Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Rajah Kishen Dutt Ran Panday v. *Narendur Bahadoor Singh, from the Court of the Judicial Commissioner of Oude; delivered 3rd December* 1875.

Present:

SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.

THIS was a suit for redemption of a mortgage made in the year 1840. The sole question between the Plaintiff and Defendant was whether or not the term for the redemption of this mortgage had expired in the year 1856. The statutes bearing on the question are the following:—First, the Oude—Limitation of Suits Act. Sections two and three are to this effect,—"When a mortgagee shall under or by virtue of a mortgage executed before the said day," that is February 1844, "have obtained possession of any land comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring a suit in any civil court or any revenue court in the said province to redeem the mortgage of such land," and so on—"provided that any suit for the redemption of land which may have been rejected or dismissed upon the ground that the suit was barred under some rule of limitation in force or supposed to be in force in the said province may be revived," and so on—And thirdly, "nothing herein contained shall be taken to bar a suit for redemption in any case where by the instrument of mortgage a term was fixed within

" which the property comprised therein might " be redeemed, and such term had not expired " before 13th February 1856, provided that if " any such term had expired before that day, " the suit shall be barred, whatever may have " been the date on which the instrument was " executed." Then in 1869 another Act was passed, the object of which was to define the rights of talookdars and others to certain estates in Oude. The second part of that confirms to the talookdars certain rights. It says,—" Every " taluqdar on whom a summary settlement of " the Government Revenue was made between " the 1st day of April 1858 and the 10th October " 1859, or to whom before the passing of this " Act, and subsequently to the first day of April " 1858 the talukdary sannad has been granted, " shall be deemed to have thereby acquired a " permanent, heritable, and transferable right in " the estate," and so on. Then section six is to this effect:—" Nothing in sections three, four, " and five, or in the said orders, or in any sannad, " shall be deemed to bar a suit for redemption " where the instrument of mortgage was executed " on or after 13th February 1844, and fixed no " term within which the property comprised " therein might be redeemed;" which manifestly does not apply to this case,—" and (*b.*) " When the instrument of mortgage fixed a " term within which the property comprised " therein might be redeemed, and such term did " not expire before the 13th February 1856." Such was the issue between the parties, and such are the statutes bearing upon that issue.

The case was first tried before the Extra Assistant Commissioner, who believed the case of the Plaintiff, who called several witnesses for the purpose of proving that the term of redemption in the mortgage was the term of 20 years, which would not have expired at the date in question.

Several witnesses were called for the Defendant, who deposed that the term expired in 10 years. The Extra Assistant Commissioner, who had the advantage of hearing and seeing the witnesses, believed the witnesses for the Plaintiff and disbelieved those for the Defendant, and gave judgment for the Plaintiff. The case was brought on appeal before the Commissioner, who reversed that decision, taking a somewhat opposite view of the case; on the whole, being more disposed to believe the case of the Defendant, though he did not believe the whole of it, than the case of the Plaintiff. There was a subsequent appeal to the Officiating Judicial Commissioner. Whether or not it was treated by him as a general appeal does not very distinctly appear, but he appears to have decided mainly, if not entirely, upon the ground that according to his view there was a presumption of law in favour of the Plaintiff, and that the burden of proof lay, not upon the Plaintiff to prove that the term did not expire before the 13th February 1856, but upon the Defendant to prove that it did; and upon this assumption he overruled the judgment of the second Court, and affirmed that of the first.

Their Lordships are not prepared to concur with the Judicial Commissioner in the view that he expressed, that the presumption of law is such as he has described it. It appears to their Lordships that in such a case as the present it lies upon the Plaintiff to substantiate his case by some evidence, by some *primâ facie* evidence at least. But in this, as in most other cases, when the *quantum* of evidence required from either party is to be considered, regard must be had to the opportunities which each party may naturally be supposed to have of giving evidence; and although the burden of proof *primâ facie* in this case in their Lordships view is upon the

Plaintiffs, still they think the consideration should not be omitted that the Defendant would naturally have the mortgage, and that it would be *primâ facie*, at all events, more in his power to give accurate evidence of its contents than in that of the Plaintiff. It is not a case in which two deeds such as a lease and a counterpart are executed, the Plaintiff keeping one and the Defendant the other, but it is a case in which it would appear that there is only one document, and that that would be, and was in this case, in the custody of the Defendant. The Plaintiff, by the hypothesis, would not have seen the document or probably have had access to it from the time of its execution, which in this case was the year 1840, whereas the Defendant would be assumed to have it and to be able to produce it, or, if he could not produce it, to show why he could not, and to give some evidence of its contents if it were lost.

Now, applying this view of the law to the present case, their Lordships have to see whether the Plaintiff in their view did give such *primâ facie* evidence as shifted the burden of proof on the Defendant. Although it may be that the evidence of neither side is altogether satisfactory, nevertheless their Lordships, after giving their best consideration to the case, are of opinion that the Plaintiff did give some such *primâ facie* evidence. He was himself examined. He called seven or eight witnesses who deposed to the contents of the instrument, to its containing the term which he contended for, and further, to the admission of the Defendant or of his predecessors of the existence of some such term, and the Extra Assistant Commissioner believed those witnesses, having, as was before observed, the opportunity of seeing them and observing their demeanour.

Again, it appears to their Lordships that there

was some confirmation of the case of the Plaintiff by that of the Defendant. The Defendant did not produce this document; he indeed gave evidence that it had been filed in some proceedings in the Settlement Court just before the outbreak of the mutiny, and had been lost in the mutiny, but he neither gave any evidence himself nor did he give any other legitimate evidence of its contents. It is true that a copy was put in by the Defendant, which purported to be a copy of the document in question. That is to be found in the record, and that describes the instrument as a deed of conditional sale. It contains these terms :—"But should I fail to "repay the mortgage money at the time entered "in this bond it will become a deed of sale, "and the Panday will be entitled to hold per-"manent possession like me, without fear or "annoyance," and so on. But this document put in was not proved in any way. No person was called who made a copy or who made the document; no person was called into whose hands this document was put, and who was able to say, "This, according to the best of my recollection, "represents the contents of the lost mortgage "deed." The case was wholly bare of proof, although that proof might have been given. At the same time it is not immaterial, as against the Defendant, to observe that the case which he set up was that of a mortgage by conditional sale, which would have become absolute in the year 1850.

It appears, further, that on the part of the Defendant, there was an attempt to show that he had sent in a return to the Government in pursuance of a requisition from them with respect to certain talooks, and that be described the villages in question in this suit as having been mortgaged for a term of years to expire in 1850, that is, that they were mortgaged by a mortgage

redeemable at the end of 10 years. But the paper containing this return was said to have been abstracted from the records of the Government office, and some attempt was made to give secondary evidence of it. But, again, their Lordships have to observe that what was put in with this purpose is described as an "unattested statement," and in this unattested statement, wholly unproved, no doubt there is what purports to be a copy of a document wherein the talook was described as having been mortgaged, and by a mortgage redeemable at the end of 10 years. It is to be observed, however, that in another return which the Defendant gives about the same time no mention is made of these villages. And there is a statement in the Government record somewhere about this time to the effect that the Defendant had not given the particulars of the mortgage, or described the terms or conditions of redemption.

Their Lordships observe that the Commissioner in giving his judgment reversing the judgment of the Extra Assistant Commissioner, makes this observation :—"Prior to "the grant of the sunuds a general inquiry "was ordered with respect to villages mort- "gaged to taluqdars, and in accordance with "the Deputy Commissioner's order, two lists "of Defendant's mortgaged villages were filed, "one by Defendant's agent, and the other "attested by himself; the original of the "former has been abstracted from the file, "but in an attested copy"—these are the words of the judgment—"filed by Defendant, "the term of the mortgage is entered as 10 "years." Their Lordships fail to perceive any evidence whatever of this copy having been attested, and they cannot help thinking that if the Judge's view was founded, as it would

appear partly to have been, on the impression that this supposed copy was an attested one, so far that judgment was wrong, and cannot be supported. But this appears, that in the settlement proceedings of 1857 the Defendant did describe himself as a mortgagee, and their Lordships have come to the conclusion that he did not then assert—at all events it is not shown that he asserted—that the mortgage was subject to redemption in 10 years or any particular time.

That being so, their Lordships are of opinion that there is some force in the remarks of the Extra Assistant Commissioner, which are to this effect. Referring to certain settlement proceedings in 1857, he says:—"The proceeding "recorded in appeal dated 4th April 1857, filed "by the Defendant, shows that in appeal the "Defendant countermanded his statement of "the purchase of the estate, and simply called "himself a mortgagee;"—it appears he had put forward some statement with respect to the purchase of the estate—"and there is an order "conveyed in the proceeding that this fact "should be inquired into. He now says that "the transaction was a conditional sale, the "term of which expired towards the close of "1257 Fuslee. Had the latter's statement been "correct, he would, under the terms of the "deed, have ranked as a purchaser and "proprietor in 1258 Fuslee, and would "not have called himself a mortgagee in "1857." Their Lordships therefore think that the evidence of the Plaintiff is to some extent corroborated by an admission of the Defendant, to the effect that there was in existence a mortgage in 1857. They therefore think that the Plaintiff gave some evidence calling upon the Defendant for an answer. It may be that the evidence was not very strong, and that it would

have been rebutted by evidence of any force on the other side. But their Lordships are of opinion that the evidence of the Defendant, the main portions of which appear to have been disbelieved by all three Courts, and some documents connected with which have been treated by all three Courts as spurious, contains no answer to the case of the Plaintiff, which must therefore prevail.

For these reasons their Lordships will humbly advise Her Majesty to confirm the two judgments which have been given in favour of the Plaintiff.