Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Radhanath Doss and others v. *Gisborne and Co., from the High Court of Judicature at Fort William, in Bengal; delivered* 19*th January*, 1871.

Present:—

LORD CAIRNS.
SIR JAMES W. COLVILE.
SIR JOSEPH NAPIER.

SIR LAWRENCE PEEL.

THE claim in this case, which led to the decision which is under Appeal, was a claim in substance for the recovery of property at present in the possession of the Respondents, Messrs. Gisborne and Company. The recovery of that property was sought by the Appellants on the footing that it had been made the subject of a conditional sale in the year 1828; and that they, the Appellants, had now the right to redeem the property,—the amount for which the property had been conditionally sold or mortgaged, having been paid off by the receipt of profits. This mortgage, made in the year 1828, was made by a person of the name of Kunhya Lall as Mortgagor, to one Russick Lall as Mortgagee. The Appellants say that Kunhya Lall was the member of a joint family, of a family joint as regards this property, and that they, the Appellants, were the other members of that joint family, and that the Mortgage was made either with their previous approbation, or their subsequent assent. Russick Lall, beyond doubt, was the native agent of the firm of Shawe and Hawes, and the Mortgage, beyond doubt, was made to Russick Lall, because as the law stood at that time Englishmen could not have held immovable property in

this part of India in their own name. That law having subsequently been altered, Russick Lall assigned over to his principals, Shawe and Hawes, the property which he thus held for them in Mortgage. Subsequently Shawe relinquished his share to Hawes, and finally by a deed executed in the year 1841, the details of which will afterwards have to be referred to, Hawes passed over or conveyed the property to the present Respondents, Messrs. Gisborne and Company.

Now the first question which arises in this state of things, is as to the right of the Plaintiffs to redeem this property? Their possession as members of a joint family is denied by the Respondents, who contend that there is no evidence that the family was joint, or that this property belonged originally to any person other than Kunhya Lall, the Mortgagee. Upon that question, Mr. Madocks, the District Judge before whom the case first came, has delivered a very elaborate and careful Judgment, in which he has come to the conclusion that the joint ownership of the property was made out in favour of the Appellants, and, although it was not necessary for the High Court of Calcutta, in the view they took of another part of the case, absolutely to decide this question, they do not appear to have disapproved of the conclusion on this point, at which Mr. Madocks had arrived. The evidence having been so fully and satisfactorily commented upon by Mr. Madocks, their Lordships do not think it necessary to say more than this, that looking to the form of the Government settlement of this property, looking to the history of the family, which is in evidence, looking to the accounts going down to the year before the date of the mortgage showing the dealings of the family between themselves, looking to the ikranamah executed between Kunhya Lall and the other members of the family almost contemporaneously with the mortgage of 1828, looking to the dealings with the Mouzah Ugda which was excepted out of the mortgage of 1828, although forming part of the whole estate, their Lordships are satisfied that this property was the joint property of the family and that Kunhya Lall was mortgaging it with the assent of and as the manager for the whole family.

Their Lordships would add to the general description of the evidence which has satisfied them of this, a reference also to the statements which were made very shortly after the conveyance of 1841 to Messrs. Gisborne and Company. In 1843, a suit was brought by the present Appellants, or some of them, against Messrs. Gisborne and Company, making parties also Russick Lall and Kunhya Lall. The Plaintiffs in that suit were nonsuited upon technical grounds, but in that suit the Plaintiffs had stated their title substantially in the same way that it is now stated, and in the answers to that suit their Lordships find that Mr. Barnes, a member of the firm of Gisborne and Company, and the other members of the firm of Gisborne and Company, stated that the Plaintiff's suit was totally false, and that the reasons of the falsity of the Plaintiff's suit were stated in the answer of Russick Lall, another Defendant, and that that answer was sufficient. They, therefore, referred their case to the answer of Russick Lall, and were content to adopt it as the statement of their case. Now Russick Lall, as has been said, was the native agent of this indigo factory at the time of the mortgage in 1828. He must have known perfectly well everything connected with the title and the circumstances of the family, one member of which was making a mortgage to him; and what Russick Lall, having these means of peculiar knowledge, said in the year 1843, was this, page 209, "Oh! Ad-"minister of Justice, let your presence consider the "fact, that although the Plaintiffs have no right and "interest in the said mouzahs, yet even it is clearly "evident from the contents of the former plaint "that the Plaintiffs themselves have admitted that "the said Kunhya Lal Doss, by the advice and with "the concurrence of the Plaintiffs, sold the pro-"perty in dispute to me,"—that of course means mortgage—"for the sum of rupees 17,011 with "the object of liquidating the money due to the "said gentleman from Kunhya Lal Doss, under "the deed of mortgage, dated the 25th May, "1826." Russick Lall was, therefore, content to affirm at this time, and Messrs. Gisborne and Company were content to adopt his statement, that Kunhya Lall had mortgaged the property by the

advice and with the concurrence of the Plaintiffs, —advice and concurrence which would have been utterly useless and unmeaning unless the Plaintiffs had been joint owners of the property.

Their Lordships, therefore, on this part of the case, have no hesitation in accepting the conclusion of the Court of First Instance, and they have the satisfaction of thinking that in that respect they are not differing from the opinion of the High Court of Calcutta, although it was not absolutely necessary for that Court to decide the question.

The next objection which was taken to the title of the Plaintiffs to redeem is this. It is said that the conditional sale having been made in the year 1828, and the condition of that sale being for liquidation of the amount of mortgage-money in eleven years,—a year afterwards, in November, 1829, the ikranamah which contained the condition making the transaction a mortgage was returned by Kunhya Lall and Russick Lall, with an endorsement, which is set out at page 235 of the Record. The endorsement is partly defaced, but it runs thus:—"(Defaced) the said mehal, ac- "cording to the conditions of the ikrar (defaced), "the Government revenue, and interest and the "consideration being (defaced); therefore I have "returned this ikrarnamah to Russick Lal Doss, the "purchaser. The mouzahs stated in the ikrana- "mah, I have absolutely sold. Dated the 27th "Kartick, 1237. Kunhya Lal Doss, Zemindar." It is said that the meaning of this endorsement, which was partly defaced, is, that it amounted to an assertion that the profits of the Zemindary were insufficient to pay the principal and interest and the Government revenue, and that, therefore, the ikranamah was returned by Kunhya Lall to Russick Lall.

Now, without going further, their Lordships are compelled to say that this is a transaction which, upon the face of it, is almost incredible. The property was mortgaged by a usufructuary mortgage, to run over eleven years. The mortgagee was bound, on the face of the deed, to pay the Government duty. The mortgage created no personal liability with regard to the payment of the debt. If the debt should be paid in the course of eleven

years, the land would be free, if not paid, at all events the mortgagor would be in no worse condition than he was at the end of the first year. There is no consideration moving to the mortgagor for the release of the equity of redemption. It is said that the district in which the property was situate was a district which, as regards its produce, was liable to the uncertainties of dry seasons; but, although that might lead to a diminution of the produce in one year, on the other hand, the absence of drought and the presence of moisture in another season might lead to a more plentiful crop, and the uncertainty is one which might have a double bearing as regards the ultimate result of the conditional sale.

But it is further to be observed, that this allegation of the return of the ikranamah, and the production of it with the endorsement, was never heard of until about two years subsequently, when one Bholanath, having sued Kunhya Lall upon a debt of his own due to Bholanath, was taking proceedings to sell this property, or to sell the equity of redemption of it, as being the property of Kunhya Lall. Then it was that the return of the ikranamah was set up, and that this endorsement was produced. The moment that defence was set up it was challenged,—challenged not merely by Bholanath, but by the other members of the joint family,—and steps were taken to dispute it. It is true that, from circumstances connected with the attempted sale of Bholanath going off, the question was not ultimately decided at that time, which is very much to be regretted. The primary Judge decided against the transaction, —decided that it was not a real transaction, but a fraudulent one to defeat the creditor. There was an appeal to the appellate tribunal. The appellate tribunal thought that an investigation of the circumstances should take place, and sent it back for that purpose. The biddings at the sale not having been sufficient to lead to a sale taking place, the Primary Judge thought that it was unnecessary to pursue that investigation. But both at that time, and at every time since when the return of the ikranamah has been set up, the transaction has been challenged as an unreal and fictitious transaction.

Their Lordships are of opinion that it is an incredible transaction, on the face of it, and they cannot arrive at any other conclusion than that it was a transaction between Russick Lall and Kunhya Lall for the purpose of defeating the proceedings of the creditor Bholanath.

Their Lordships must add this further observation: the mortgage or conditional sale of 1828 is clear and undisputed. It lies upon those who desire to set up any title putting an end to the mortgage to establish their case by evidence which is clear and satisfactory. That onus certainly is not discharged in this case, and their Lordships therefore are of opinion that on this point also the title of the Appellants is made out, and that unless on some other ground yet to be considered they are precluded from redeeming, they are not precluded by the pretended return of the ikranamah. Upon this point also their Lordships, in substance, agree with the view of all the Judges in the Court in India.

We come now to the remaining part of the case, which is this: Assuming the title of the Plaintiffs to redeem to be made out, the Respondents, Messrs. Gisborne and Company, claim the benefit of the Statutes of Limitation, and assert that the time during which the title of the Plaintiffs to redeem could be put in force has elapsed. In the first place, they say that the Appellants are barred by the 13th section of the law of limitations, that is to say, the section which speaks of suits for enforcing the right to share in any property moveable or immoveable, on the ground that it is joint family property. It is not necessary to repeat that section at length, for their Lordships are of opinion that it is a section which deals with suits between one or some member or members of the joint family and some other member of the joint family, complaining of what we should term in this country an ouster of some members by others, or of a failure by the member in occupation to account for profits, or to pay maintenance where it is due. The present case is a case by no means of that description. In the present case the foundation of the title of the Plaintiffs is a mortgage, which, as has been already said, was in its inception, in substance, the mortgage of the whole of the

joint family. The circumstance that it is not the whole of the members of the joint family, but only some who now come to recover their share of the property, does not make this a dispute in any way between members of the joint family as to the question of whether the property is joint or not. It is merely a question of the title of the Plaintiffs to redeem, and the question of joint or not joint property has only to be decided incidentally for the purpose of establishing that title as against strangers.

The Respondents then allege that they are entitled to the benefit of the 5th section of the same law, "In suits for the recovery from the purchaser, "or any person claiming under him, of any pro- "perty purchased *bonâ fide*, and for valuable con- "sideration, from a trustee, depository, pawnee, or "mortgagee, the cause of action shall be deemed "to have arisen at the date of the purchase." Now questions of very considerable importance have been raised and argued as to the meaning of this section. Their Lordships desire to say, that the provision of the section is founded, no doubt, upon considerations of high policy,—of a policy which their Lordships do not at all doubt is one which is extremely beneficial to India, having regard to the circumstances of that country. But their Lordships cannot fail to observe that the provisions of the section are of an extremely stringent kind. They take away and cut down the title, which *ex hypothesi* is a good title of a *cestui que trust*, or of a person who has deposited, pawned, or mortgaged property; they cut down that title as regards the number of years that the person would have had a right to assert it: from a very great length of time, sixty years, they cut it down to twelve years. It is, therefore, only proper that any person claiming the benefit of this section should clearly and distinctly show that he fills the position of the person contemplated by this section, as a person who ought to be protected. Their Lordships think that in order to claim the benefit of this section a Defendant must show three things:—first, that he is a purchaser according to the proper meaning of that term; second, that he is a purchaser *bonâ fide*; and third, that he is a purchaser for valuable consideration.

Now what is the meaning of the term "pur-

chaser" in this section? It cannot be a person who purchases a mortgage as a mortgage, because that would be merely equivalent to an assignment of a mortgage; it would be the case of a person taking a mortgage with a clear and distinct understanding that it was nothing more than a mortgage. It, therefore, must mean, in their Lordships' opinion, some person who purchases that which *de facto* is a mortgage upon a representation made to him, and in the full belief that it is not a mortgage, but an absolute title.

Now, it is important in this case to consider how it is that in pleading in the first instance the transaction which here has taken place, the Respondents have put their title. In page 14 of the Record, in the sixth head of their statement, they express themselves thus:—"The Defendants, as "purchasers for a just consideration, have all along "held adverse possession of the disputed property "for more than 12 years without notice of any "legal right as copartners, *i.e.* if any right had "existed pertaining to the Plaintiffs as well as to "those persons from whom the Defendants have "acquired their right. Thus, in such a case, also "the Plaintiffs' claim is, by reason of limitation, "inadmissible." There is no averment there of any fact; it is a statement that as purchasers they are entitled to the benefit of the statute, but when they come to their averment of facts, their statement is this: the second head is, "On the 16th "May, 1838 A.D., Russick Lal Doss sold the said "mouzahs to Messrs. William Shawe and William "Hawes for Rs. 17,011, and caused the names of "the Messrs. William Shawe and William Hawes "to be entered in the Government records, on the "excision of his own name, and Mr. William "Shawe sold his share to Mr. William Hawes, "who after that sold it to Messrs. Gisborne and "Co. and Mr. C. H. Barnes, and Mr. C. H. Barnes "sold his 4 annas share to Messrs. Gisborne and "Co., and mutation of names took place." This is a statement which puts the title of Gisborne and Company exactly in the same position as the title of Shawe and Hawes. It alleges that Russick Lal sold to Shawe and Hawes, that Shawe and Hawes sold to Hawes, and then Hawes sold to Gisborne and Company. It draws no distinction

between the various transfers of the property, but puts them all exactly on the same footing. Now, an allegation or a plea of a purchase for value is perfectly well known and understood, and the averments in that plea are not matters of technicality,—they are matters of substance. In pleading a purchase for valuable consideration in this country, the very first averment in the plea is that the person selling either was seised, or alleged that he was seised, for an absolute title, and then the plea goes on to say that being so seised, or alleging that he was so seised, he contracted to sell, and did sell and convey that absolute title asserting it to be such to the purchaser, who paid his money for that which was thus sold. There is not a fragment of an averment in the whole of this pleading of that kind. The pleading is perfectly consistent with the transaction having been nothing more than the purchase, that is to say, the transfer of that which was a conditional title, or a title by way of mortgage.

We turn then from the pleading to see what is the evidence of the transaction in the case. Now, there is no evidence at all of any negotiation for this purchase, of any specification, or schedule, or inventory of what the property was that was to be included in the general purchase of the factory which was taking place. There is no evidence of any allegation or statement on the part of the vendors which would lead Messrs. Gisborne and Company to believe that this was an absolute title which they held to the property in question. The only evidence that there was a purchaser at all is the production of the purchase deed to which reference is now made.

The purchase deed is at page 296. It contains a recital of the manner in which the vendor, the first party to the deed, Hawes, had had conveyed to him the various factories which were to be handed over to Gisborne and Company. It then contains this recital of the contract between Hawes and Gisborne and Company, page 297:—

"And whereas the said John Dougal, George "Dougal, Charles Jones Richards, Matthew Gis- "borne, and John Richards have contracted and "agreed with the said William Hawes for the ab- "solute purchase of the said several indigo fac-

"tories or works and premises hereinafter de-
"scribed, at and for the price or sum of Company's
"Rs. 210,000, and the same are intended to be
"conveyed and assured unto the said John Dougal,
"George Dougal, Charles Jones Richards, Mat-
"thew Gisborne, and John Richards, and their
"heirs in the manner hereinafter expressed."
It is a contract for the absolute purchase, but the absolute purchase of those premises which are afterwards described in this deed and intended to be conveyed by it. When we turn to what these premises are, we find first an enumeration of the Indigo Factory; then this addition, "All lands
"cultivated and uncultivated to the said several
"and respective Indigo Factories or sets of works
"respectively belonging or in any wise appertain-
"ing;" and further, on page 299, "And all the
"estate, right, title, interest, use, trust, property, pos-
"session, possibility, claim, and demand whatsoever,
"both at law and in equity of them the said Wil-
"liam Hawes, Robert Molloy, and James Cullen
"and each of them in, to, out of, or upon the said
"several and respective Indigo Factories or sets
"of works, lands, hereditaments, chattels, and pre-
"mises, and every or any part or parcel thereof."
Now assume that there was in this commercial house, as a part of their property in trade, a mortgage securing to them the debt which has been mentioned; assume that that was perfectly well known to every person connected with them, and to the purchasers. No more fit or apt deed could have been devised than this for the purpose of conveying a title to that mortgage as the rightful title upon which the property was to be held by the purchasers. The deed, in other words, is perfectly consistent with it not having been the intention of any person to this transaction to do more than to hand over this along with all the other property which the commercial firm possessed, according to whatever might be the right and true title upon which each portion of the property was held. Their Lordships, therefore, can find in this deed no evidence of an averment on the part of the vendor or of any belief on the part of the purchaser that the property of Moheeanwan was a property which the vendors claimed to hold by what we should call in this country a fee-simple title.

Under these circumstances, their Lordships think that the first requisite in the law of limitation is not made out, and that the Respondents here are unable to show, or at all events have not shown, that they are purchasers of this specific property as an absolute property in contradistinction to a mortgage property upon a contract by the vendor to convey the property to them as an absolute property.

This would be sufficient to decide the case; for, of course, unless the whole of the three requisites exist, the benefit of the statute is not obtained. Their Lordships, however, think it right to go further, and to say that they are not satisfied that even if this objection did not exist, Messrs. Gisborne and Co. are able to show that they are *bonâ fide* purchasers. It is unnecessary to impute, and their Lordships would not desire to impute, to Messrs. Gisborne and Co. any dishonesty whatever in the transaction, or any moral obliquity in their dealings in this matter. But what their Lordships have to observe is this: Messrs. Gisborne and Co. must be regarded as dealing in this case upon one of two footings. Either they were aware in the year 1841, when they took this conveyance, of all that had passed between this native family and the predecessors in title of Gisborne and Co. by way of allegation and averment, and claim upon the one side and upon the other, that is to say, they must either have been aware of all the contents of the papers connected with the litigation which had taken place in previous years, or if not aware of the contents of those papers, they must at all events have been aware of the original conditional sale of 1828, and of the alleged return of the ikranamah with its endorsement. It has not been very clear to their Lordships upon which of these two footings the Counsel for the Respondents would desire Messrs. Gisborne and Co. to be dealt with. At one time it rather appeared that their Counsel would wish it to be considered that they knew nothing, or should be taken as knowing nothing but the conditional sale and the alleged return of the ikranamah. At another time their Counsel appeared desirous to refer to certain portions at all events of the proceedings which had taken place between the conditional sale and the

year 1841. But assume that they were not aware of the details of that litigation; assume that Messrs. Gisborne and Co. knew nothing but what has been called the bare title to the property, the conditional sale, the alleged endorsement upon and return of the ikranamah, and the transfer subsequently from Russick Lall to Hawes and Shawe. Their Lordships are of opinion that looking to the clear and undisputed mortgage in the first instance —looking to the transparent unreality of the transaction connected with the alleged return of the ikranamah, the mere production of the endorsement upon that ikranamah as the description of the cause for its return was amply sufficient to put any persons in the position of Messrs. Gisborne and Co. upon an inquiry and consideration as to whether that transaction could be a real transaction, or whether it could be a transaction which could form part of the title of a purchaser. On the other hand, if, as seems to have been rather the opinion of the learned Judges below, and certainly seems much more consistent with all the facts of the case,—if it be taken that Messrs. Gisborne and Co. were perfectly aware of all the accounts in the factory and of all the details of the litigation, and of all the claims that had been made before with regard to this property, then their Lordships consider that their attention was pointedly and distinctly called to the infirmity of title in this case, and that with their attention so called they could not be considered to be *bonâ fide* purchasers.

Therefore upon both grounds, both upon the ground that they are not purchasers within the meaning of the law, and upon the ground that if they were purchasers they are not, in the sense in which the words are used in the law, *bonâ fide* purchasers, their Lordships think that Messrs. Gisborne and Company are not entitled to the benefit of this statute.

It would perhaps be right that their Lordships should advert also to an argument which was adduced, although not very warmly pressed, that under the 10th section, Messrs. Gisborne and Company might find protection. The 10th section says, "In "suits in which the cause of action is founded on a "fraud, the cause of action shall be deemed to have

"first arisen at the time at which such fraud shall "have been first known by the party wronged." This, in their Lordships' opinion, is not an action founded upon fraud in that sense. It is an action upon title to recover the possession of property to which the Plaintiffs are entitled, which clearly they must recover, unless there be some specific protection given to those now in possession of it by virtue of the other sections of the statute to which reference has been made.

This being the opinion at which their Lordships have arrived, they will humbly recommend to Her Majesty that the decree of the High Court of Calcutta should be reversed, and that in place of it an order should be made dismissing the appeal to the High Court and dismissing it with costs. That would set up again the decree of Mr. Madocks, the Zillah Judge. Their Lordships are content to allow that decree to stand, and are unwilling to enter upon any criticism of the precise form of it, because no argument has been adduced before their Lordships upon the footing that, supposing the decree in substance to be right, any modification should be made of it in detail. Their Lordships, therefore, will leave that decree to be the decree in the case, and will only further add that the Appellants should also have the costs of this Appeal.