Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Nawab Syud Allee Shah v. *Mussamut Amanee Begum, from the High Court of Judicature, North-West Provinces of Bengal; delivered 23rd January* 1873.

Present:

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

SIR LAWRENCE PEEL.

THIS was a suit brought by the Respondent Mussamut Amanee Begum against the Nawab Syud Allee Shah, to recover a sum of Rs. 13,000 as the balance of the purchase money which she alleges was due to her upon a sale made by her to the Nawab of a decree which she had obtained in the Courts in India. Her statement is that the price which was agreed to be paid by the Nawab for the decree was Rs. 14,000; that she received Rs. 1,000 only of that amount, and that the remainder was left in the hands of the Nawab. She not only denies the payment, in fact, but she sets up an affirmative case. She says that a note under the seal of the Nawab was given to her for Rs. 13,000, which was to be paid off when the mutation of names took place. Therefore, her case is that the consideration money was not paid, but a rooqua given for it, payable when the mutation of names took place. Now, although, in a general way, it may be said that the proof of the payment of the consideration lies upon the

party who asserts the payment, their Lordships think that in this case the onus of proof was shifted and thrown upon the Respondent, in consequence of the acknowledgements she had made of the receipt of the whole purchase money. Their Lordships think it is impossible to say that all those acknowledgements are merely formal; some of them seem to have been regular admissions made in a formal way of the receipt of the money, and which were intended to be, and were acted upon.

The deed of sale bears date on the 1st of February 1868. It contains the agreement to sell the half of the decree, that half being stated to be Rs. 16,956, and it contains an acknowledgement of the payment of the whole consideration. Now it is to be observed that this acknowledgement may, after the deed has been delivered over or registered, amount to an admission of the payment; although at the time when it was written, payment obviously was not made, for it is written in with the rest of the deed, and the deed was clearly written and executed by the Respondent before the money was paid. However, that is perfectly consistent with its afterwards becoming an acknowledgement of the payment of the money, because, although the money was not paid at the time the deed was written, and whilst the deed remained in the hands of the Respondent, or of her agent, it was of course inoperative for any purpose, it may be inferred that the deed would not have been handed over until the money was paid; but undoubtedly it would seem from the observations of the subordinate judge and the judges of the High Court that it is not unusual that such deeds should be handed over, although the consideration money be not paid.

But the acknowledgement of the payment of the whole purchase money does not rest upon the deed of sale; on the contrary, there are two subsequent acknowledgements which appear to their Lordships to be entitled to greater considera-

tion and weight. The deed was registered on the 17th February, a fortnight after its date, and at the time of the registration Abdool Humeed, who was the agent of the Respondent and her son-in-law, made an admission, which is recorded, that the whole consideration money was received "in cash, in a lump." It appears that that admission is one which, if made, the Indian Registration Act of 1866 requires the registrar to record. The 65th section of that Act, which relates to the procedure on admitting the registration, enacts that "On every document "admitted to registration there should be en- "endorsed from time to time the following "particulars:" and amongst the particulars is this: "Any payment of money or delivery of "goods made in the presence of the registering "officer in reference to the execution of the "document, and any admission of receipt of "consideration made in his presence in reference "to such execution." Thus the Legislature has thought it desirable that the public register should contain a record of any payment that takes place in the presence of the registering officer, and of any admission of payment made in his presence in reference to such execution, and requires him to record it. The acknowledgement was made and recorded in pursuance of this Act, and the presumption ought to be in favour of the truth of such a public declaration, requiring cogent and convincing evidence to rebut it.

Their Lordships do not say that an admission so made is conclusive, but still it ought to afford a strong presumption of truth, and throw upon him who makes it, when he comes to impeach such an acknowledgement, the burden of satisfying the court, by strong and cogent evidence, that it was made under some circumstances of mistake or error. Nothing of the kind appears here, and one does not see why the admission should have been made in this case unless it were true, because it was not necessary for the

purpose of the registration, the Act only requiring that, if the admission be made, it shall be recorded.

But the evidence of acknowledgement does not stop there. A further act was necessary to perfect thet itle of the Appellant, namely, the mutation of names in the court which had given the decree, and accordingly on the 3rd of March a petition was presented to that court by Abdool Humeed which again contains an acknowledgement of the payment. That petition states the sale of the decree, and contains an allegation that the Mussamut had received the consideration money from the purchaser, who had become the proprietor of her half share, and upon that petition her name was expunged and that of the purchaser of the decree recorded in her place. There seemed to be again no necessity for making this acknowledgement, for the name might have been changed, for anything which appears, without such a statement, but it is made, and that so late as the 3rd of March, more than two months after the transaction.

It seems, therefore, to their Lordships that the onus was thrown upon the Respondent to prove that the money was not paid. She sets up that this rooqua was given, and that the money was to be paid when the mutation of names took place, and was not paid. Then her case is that in the following October the Nawab came to her moulvee and asked him for the note, as if he was going to pay it off, and having obtained possession of it, said "I cannot pay it until you come to Meerut;" and when the moulvee went to Meerut he refused to pay at all. That, no doubt, would be a gross fraud on the part of the Nawab, but fraud is not to be presumed, and must be proved by satisfactory evidence. The evidence is of the most meagre description. The witnesses who speak to the Nawab having thus obtained possession of the note do not say that any remonstrance or any objection was made at the time. They simply say that he so obtained the note, and then said, "come to Meerut, and it shall be paid."

The Nawab, who was examined as a witness, was asked no questions upon the subject in cross-examination. It seems to their Lordships that the judge of First Instance came to the right conclusion in finding that he could not give credit to the story of the note. Then, if credit cannot be given to that transaction, it seems to their Lordships that none can be given to the rest of the case of the Respondent. She has set up an affirmative case which is entirely untrue; and when that has been done, there is the strongest inference that the fact of payment which that affirmative case was intended to refute is a fact which, but for the attempted refutation, she knew would be established against her by the evidence upon the other side. When we come to the evidence of the fact of payment, witnesses are called on both sides, and observations may be made on all of them. They were connected with the parties on the one side or on the other, and if the case rested on their testimony, it would be very difficult to say which set of witnesses should be credited; but after the admissions which have been made, supposing their Lordships were left in doubt upon that evidence, they could not find for the Respondent.

It is not unimportant to observe that the Nawab, who is a gentleman of rank, went into the witness box on this occasion, and gave his testimony, and of course offered himself for cross-examination. Their Lordships have often said that it would be very desirable if native gentlemen would do that more frequently, because presumptions are necessarily made against them, if when parties in a court of justice, and facts are in dispute, the knowledge of which must rest with them, they will not present themselves to the court to state their own evidence and knowledge of those facts. Presumptions are necessarily made against persons who will not subject themselves to examination when a *prima facie* case is made against them, and when by their own evidence they might have answered it.

However, in this case the Nawab certainly did present himself as a witness, and he has stated in the most distinct manner that the money was paid.

Upon the evidence, therefore, as it stands at present, their Lordships think that the Respondent has entirely failed to show that the acknowledgements of her agents are untrue, and that the money was left unpaid. The subordinate judge seemed to have felt some doubt as to his having got at the truth of the transaction. He doubted whether it was a real transaction such as the documents represent; but if it were not, still the Respondent would not be entitled to recover the Rs. 13,000. If the transaction was not a real one, then of course it never could have been intended that the Rs. 13,000 should be paid, but after all that is a mere suspicion; both parties were content to treat the transaction as a real one, and courts of justice cannot act upon suspicion when both parties come before them so treating it. They must then regard the evidence which is brought forward on either side according to the rules which usually guide the courts in the consideration of issues, and the evidence brought to support them.

The judges of the High Court have scarcely gone at all into the consideration of the evidence, but, treating the evidence on both sides as doubtful, they have drawn an inference from an agreement that was subsequently made between the parties,—an inference so strongly in favour of the Respondent that they think they can rest their judgment upon it, and reverse that of the subordinate judge. Their Lordships, upon looking at that document, cannot say that in one aspect such an inference may not be made, but on the other hand, inferences may be made from it which support the case of the Appellant. No doubt it is a document which cannot altogether be accounted for. It seems that in the original deed of sale there had been a clause to the effect that if the decretal money

was not realized, the property of the Respondent should be liable to make good the consideration for the sale to the Nawab. It is stated that that clause was struck out at the execution of the deed by the moulvees of the parties from some misunderstanding, or from the fact of one having over-reached the other; but undoubtedly it appears to have been struck out by consent, for both moulvees signed the memorandum in the margin that that was so. After the registration and the mutation of names had taken place a fresh agreement was signed by the Respondent on the 1st of April, the object of which is said to have been to restore the clause which had been so struck out. Apparently in words the clause goes further, for it seems to make her property liable, not merely for the consideration money, but for the whole amount of the decree. However, in a subsequent proceeding, both parties appear to have treated this agreement as only restoring the original clause and making her property liable for the consideration money. The High Court dwelt a good deal upon the agreement as a new and increased liability that she took upon herself, and as there was no consideration for her incurring it, their inference is that she did it in order to obtain payment of this money. If the clause is literally taken it would be no doubt a very unwise agreement, because she was undertaking a much larger liability; and Rs. 13,000 was an inadequate consideration for what she was doing. But if it really was her intention in signing it to get the Rs. 13,000, the question immediately occurs why did not she obtain it? She had this document in her own hands, and if the Nawab was reluctant to pay this money, she might have said "Well, I "will give you this agreement. I want the "Rs. 13,000. I will give you this agreement if "you will pay me." But this was not done. Therefore, it seems that no strong inference can arise in her favour from the circumstance of her having made it; and, on the other side, the Appel-

lant says "If the money had been unpaid, why was "not some reference made in this agreement to the "fact that it was unpaid." From the omission to do so it is inferred on his part that the money was not really due at that time, otherwise some mention of it would have been made in this fresh document drawn up long after the time when, according to the statement of the Respondent, the money ought to have been paid.

It is also not unworthy of observation that from the time when it is said this money ought, according to the Respondent's own case, to have been paid, namely, in March, it is not pretended that any demand was made of it until October, although we must assume that the Respondent was a needy woman.

Upon the whole, therefore, their Lordships think there was not sufficient ground for disturbing the first judgment of the subordinate judge, and they will humbly advise Her Majesty to allow this Appeal, to reverse the decision of the High Court, and, in lieu thereof, to order that the appeal to the High Court be dismissed, and the judgment of the subordinate judge be affirmed, and that the costs, if any, paid by the Appellant to the Respondent in the Court below should be repaid. Their Lordships in this case say nothing about the costs of this Appeal, as they understood that the suit was prosecuted below as a pauper suit.