently genuine " deeds; circumstances should prove them; " oral evidence is easily procured, but court does " not know that it has ever met with any that it

" would trust if not supported by such, for its " truthfulness may be tested by the fact that it " rarely fails to depose to facts that must for the " most part be entirely outside the reach of " memory. It must be further borne in mind " that Luchmee Narain and Leeladhur were " servants of Qurutoollah." That is, they were the servants of the mortgagee. Although the mortgage was made to them, they were his servants; and then the court decides all the three issues against the Defendant.

Well, having decided that, it was not a final decision; having made that decision he did not mean to make it as a final decision subject to appeal, but he ordered that the case should be forwarded to the financial commissioner for his final orders, so that the case did not go before the financial commissioner by way of appeal from the settlement officer, but it went to the financial commissioner upon the orders of the settlement officer that the case was to be forwarded to him for his final orders.

The case then went to the commissioner, Mr. Capper, who was the officiating commissioner, not for the purpose of deciding whether the decision of the assistant settlement officer was correct or not, but it went to him merely as the conduit for passing his judgment on to the financial commissioner. Therefore we find the order of Mr. Capper, the officiating commissioner, at page 42 of the record, " forwards to the financial commissioner with reference to his 5,363 of 31st August 1867."

The court of first instance has found, first, that the deed of sale is not valid; he expresses no opinion upon that; secondly, that the signature is not that of Ganga Sing; he expresses no opinion upon that. " The halufnamah is not valid, consequently the third issue is not tried." Then he sends that on to the financial commissioner with those findings of the assistant settlement officer.

The case then came on again before Colonel Barrow, who had succeeded Mr. Davies as the

financial commissioner, and it came before Colonel Barrow in the same way as it would have come before Mr. Davies if he had continued to be the financial commissioner. If he had retained the office which he held when he made the remand and directed these issues to be tried, he would have had to deal with the finding of those issues when they were returned to him, and so Colonel Barrow having been substituted for him, he having taken another office, he had to deal with the findings of the assistant commissioner which by the orders of the assistant commissioner were sent up to him for his final orders through the intervention of the commissioner.

Having got the case then again before him, he was not sitting as a court of appeal. He was sitting there to do what he thought right with reference to the settlement, having regard to the finding of the settlement officer. He then takes up the case, not by way of review of judgment, not by way of appeal, but in consequence of the reference which had been made to him by the assistant settlement officer. He says "The case "has been pending a very long time, and a "variety of orders have been passed upon it. "In my last,I proposed to transfer the proceedings "to the judicial commissioner, as I was under the "impression I had disposed of the appeal as com-"missioner of division. I find, however, that my "orders were given in this court," that is in the Financial Court. "I therefore proceed to dispose of" what he calls the Special Appeal. "The "original mortgagor was a Talookdar." And then he goes into the question of the law of the case, and reviews the proceedings. After stating what had been done, he says, "In May 1867 Mr. Davies "differed with this finding, but in November "1867 he again reversed his own order, and "remanded the case for trial on certain issues; "the issues were tried by Mr. Hastings." He made a mistake there, they were tried by Mr. Butts. "And the finding on them was by an "officer who had never seen the case before. I "need only observe, I discredited the Talookdar's

" denial of his signature," that is Gunga Sing's denial of the signature, "And do not find any " sufficient evidence to invalidate documents " which have so often been before the courts " without question. I do not propose, however, " to go at length into the subject of those issues, " as for reasons given in my judgments of the " 21st and 31st January 1867, I intend to " adhere to my previous strongly expressed " opinion in this case, convinced as I am of its " equity." That is determining the question on the point of law, that the Punjab rules had not been so far introduced into Oude as to be binding with reference to this mortgage. "The Talookdar " never had the remotest idea of recovering this " village, and the conditions of the transfer and the " rate of interest show that it was an ordinary " Newabee transaction, though executed just as " our rule commenced, and such mortgages as " a fact were never redeemed. The Talookdar " in 1858 summary settlement, when Talookdars " were getting back all their villages, were so " well aware of his having finally parted with " this village, that he never attempted to have it " included in his settlement although he got back " the whole of the rest of his Talooque. It would " be inequitable now to restore it on a technical " objection, such as enforcing a law of fore- " closure." He calls that a technical objection. If the law was in force it was not a technical objection; if it was not in force, it was not binding, but it was not a technical objection. "It would be " therefore inequitable now to restore it on a " technical objection, such as enforcing a law of " foreclosure, which was utterly unknown to the " parties concerned, and which had never been " formally introduced into Oudh." The question then which was very proper to be considered was, was the law of the Pungab introduced into Oudh in such a manner as to be binding on the parties when either the original mortgage was made or the sale to Miriam, if it was a genuine document was executed. "The late financial commissioner, " as shown by the proceedings, was undecided in

" this case, and as he never passed final orders, " and the case still remains on the file, it becomes " necessary for me to dispose of it; and as I am " most decidedly of opinion that the Talookdar, " Gunga Sing, *bonâ fide* sold this property, I shall " uphold the sale." He was correct in saying that Mr. Davies never passed final orders. Having sent the new issues to be tried by the assistant commissioner, it was necessary that some one, when those issues had been tried, should pass the final orders, and that was the financial commissioner. He says, " Mr. Davies not " having passed any final orders on these findings " of the settlement officer, it becomes now my " duty to dispose of that question." Then he says, " I see no reason at all why the Talookdar should " benefit by the supposition that the letter of the " 4th February 1856 introduced all our laws. " I am of opinion it did not do so until each " separate law was decided to be in force. It " must be shown, as I have said in former pro- " ceedings, that the custom of issuing rules of " foreclosure was actually introduced between " 1856 and 1858, and that in the district of " Durriabad, such rules were freely and frequently " made use of, before I give in to this technical " objection, that the form of foreclosure was not " observed. I go altogether with the weaker " side in this case, and cancelling all intermediate " orders and proceedings, I direct that the " orders of this court of the 31st January 1867 " be carried out, which are, that the Talookdar's " right and interest in the property claimed have " terminated for ever." So that in dealing with these issues he upset Mr. Davies' order, which was made upon review. It is clear he could not do that, because Mr. Davies' order was made as financial commissioner. He made that order upon a review of judgment, and that to a certain extent was binding either upon Mr. Davies or upon any other financial commissioner who succeeded him, no appeal having been preferred upon that decision to a higher authority. But he

in fact did reverse all the former orders. What he ought to have done was this, to consider what was the effect of the findings upon the case, and what was the law of the case.

It appears then, that Colonel Barrow differed from the assistant settlement officer upon the question of fact, namely, whether the halufnamah and the deed of sale purporting to have been made to Miriam were actually signed by Gunga Singh. If the deed of sale was actually signed by Gunga Singh, and he allowed a sale to be made by the original mortgagees to Miriam, upon the ground that the mortgage had become absolute, of course Gunga and his heirs were bound by that.

It appears to their Lordships that upon the question of fact the financial commissioner was wrong. He gives no very good reasons for coming to a different conclusion from the assistant commissioner upon the question of fact as to whether Gunga Singh did sign his name on the back of the sale to Miriam or whether he did actually execute that halufnamah.

Now the evidence upon this question of the execution of the halufnamah commences, I think, at page 33 of the Record. There are some witnesses who do prove that Gunga did sign that deed in their presence. Gunga Singh himself was called and swore that he did not sign that document. Then the assistant commissioner, who is in a better position than this court for judging from the comparison of signatures, because we have not the original documents here before us to compare them, came to the conclusion, comparing the genuine signature upon the mortgage with the signature of Gunga Singh upon the back of the sale to Miriam, and the signature of Gunga Singh to the halufnamah, that those signatures were different, and he acted upon the testimony of Gunga Singh, and upon the appearance of the signature he found that Gunga Sing did not sign those documents. The financial commissioner in reviewing that judg-

ment does not go into the facts, at least he scarcely goes into the facts. He treats it rather as if the case had come before him upon special appeal, and it is now the duty of this court to decide the fact in the same way as the financial commissioner in their opinion ought to have done, at least it becomes now necessary to consider the question.

Now, adverting to the evidence and adverting to the reasons which were given by the assistant commissioner, this board arrive at the conclusion that the assistant commissioner was right upon the question of fact, and that the financial commissioner was wrong in coming to an opposite conclusion. The case, therefore, stands upon the mortgage deed itself, without the sale to Miriam confirmed by Gunga Singh, and the question then simply comes to a question of law: what was the effect of the letter of the Government of India to the Chief Commissioner of Oude after the annexation declaring that the Punjaub rules were to be considered in force in Oude?

Paragraph 43 of the letter of the Secretary to the Government of India in the Foreign Department to the Chief Commissioner of Oude, says, "The administration of civil justice is the "next subject which calls for the instructions of "the Governor-General in Council, and here "again every mutual assistance is derived from "the results of experience in the Punjaub. In "1854 some 'Rules for the better administration "of Civil Justice in the Punjaub,' consisting of "two parts, the first relating to 'principles of "law,' and the second to 'procedure' now pre-"pared and submitted to the Governor-General "in Council, who, while he demurred for ob-"vious reasons to their being promulgated under "the authority of the Government of India, "still made no objection to their being cir-"culated by the chief commissioner on his own "authority, so that they might have the same "force as circular orders of the Sudder Dewanny "Adawlut. These rules now for the most part

" guide the proceedings of the judicial courts in " the Punjaub, and they have been so well fitted " to the requirements of a new province and a " simple people, so easy in their application, so " acceptable to the population no less than to " the officers themselves, and so beneficial in " their results, that the Governor-General in " Council advises that they should be made the " groundwork of the civil judicial system in " Oude." So that he advises that they were to be made the groundwork of the judicial system in Oude. He notes, "in the preparation of the " rules under notice much attention has been " given to the *lex loci*, and that it follows that " those provisions of the rules" (that is, the rules of the Punjaub) " which rest on the *lex loci* " in the Punjaub cannot with any propriety or " without risk of injurious failure be extended to " the province of Oude." But the rule in question, which declared that redemption should not be taken away until proceedings for foreclosure had been adopted, was not a matter of the *lex loci* of the Punjaub; it was a matter of general equity which had been enacted in the provinces of Bengal by the Regulation of 1793, and the Regulation of 1806. They were consolidated in effect and introduced into the Punjaub. They were not the *lex loci* of the Punjaub. Those rules which were applicable to the *lex loci* of the Punjaub were not necessary to be introduced into Oude, but this not being one of the particulars of the *lex loci* of the Punjaub it would appear that as a general rule and principle of equity to be acted upon in cases between mortgagor and mortgagee, it was one of those rules which were expressly intended to be passed and to take effect in Oude. In paragraph 46 he says "While then the Governor-General in " Council directs your attention to this collection " of principles in law as calculated to afford " material assistance, in the absence of any better " or more appropriate treatise he refrains from " requiring the strict observance of them until

" it can be ascertained how far they are ap-
" plicable to the peculiarities of the province and
" the customs of its people." I think there can be no doubt that it was the intention of the Governor General that the principle of the Punjaub rules, so far as they related to redemption and foreclosure of mortgages, should be introduced into Oude.

But then it has been contended that this law was not known to the people at the time when the mortgage in question was executed. The mortgage in question was executed after those rules had been so far introduced. It may be that the people had not notice, but then it cannot be said that nobody is bound by a law until he has notice of it. There are many occassions on which people do not actually know what the law is, and yet they are bound by it. There was no injustice in this case, because it was a mere natural equity, such an equity as the English rules of equity would prescribe in similar cases to prevent injustice being done by the absolute rules of the law. It was no more than what a court of equity would do in this country, to say that a mortgagee who mortgages shall not be debarred from his right to redeem unless a foreclosure has taken place.

This Board therefore think that there was no objection to these rules, upon the ground that it was not proved that this particular Defendant had notice of the law. If any presumption were to be made at all, surely it would be as against this officer who was one of the Tashildars of the Government. Upon the first annexation of Oude he was the Tashildar of a certain district in Durriabad, a revenue officer of Government, and one would suppose that he above all others would have had notice of the introduction of those laws. But this Board do not rely upon the mere question of whether he had or had not notice. Whether he had or had not, those laws were introduced into Oude, according to the construction of this Board, and were binding upon him as well as upon every bodyelse.

Now this is not a case in which this matter has come before the Board for the first time. The case was raised in the case of *Mulkah Do Alum Nowab Tajdar Bohoo* v. *Mirza Jehan Kudr*, in the 10th Volume of Moore's Indian Appeals, page 252. That was a case which was before this Board very recently, in which the question arose whether the rules of the Punjaub with relation to dower had been introduced into the Punjaub in such a manner as to affect dower in the case of a marriage which had taken place before those rules were introduced. In this case the mortgage was after the rules were introduced. In that case I think the marriage was before the rules were introduced. It was laid down by Lord Kingsdown, at page 277, "It was suggested that this," speaking of the introduction of the laws, "was only to apply to future contracts and "not to contracts previously made. But their "Lordships think it clear that these sections "provide for the mode in which all contracts of "this description which might come before the "courts were to be treated. Upon the whole "their Lordships are of opinion that the commis-"sioners were bound to apply the provisions of "this code to the case before them, and were at "liberty to exercise a discretion in the division "of the property in dispute between the widow "and the heirs." That was that the courts of law were bound to introduce the equity which had been laid down in those rules in cases where the circumstances required the principles of equity to be introduced. And upon the same footing it appears now to the Board that those rules wereapplicable in the present case, in which the rules of equity ought to be applied as between a mortgager and a mortgagee, in order that the mortgagee may have that benefit of redemption which the laws of this country, if the case came before them, would as a matter of equity award him.

An Act of the Governor-General of India was referred to by the learned counsel for the Appel-

lant, the Act of 1866, No. 13; but in the view which the Board have taken of this case, it is not necessary to consider whether that law would apply to the present case.

I am reminded that I ought to have observed that the case to which I have just referred, in 10th Moore's Indian Appeals, is an express authority to the effect that the letter from the Government of India of February 1856 was an introduction of the laws of the Punjaub into the province of Oude.

This Board thinking that the financial commissioner, Colonel Barrow, was wrong with regard to the matter of fact, and also wrong in his construction of the law applicable to the case, it now becomes necessary for their Lordships to say what ought to be done, because now by virtue of this appeal they are placed in the position of financial commissioner. After the finding of the assistant commissioner the matter was referred to the financial commissioner for his final orders, and it is now the duty of this Board to state what those orders ought to have been. It appears then to their Lordships that Gunga Sing was entitled to redeem this mortgage on payment of Rs. 2,000, and to have a reconveyance of the property on payment of that amount. That amount, as their Lordships understand, has already been brought into the court in Oude, and therefore the mortgagee will be entitled upon making the conveyance to take that sum of Rs. 2,000 out of court. Their Lordships will humbly recommend to Her Majesty that the mortgagor was entitled to redeem upon payment of the Rs. 2,000, that that Rs. 2,000 having been brought into court the mortgagee is entitled to take that amount out in satisfaction of his mortgage, and that he should be ordered to re-convey the premises to the mortgagor. The money having been brought into court as far back as the 23rd October 1866, it may be that that money has been invested, and that some interest may have been made upon it by the investment of

the officers of the court. If it should turn out that any interest has been made on that money which was brought into court, we think that the mortgagor is entitled to that interest, the mortgagee being entitled to take out the principal and being bound to re-convey, the mortgagor being entitled to take out of court any interest or profit which may have been made since it was brought in.

Looking at all the circumstances of the case, we think that the decision of the financial commissioner being reversed, the costs ought to follow the usual order, and that the appeal should be allowed with costs; but under all the circumstances we think the order ought only to apply to the costs of this appeal.