Judgment of the Lords of the Judicial Committee on the Appeal of Synd Mahomed Hossain Khan v. *Bhabootee Singh and others, from the Court of the Financial Commissioner of Oudh; delivered May 6th, 1874.*

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 Bhabootee Singh and two other persons, who were the mortgagors of a talook called Kullee, in Oudh, against Synd Mahomed Hossain Khan, the mortgagee, to redeem the estate. The mortgage occurred in the year 1855, and was for a period of 10 years, in consideration of an advance of Rs. 6,000. The mortgagee was to receive the usufruct of the talook during the period of 10 years, and at the expiration of that time the mortgagors were to be entitled to redeem upon payment of the principal and interest at the usual rate in India of 12 per cent. per annum. There is now no question that the mortgage was executed and that the advance was made. The defence which is set up by the mortgagee to the claim to redeem is, that under a special agreement in the mortgage deed it had been provided that the right to redemption should be lost, and that the mortgage should be turned into an absolute sale, in the event of the mortgagors breaking certain stipulations in that special agreement. The question in the

appeal is whether this defence has been established, and the mortgagees have made out to the satisfaction of their Lordships that the mortgagor has committed some breach of the agreement which has turned this mortgage into an absolute sale. A translation of the deed has been sent over in the shape of a supplemental record. The mortgage is to the effect which has just been stated, and the special terms are the following:—"We," that is, the three mortgagors, "do further declare that we engage to pay "1R. per cent. interest. We likewise bestow "and confer on and give to the mortgagee the "privilege of enjoying the entire proceeds of the "above-mentioned taluka and the perquisites "thereof." The next is an important part of the agreement—"and pending the repayment of the "mortgage money we, our heirs and successors, "will have no claim, right, dispute, or opposi-"tion in regard to the above-mentioned taluka; "but if perchance we or any of our heirs at-"tempt to put forth a claim, our action must "be held invalid and incognizable." "We "will be held responsible for any interference "for establishing that the mortgaged estate is "our property, and for any claim referred to "above, and the mortgagee shall have no "business therewith. Whenever, after the ex-"piration of the 10 years fixed as a term for "redemption of this mortgage, we propose to "redeem this estate, we will pay during the time "the crops are off the ground, in whole and "entirely in one lump sum, the mortgage "money with interest, and whatever balance "accruing in the said estate as due to the mort-"gagee and all Tuccavee advances, &c." Then comes this clause: "And if we propose to sell "the estate, we shall do so to the mortgagee "and not to anyone else, and that during the "continuance of the mortgage we will not raise

" any tumult, quarrel, or commit any violation
" of the contract in or in regard to the aforesaid
" taluka in opposition to the mortgagee."
Then comes the condition which is said to have become operative in this case, and by virtue of which the mortgage has been turned into an absolute sale—" But if perchance we
" happen within this term and until the re-
" payment of the mortgage money, &c., to
" cause any violation of the contract, or fault,
" aggression, or confusion in taluka, or if after
" the expiration of the term of redemption we
" fail to redeem the said mortgage, this very
" mortgage shall, in lieu of the mortgage money
" aforesaid, be held to be a sale; and neither we
" nor our heirs nor representatives will have any
" claim, right, or opposition, or dispute in or in
" respect of the said taluka whatsoever."

Various proceedings took place in the suit before the settlement officer and on appeal from him to the Commissioner, and again on remand, and a further hearing by the Commissioner, to ascertain the facts which were said to constitute a breach of this agreement, and to give the mortgagee a right to treat the mortgage as turned into a sale. It is not necessary to go through those proceedings; it will be sufficient to state the result.

Two grounds were mainly relied upon; one that during the troubled period of the mutiny, at a time when the mortgagee had left Oudh, the mortgagors during some settlement proceedings made a claim to have the settlement of this estate, and two petitions were put in, in which undoubtedly they not only claim to have the settlement made with them, but declare the mortgage to be one which ought not to be binding upon them; in one petition stating that it was obtained from them by the fraud of the mortgagee, in the other that it was obtained from them by duress. These statements in the petitions were not well

founded, and the settlement was ultimately made with the mortgagee. The second ground relied on was that during the mutiny the mortgagors had interfered with the taluk, and had driven the agents of the mortgagee from the estate. The settlement officer upon the remand in this suit found that, although there was no active interference, some passive aid was given by the mortgagors to those who had driven the mortgagee from that part of the country.

The Commissioner, upon the case coming back to him after the remand, considered that this last ground of forfeiture was not sustained by the evidence; but he held that the other breach of the agreement had been established, and, as a consequence, that the mortgage had been converted into a sale. He says, "It is proved "that a valid mortgage was executed for a "fair consideration for 10 years, and that in "breach of the conditions of the deed, which "were of the most stringent nature, Appellants "before the expiry of the term sued twice for the "possession of their estate, and not merely for "the record of their rights as proprietors, and "that on both these occasions they declared the "deed invalid. On the 1st of January 1859 "they all deposed that the execution of the "deed had been procured by force and trickery. "Appellants then having made a valid mortgage "of their estate for 10 years, and having on two "occasions within the term repudiated the deed "and endeavoured to regain possession, had, in "the opinion of the Court, committed a breach "of agreement or 'Budubdee,' and the deed "provides that in case of 'Budubdee' the mort-"gage shall be converted into a sale." Then he says that this condition is a very hard one, "but it cannot be considered illegal; and it "appears to the Court that it has no alternative "but to enforce it."

There was a special appeal from the Commissioner to the Financial Commissioner. In that appeal, which was upon a matter of law only, namely, whether the Commissioner had drawn the right conclusion from the facts in point of law, the Financial Commissioner considered that the presentation of the two petitions, and the statements contained in them, did not amount to a breach of any part of the condition contained in the mortgage deed. Their Lordships think that the Financial Commissioner was right in so holding. The part of the agreement which alone can be said to be violated is this; —"pending the repayment of the mortgage " money we, our heirs and successors, will have " no claim, right, dispute, or opposition in regard " to the above-mentioned taluka; but if per- " chance we or any of our heirs attempt to put " forth a claim, our action must be held invalid " and incognizable." It may be that the claims put forward in the petitions constituted a violation of that part of the agreement; but this violation by itself would not have the effect of turning the mortgage into a sale, unless it constitutes a breach which can be brought within the latter part of the clause which makes the condition. It is translated thus—"But if perchance we happen " within this term and until the repayment of " the mortgage money, &c., to cause any viola- " tion of the contract or fault, aggression, or " confusion in taluka, this very mortgage shall " be held to be a sale." As thus translated, the words, "any violation of the contract," may perhaps be read apart from the following words, "or fault, aggression, or confusion in taluka." And if this were a correct translation, it may be that the breach of the earlier part of the agreement to which I referred would have been brought within the terms "violation of the agreement" found in the condition below. But

on looking at the original words it would seem that this translation is inaccurate. The Financial Commissioner evidently considered that the original words of the deed should be seen, for he sets out the Persian words. It seems that the only word which could have been translated into "violation of the contract" is the word "Budubdee." That word in the original Persian sentence appears to follow the words which are translated "fault, aggression, or confusion," and so placing it, the clause reads, "fault, aggression, "confusion, or violation of contract in taluka." That collocation gives a very different meaning to the words, "violation of the contract," than they would have, supposing these words to precede the others. It is by no means clear from references which were made during the course of the argument to Wilson's Dictionary that the words, "violation of the contract," are an exact translation of the word "Budubdee." It may mean any misconduct or anything done wrong under the agreement. The sentence would then run thus;—"any fault, aggression, "or confusion, or anything done wrong, con- "trary to the agreement, in the taluka." Taking the words altogether, their Lordships think that they were meant to apply to some breach of the agreement in a matter connected with the taluka itself, such as cutting the wood, taking the crops, or interfering with the ryots; and so construing the clause, though the claims put forward in the petitions may be a breach of the former part of the agreement, such a breach does not fall within the scope of the condition which turns the mortgage into a sale.

Their Lordships need hardly say that in construing clauses in their nature penal the Courts have always held that the party who seeks to take advantage of the penalty must bring the

case very clearly within the scope of the clause. Their Lordships think that this has not been done in the present case; and without saying that all the reasons given for his judgment by the Financial Commissioner are correct, they think that that judgment is in itself sound and ought to be maintained.

What has been already said really disposes of the Appeal so far as any question has been brought before their Lordships, but Mr. Doyne suggested that it would be very desirable that their Lordships should give some opinion as to the terms upon which the redemption ought to take place. Their Lordships felt that they were scarcely in a position to do this, but suggested to the learned counsel, in order to prevent further litigation, whether they could not agree as to what those terms ought to be. Their Lordships understand that on both sides it is now agreed that the proper terms of redemption are, that up to the time when the principal sum was deposited in Court, the mortgagee should be entitled to interest as provided by the deed, and that he should not be subject to an account for the rents and profits he has received, but that from the time of the deposit interest should cease, and the mortgagors should be entitled to the rents and profits, and to an account of such as have been received by the mortgagee.

Their Lordships therefore will humbly advise Her Majesty to affirm the decree of the Financial Commissioner; with a declaration that the redemption ought to be allowed upon the terms which have been just mentioned. The Appellant having failed upon the main question must pay the costs of this Appeal.