Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Ram Krishna Das Surrowji v. *Surfunnissa Begum and others, from the High Court of Judicature, at Fort William, in Bengal; delivered February 28th,* 1880.

Present:

SIR JAMES W. COLVILE.
SIR BARNES PEACOCK.
SIR ROBERT P. COLLIER.

IN this case the Appellant sued on a mortgage title, completed, as he alleged, by foreclosure under Reg. XVII. of 1806, sec. 8, to recover possession of the property in suit from the Respondent, who held it as purchaser at an execution sale in a suit against the mortgagor. The mortgage deed was in the English form, with a power of sale. Inasmuch as it was sought to be enforced in the mofussil, the procedure prescribed by the regulation has been applied to it as if it were a mere bye-bil-wafa, or deed of conditional sale. The suit is the ordinary suit which in such cases the mortgagee who has foreclosed is obliged to bring in order to recover possession of the mortgaged premises, with this difference only, viz., that it is brought against the purchaser under the execution sale as well as against the mortgagor, and that the former is the substantial defendant.

In such a suit the Plaintiff has to make out his title to dispossess the other party, and any objection which can be taken either to the original mortgage title or to the proceedings in foreclosure may be taken.

Q 426. 125.—3/80. Wt. 5034. E. & S.

The Respondent was one of a firm of builders who, in December 1872, sued one Surfunnissa Begum, as the daughter of Moonshi Busloor Ruheem and the representative of his estate by virtue of a certificate under Act XXVII. of 1860, for the amount claimed as due to them for work done partly in the lifetime of Busloor Ruheem and partly after his death. On the 10th of December 1872 they applied for and obtained, under sections 84 and 85 of the Civil Procedure Code, an attachment before judgment, in order to secure the property. Mr. Doyne took objection to the regularity of the issue of that attachment, complaining that there was no proof of the proceedings which are enjoined by section 81 and the subsequent sections having been adopted. But, in their Lordships' opinion, it must be taken that, as between Surfunnissa Begum and the Plaintiffs in this former suit, there was a valid and subsisting attachment at the date of the execution of the mortgage, and that this is virtually admitted by the consent order of the 23rd January 1873, which was made when part of the property which had been attached was released from the attachment on the payment of part of the Plaintiffs' demand, and it was arranged that the attachment should continue as to the particular property which is the subject of this litigation.

In these circumstances Surfunnissa Begum, on the 20th of May 1873, executed the mortgage under which the Plaintiff claims; and the principal question raised by this Appeal is whether that alienation of the property was not, by reason of the attachment, null and void as against the attaching creditors and those deriving title under them. The decree in that suit was made on the 13th of September 1873, and the proceedings in execution began on the 18th of the same month; and it has been suggested on the part

of the Appellant that, inasmuch as one of these proceedings consisted in an attachment after judgment, it must be presumed that the actual sale in execution proceeded under this subsequent attachment, and that the Respondent cannot claim the benefit of the former attachment. Upon this point, the learned judges of the High Court say :—"The "attachment never was removed, and the pro- "perty remained unaffected by this mortgage "(so far as the person at whose suit the attach- "ment issued) at the time it was attached and "sold in execution of the decree." Their Lordships must, therefore, assume that, although where property has been attached before judgment it is usual to re-attach it after judgment, that proceeding implies no abandonment of the first attachment, which gives the priority of lien. There is no trace here of any express abandonment. If this be so, and there were, as their Lordships think there was, a valid and subsisting attachment at the date of the mortgage, that alienation, unless it can be shown not to fall within the provisions of the 240th section, was null and void as against the attaching creditor and those who claim under him. Hence, the determination of this Appeal depends very much upon the point which has been ingeniously raised and argued by the learned counsel for the Appellants, and particularly by Mr. Cowell. It is said that section 240 does not govern the case, for the following reasons. That section runs thus: "After any attachment shall have been "made by actual seizure or by written order "as aforesaid, and in the case of an attachment "by written order after it shall have been duly "intimated and made known in manner afore- "said, any private alienation of the property "attached, whether by sale, gift, or otherwise," and so on, "shall be null and void." It is contended that the words "after it shall have

" been duly intimated and made known in " manner aforesaid" incorporate into the 240th the provisions of the 239th section, which says, " In the case of lands, houses, or other immoveable " property the written order shall be read aloud " at some place on or adjacent to such lands, " houses, or other property, and shall be fixed up " in some conspicuous part of the court house; " and when the property is land or any interest " in land, the written order shall also be fixed " up in the offices of the Collector of the " zillah in which the land may be situated." Their Lordships entertain some doubt whether, under the circumstances of this case, it was not rather for the Plaintiff, who was seeking to oust the Defendant from possession, to prove the non-observance of the formalities in question, rather than for the Defendant, who was in possession, to prove affirmatively that they had been observed. However that may be, they are clearly of opinion that the point raised is one which cannot be taken here upon Appeal for the first time. It is one which ought to have been taken in the Court below, and their Lordships can find no trace of its having been so taken. No such trace is to be found in the judgments, or in the evidence, or in the reasons which are stated in the Petition presented to the High Court for leave to appeal to Her Majesty in Council. On the contrary, the first of those reasons seems rather to assume the regularity of the attachment, and to suggest that it had ceased to be a valid and subsisting attachment at the time the mortgage was made. It is in these words: "That " their Lordships ought to have held that, " even if the said property was legally attached " before judgment, such attachment had ceased " to be a valid and subsisting attachment under " section 85 of the Act." In the case which has been cited from the "Weekly Reporter,"

volume 10, it is clear from the judgment of Mr. Justice Macpherson, who is one of the Judges who decided the present case, that there it had been positively proved that those proceedings which were enjoined by the Act had not taken place. Their Lordships think this is clearly an objection which ought to have been taken in the Court below, and not raised for the first time here, because it involves a question of fact; and if it had been taken before the High Court and argued, the Judges of that Court might have directed a further inquiry into the matter under the powers which its procedure gives them. Upon this record they think the judgment of the High Court was right, and will therefore humbly advise Her Majesty to affirm that judgment and to dismiss this Appeal. The costs of this Appeal will follow the result.