HUNOOMANPERSAUD PANDEY,* *Appellant*,
and
MUSSUMAT BABOOEE MUNRAJ KOONWEREE, ... *Respondent*.

By their very constitution, the Court in India are to decide according to equity and good conscience. The substance and merits of the case are to be kept constantly in view. The substance and not the mere literal wording of the issues is to be regarded; and if, by inadvertence, or other cause, the recorded issues do not enable the Court to try the whole case on the merits, an opportunity should be afforded by amendment, and, if need be, by adjournment, for the decision of the real points in dispute.

Deeds and contracts of the people of India ought to be liberally construed. The form of expression, the literal sense, is not to be so much regarded as the real meaning of the parties which the transaction discloses.

The terms of "proprietor" and of "heir," when they occur, whether in deeds or pleadings, or documentary proofs, may, indeed, by a mere adherence to the letter, be construed to raise the conclusion of an assumption of ownership, in the sense of beneficial enjoyment derogatory to the rights of the heir; but they ought not to be so construed unless they were so intended.

Where, therefore, a Ranee, without claiming any beneficial interest in the property of her minor son, described herself as "proprietor" or "heir," and the Collector remarking upon the description as improper continued her name as "*Sarbarakar*":—*Held* that she must be viewed as a Manager, inaccurately and erroneously described as "proprietor" or "heir."

Under the Hindoo law, the right of a *bona fide* incumbrancer who has taken from a *de facto* Manager a charge on lands created honestly, for the purpose of saving the estate, or for the benefit of the estate, is not (provided the circumstances would support the charge had it emanated from a *de facto* and *de jure* Manager) affected by the want of union of the *de facto*, with the *de jure* title.

The question, whether a *prima facie* case of a subsisting charge by a deed is made out, involves the consideration of two points; first, the actual factum of the deed; and next, the consideration for it.

The question on whom does the *onus* of proof lie in such a suit as that of a mortgagee claiming under a mortgage executed by the Manager of an estate during the infancy of the heir, is one not capable of a general and inflexible answer. The presumption proper to be made will vary with circumstances, and must be regulated by and dependent on them. The presumption in the case where the mortgagee himself with whom the transaction took place, is setting up a charge in his favour made by one whose title to alienate he necessarily knew to be limited and qualified; remarked upon.

It is to be observed that the representations by the Manager accompanying the loan as part of the *res gestæ*, and as the contemporaneous declarations of an agent, though not actually selected by the principal, have been held to be evidence against the heir; and such *prima facie* proof has been generally and reasonably and rightly required in the Supreme Court of Calcutta between the lender and the heir, where the lender is enforcing his security against the heir. It is obvious, however, that it might be unreasonable to require such proof from one not an original party, after a lapse of time, and enjoyment and apparent acquiescence.

The power of the Manager for an infant heir to charge an estate not his own, is, under the Hindoo law, a limited and qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate. But where, in the particular instance, the charge is one that a prudent owner would make, in order to benefit the estate, the *bona fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded. But of course, if that danger arises or has arisen from any misconduct to which the lender is or has been a party, he cannot take advantage of his own wrong, to support a charge in his own favour against the heir, grounded on a necessity which his wrong has helped to cause.

The lender is bound to inquire into the necessities for the loan, and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the Manager is acting in the particular instance for the benefit of the estate. If he does so inquire and acts honestly, the *real* existence of an alleged sufficient and reasonably credited necessity is not condition precedent to the validity of his charge, and, under such circumstances, he is not bound to see to the application of the money.

The mere creation of a charge securing a proper debt cannot be viewed as unprovident management; and a *bona fide* creditor should not suffer when he has acted honestly, and with due caution, but is himself deceived.

Mode of taking account when the mortgagee was in possession of the estates as mortgagee, and also as lessee under a lease.

26th July, 1856.

THE RIGHT HON. THE LORD JUSTICE KNIGHT BRUCE:

THE complainant in the original suit, was Lal Inderdowun Singh, described in

* 6, Moore's I. A., p. 393.

393 & 408

the plaint as proprietor of the *Raj* of *Pergunnah* Munsoor Nuggur Bustee. The suit was against the present Appellant, the chief Defendant, and Ranee Degumber Koonweree, the second Defendant, the mother of the complainant. The complainant sought by his plaint the possession of certain immoveable property described in his claim, the particulars of which it is unnecessary to state. He sought also to set aside a mortgage Bond bearing date *Assar Soodee Poorunmashee*, 1246 *Fuslee*, set up by the Appellant; to oust the Appellant, to cancel the name of the Appellant as mortgagee in the Collector's records, and to recover mesne profits.

To this suit the Defendant put in his answer. The title of the complainant to the lands as heir was not denied by the answer; but the Defendant alleged his title as mortgagee (except as to some *Birt* lands, the claim to which was abandoned in the suit, and to which it is unnecessary further to refer). The substantial dispute between the parties was, as to the lands for which the suit proceeded, whether the Defendant could resist, under his title as mortgagee to the extent of that interest, the title of the complainant as heir and proprietor of the lands.

It is unnecessary to enter in detail into the pleadings or proceedings in the suit. It is sufficient to state, that in the result the Sudder Ameen decided in favour of the security, and dismissed the claim generally, but that on appeal from that decision, the Sudder Court decided against the security, and in substance granted the relief asked by the plaint, except in so far as it was abandoned.

The reasons for the decision of the appellate Court are contained in their judgment. The Court says, "The question with which the court have first to deal, respects the right of the Ranee to execute the instrument before them." They then remark, "that the Bond itself assigns to the Ranee a proprietary character, and that it was not amongst the Defendant's pleas that the Ranee acted as her son's guardian, but that he has claimed for her the proprietary character, both in his answer to the plaint, and still more broadly and unreservedly in his answer to the pleadings in appeal. The Plaintiff, on the other hand, has throughout argued for the avoidance of the Bond, by denying the Renee's proprietary title in any way; and such being the issue joined between the parties, the Court, looking to the fact that the estates in dispute unquestionably devolved on the Plaintiff, to the exclusion of the Ranee, on the death of the Plaintiff's father, Rajah Sheobuksh Singh, have no hesitation in declaring that, even on the assumption that the Ranee voluntarily executed the Bond and received full consideration for it, the Bond is not binding on the plaintiff, and that neither he nor his ancestral property can be made liable in satisfaction of it. It is needless for the Court, their inquiries being thus stopped *in limine*, to enter on the real merits of the transaction as between the Ranee and Hunoomanpersaud Panday."

Their Lordships collect from this judgment that the Court thought that a bar was interposed by the pleadings, and by the Ranee's act of assumption of proprietorship, to the further consideration whether the Appellant's charge could in any character be sustained against the estate.

The Court did not enter upon the question of the validity of the charge, in whole or in part, as a charge effected by a *de facto* Manager, or proprietor, whether by right or by wrongful title, nor advert to the fact that the charge included some items of former charge wholly unaffected by the objection which they considered of so much weight.

The judgment may be considered under the following points of view:

First. Did the appellate jurisdiction rightly construe the pleadings, and take a right view of the issues framed under the direction of the Judge, according to the practice of those Courts?

Secondly. Did it take a right view of the relation in which the Ranee intended to stand to her son's estate? And,

Thirdly. Did it consider the point, whether the rights of these parties could wholly depend upon the question whether

that relation was duly or unduly constituted?

On the first point their Lordships think it right to observe, that it is of the utmost importance to the right administration of justice in these Courts, that it should be constantly borne in mind by them that by their very constitution they are to decide according to equity and good conscience; that the substance and merits of the case are to be kept constantly in view; that the substance and not the mere literal wording of the issues is to be regarded; and that if, by inadvertence, or other cause, the recorded issues do not enable the Court to try the whole case on the merits, an opportunity should be afforded by amendment, and, if need be, by adjournment, for the decision of the real points in dispute.

But their Lordships think that if the wording of the issues be carefully considered, it will be found that the issue in substance is, whether the charge under the instrument bound the lands. The words in which the Principal Sudder Ameen states the issue on this point are: "whether it (the mortgage Bond) ought to have effect against the mortgaged villages." It was not an issue limited to the particular description or character in which this act was done, and a misdescription or error in that respect would not have been fatal to the charge. Consequently, their Lordships cannot agree with the Sudder Dewanny Adawlut, upon the first point, that the real question in dispute between these parties, namely, whether the charge bound the lands in the hands of the heir, was not substantially included in the issues, which were evidently intended to raise it. Neither can their Lordships adopt the reasoning or the conclusion of the Sudder Dewanny Adawlut, upon the second point, as to the relation in which the Ranee meant to stand, and substantially stood, to the estate of her son.

Deeds and contracts of the people of India ought to be liberally construed. The form of expression, the literal sense, is not to be so much regarded as the real meaning of the parties which the transaction discloses. Now, what is meant by the assumption of proprietorship on the part of the Ranee, which the judgment ascribes to her? It is not suggested that she ever claimed any beneficial interest in the estate as proprietor; had she done so, it would have been, *pro tanto*, a claim adverse to her son; and it is conceded by the Respondent's counsel that she did not claim adversely to her son. The terms of "proprietor" and of "heir," when they occur, whether in deeds or pleadings, or documentary proofs, may, indeed, by a mere adherence to the letter, be construed to raise the conclusion of an assumption of ownership, in the sense of beneficial enjoyment derogatory to the rights of the heir; but they ought not to be so construed unless they were so intended, and in this case their Lordships are satisfied that they were not so intended. They consider that the acts of the Ranee cannot be reasonably viewed otherwise than as acts done on behalf of another, whatever description she gave to herself, or others gave to her; that she must be viewed as a Manager, inaccurately and erroneously described as "proprietor," or "heir;" and it is to be observed, that the Collector takes this view, for, whilst he remarks on the improper description of her as heir, or proprietor, he continues her name as "*Surberakar*." If the whole context of all these documents and pleadings be taken into consideration, and the construction proceed on every part, and not on portions of them, they are sufficient, in their Lordships' judgment, to show the real character of her proprietorship.

Upon the third point, it is to be observed that under the Hindoo law, the right of a *bonâ fide* incumbrancer who has taken from a *de facto* Manager a charge on lands created honestly, for the purpose of saving the estate, or for the benefit of the estate, is not (provided the circumstances would support the charge had it emanated from a *de facto* and *de jure* manager) affected by the want of union of the *de facto*, with the *de jure* title. Therefore, had the Ranee intruded into the estate wrongfully, and even practised

a deception upon the Court of Wards, or the Collector, exercising the powers of a Court of Wards, by putting forth a case of a joint proprietorship in order to defeat the claim of a Court of Wards to the wardship, which is the case that Mr. Wigram supposed, it would not follow that those acts, however wrong, would defeat the claim of the incumbrancer. The objection, then, to the Ranee's assumption of proprietorship, in order to get the management into her hands, does not really go to the root of the matter, nor necessarily invalidate the charge; consequently, even had the view which the Sudder Dewanny Adawlut took of the character of the Ranee's act, as not having been done by her as guardian, been correct, their decision against the charge without further inquiry would not have been well-founded. It would not have been accordant with the principles of the Hindoo law, as declared in Coleb. Dig., vol. i., p. 302, and in the case of Gopee Churun Burral *vs.* Mussummaut Ishwuree Lukhee Dibia, (3 Sud. Dew. Adaw. Rep. 93,) and as illustrated by the case cited for the Appellant in the argument, against the authority of which no opposing decision was cited. Their Lordships, however, must not be understood to say, that they see any ground of probability for the assertion, that the Ranee really meant to deceive the Court of Wards, or the Collector exercising its authority, by any consciously false description of herself. The title to this *Raj* cannot readily be supposed to have been unknown in the Collector's office, nor is it probable that the Ranee could have deceived the office by such a false description of herself.

It is a circumstance worthy of remark, too, that the complainant does not ascribe this conduct to her in his plaint. The case that the plaint makes is not that she intruded upon him and assumed proprietorship; the plaint itself says she had possession as guardian, that is, as managing in that character; and on a review of the whole pleadings and documentary evidence, and of the probabilities of the case, their Lordships think it a strained and untrue construction to assign any other character to her acts than that which the plaint ascribes to them, notwithstanding the use of terms inconsistent with it. For these reasons, their Lordships think that the judgment of the Sudder Dewanny Court cannot be supported on the grounds which that Court has assigned.

It then remains to be considered whether the judgment is substantially right, though the reasons assigned for it are not satisfactory or sufficient.

If the evidence discloses, as it is contended for the Respondents that it does disclose, no *primâ facie* case of charge at all on this ancestral estate, then, as the only bar to the resumption by the heir of his estate is the alleged mortgage title over it, the proof of which lies on the mortgagee, the complainant's title to the estate, to the mesne profits, and to the other relief, is made out; but if, on the other hand, the evidence discloses even a *primâ facie* case of charge, some inquiry at least ought, as it seems to their Lordships, to have been directed.

The question then next to be considered is, whether a *primâ facie* case of a subsisting charge is made out by the Appellant. This question involves the consideration of two points: first, the actual *factum* of the deed; and, next, the consideration for it.

First, as to the *factum*. The execution of the Bond by the Ranee is stated by several of the attesting witnesses. It was argued, however, on behalf of the Respondent, that the Court ought not to act on their evidence. Some discrepancies, —such, however, as are not unfrequently found in honest cases in native testimony, —were dwelt upon. The Sudder Ameen, who decided this case originally, has made some pertinent remarks on the confirmation which circumstances give to the oral evidence that the Bond is the deed of the Ranee. The decision by a native Judge, possessing the intelligence which this judgment of the Sudder Ameen evinces, on a question of fact in issue before him, is, in the opinion of their Lordships, entitled to respect; he must necessarily possess superior knowledge of the habits

and course of dealing of natives, and that knowledge would be likely to lead him to a right conclusion upon a question of disputed fact. The Sudder Ameen observes, in substance, that possession went along with this Bond, and that the mortgagee was inscribed in that character as proprietor on the records of the Collector. He was, therefore, put in possession as mortgagee, and was publicly known as mortgagee in the Collector's office.

It is to be observed further, that his receipt of the rents and profits of the lands included in this conveyance would diminish, *pro tanto*, the annual income of the estate, which would come to be administered by the Ranee, and that this state of things continued for several years after the execution of the Bond. The Ranee's ignorance, then, of such title, possession, receipt, and diminution, is, as the Sudder Ameen justly observes, not a probable supposition. It could be rationally accounted for only on one supposition—that the Ranee was a mere cypher, and entirely ignorant of that which was done in her name. This, however, does not appear to have been the case: she herself denied it on a subsequent contest as to the managership; and the act of the Collector in his decision upon that dispute, in putting her into the management, confirms her own statement of her capacity. Had her incompetency been of so flagrant a character, as the above hypothesis demands to be attributed to her, it is not reasonable to suppose that it would have been unknown in the Collector's office, nor is it reasonable to suppose that the management would have been confided to her had such been her character. It was argued, indeed, that she may have become by that time capable; but it is to be observed that a long course of neglect and mismangement, which is attributed to her, would not be a school of improvement.

It was argued that the complainant was not to be bound by the Ranee's allegations of her own competency; that she had tasted the sweets of management, and would desire their continuance. Certainly the complainant is not to be bound by her assertion; but it is not the assertion that is relied on as confirmation. What is relied on is the result of the contest, and the acknowledgment of her as one competent to the management of the estate by an officer interested in its right administration.

Their Lordships cannot but concur with the Sudder Ameen in thinking that these circumstances do materially confirm the story of the attesting witnesses as to the Ranee's execution of the deed. The story of her non-execution of it is based, in a considerable degree, on a supposition of her incapacity. That the deed is hers, is, in the opinion of their Lordships, further confirmed by the great improbability of the history which some of the witnesses of the Respondent give as to the *factum* of the instrument. The story told by the witnesses, Heera Lal and Gyapershad Patuk, is so destitute of probability, so little in harmony with the ordinary conduct of men in like circumstances, that their Lordships can place no reliance upon it. According to the case of the Respondent, this Bond was fraudulently executed in the name of the Ranee, without her sanction or knowledge, in order to fix a false charge of Rs. 15,000 in the Defendant's favour on the property of the infant Rajah. The Defendant and several associates were, according to this story, conspiring together for this object. According to the witnesses, who give nearly *verbatim* the same account of the transaction, these conspirators had witnesses ready, though not present, who were to attest consciously the false deed as true; yet such is at once the impatience and the folly of these conspiring parties, that every one of the witnesses, each of whom is described as dropping in by chance as it were, is solicited without any assigned adequate motive, and with no previous sounding, to become a party to this fraud by consciously attesting the false deed as true. Each witness declines, and each is entreated to secrecy; and each preserves the secret inviolate, contrary to duty, and without any assigned motive for secrecy. The communication and the concealment

are both without motive according to the account which is given us. And the story of this utterly needless communication of his crime, is told of a man used to business, intelligent, and described by the Respondents as the habitual accomplice of crafty and designing men, the *Karindas*, in acts of fraud.

Taking the whole circumstances as to the *factum* of this instrument into consideration, their Lordships concur in the finding by the Sudder Ameen as to it.

Next, as to the consideration for the Bond. The argument for the Appellant in the reply, if correct, would indeed reduce the matter for consideration to a very short point; for according to that argument, if the *factum* of a deed of charge by a manager for an infant be established, and the fact of the advance be proved, the presumption of law is *primâ facie* to support the charge, and the *onus* of disproving it rests on the heir. For this position a decision, or rather a *dictum* of the Sudder Dewanny Adawlut at Agra, in the case of Oomed Rai *vs.* Heera Lall (6 Sud. Dew. N. W. P. 218), was quoted and relied upon. But the *dictum* there, though general, must be read in connection with the facts of that case. It might be a very correct course to adopt with reference to suits of that particular character, which was one where the sons of a living father were, with his suspected collusion, attempting, in a suit against a creditor, to get rid of the charge on an ancestral estate created by the father, on the ground of the alleged misconduct of the father in extravagant waste of the estate. Now, it is to be observed that a lender of money may reasonably be expected to prove the circumstances connected with his own particular loan, but cannot reasonably be expected to know or to come prepared with proof of the antecedent economy and good conduct of the owner of an ancestral estate; whilst the antecedents of their father's career would be more likely to be in the knowledge of the sons, members of the same family, than of a stranger; consequently, this *dictum* may perhaps be supported on the general principle that the allegation and proof of facts, presumably in his better knowledge, is to be looked for from the party who possesses that better knowledge, as well as on the obvious ground in such suits of the danger of collusion between father and sons in fraud of the creditor of the former. But this case is of a description wholly different, and the *dictum* does not profess to be a general one, nor it is so to be regarded. Their Lordships think that the question on whom does the *onus* of proof lie in such suits as the present, is one not capable of a general and inflexible answer. The presumption proper to be made will vary with circumstances, and must be regulated by and dependent on them. Thus, where the mortgagee himself with whom the transaction took place, is setting up a charge in his favour made by one whose title to alienate he necessarily knew to be limited and qualified, he may be reasonably expected to allege and prove facts presumably better known to him than to the infant heir, namely, those facts which embody the representations made to him of the alleged needs of the estate, and the motives influencing his immediate loan.

It is to be observed that the representations by the Manager accompanying the loan as part of the *res gestæ*, and as the contemporaneous declarations of an agent, though not actually selected by the principal, have been held to be evidence against the heir; and as their Lordships are informed that such *primâ facie* proof has been generally required in the Supreme Court of Calcutta between the lender and the heir, where the lender is enforcing his security against the heir, they think it reasonable and right that it should be required. A case in the time of Sir Edward Hyde East, reported in his decisions in the 2nd volume of Morley's "Digest," seems the foundation of this practice. (See also the case of Brown *vs.* Ram Kunaee Dutt, 11 Sud. Dew. Adaw. Rep. 791.)

It is obvious, however, that it might be unreasonable to require such proof from one not an original party, after a lapse of time, and enjoyment and apparent acquiescence; consequently, if, as is

the case here as to part of the charge, it be created by substitution of a new security for an older one, where the consideration for the older one was an old precedent debt of an ancestor not previously questioned, a presumption of the kind contended for by the Appellant would be reasonable. The case before their Lordships is one of a mixed character; the existing security represents loans and transactions at various times and under varying circumstances: it is a consolidating security; and as to part, at least—namely, the ancestral debt—there is, in the opinion of their Lordships, ground to raise a *primâ facie* presumption in the Appellant's favour of a consideration that binds the estate. It is unnecessary to the decision to pursue the inquiry as to the other items of charge, but that part of it which relates to the advance for payment of the revenue seems to be at least *primâ facie* proved as against the estate. And, as to the whole charge, there is also at least *primâ facie* evidence in the admissions of the Plaintiff, proved by several witnesses, uncontradicted on the point. As to the debt of the ancestors, it was said that it was already secured, and that the estate being ancestral, could not, according to the law current in the North-Western Provinces, be charged, in the hands of the heir, for an ancestor's debt. But it is to be onserved as to the change of security, that there was a reduction of interest; it is, therefore, a transaction, *primâ facie*, for the benefit of the estate; and though an estate be ancestral, it may be charged for some purposes against the heir, for the father's debt, by the father, as, indeed, the case above cited from the 6th volume of the Decisions of the Sudder Dewanny Adawlut, North-Western Provinces, incidently shows. Unless the debt was of such a nature that it was not the duty of the son to pay it, the discharge of it, even though it affected ancestral estate, would still be an act of pious duty in the son. By the Hindoo law, the freedom of the son from the obligation to discharge the father's debt, has respect to the nature of the debt, and not to the nature of the estate, whether ancestral or acquired by the creator of the debt. Their Lordships, therefore, are clearly of opinion that a *primâ facie* case of charge for something was made out; and it is not necessary to determine, nor, indeed, have their Lordships the necessary facts before them to enable them to determine, for how much, if for anything, this deed must ultimately stand as a security.

One point remains to be considered, namely, whether, in taking the account between these parties, the Defendant is to be charged, as mortgagee in possession, with the actual rents and profits, or only with the rent fixed by the *pottah*. It is said for the Appellant, that the Sudder Dewanny Adawlut did not set aside the *pottah*. In terms they certainly did not. But their Lordships think that it was part of one mortgage-security, consisting of several instruments of equal date with the mortgage Bond; and that it was intended to create, not a distinct estate, but only a security for the mortgage-money. Mr. Palmer contended that a stipulation such as this *pottah* evidences, may stand in India between mortgagor and mortgagee, and that the Regulations as to interest do not touch such a case. The Regulations provide for the case of an evasion of the law as to interest by invalidating the mortgage security, and forfeiting the claim of the mortgagee to his principal and interest: but Mr. Palmer contends that where there is no such evasion, and a *bonâ fide* and fair rent is fixed upon as representing, *communibus annis*, the rents and profits of the estate, the Court ought to stand on that, the agreement of the parties, and not to direct to taking of the accounts between mortgagor and mortgagee on any other basis. It is certainly possible that, by reason of the provision that the rent shall be a fixed one, notwithstanding losses and casualties, the mortgagee might be a loser, in his character of lessee, on an account calculated on this basis; but, notwithstanding that contingency, their Lordships think that, as it was not meant that the principal should be risked, it was virtually a provision to

exclude an account of the rents and profits, and that the decree of the Sudder Dewanny Adawlut, directing an account of the actual rents and profits, therefore, proceeds on the right principle, and is in accordance with the true nature of the security and the spirit of the Regulations.

In the case of Roy Juswunt Lall *vs.* Sreekishen Lall, reported in the decisions of the Sud. Dew. Adaw. in 1852, vol. 14, p. 577, the Court seems to have thought that where a mortgage lease was granted, and whilst the term was running, the mortgage account could not be taken; but it appears from that case, that in former decisions of that Court not reported, where the lease had expired, the Court directed the account to be taken on the ordinary footing of the receipt of rents and profits of the mortgaged estate. Their Lordships think that, under the Regulations unless the principal is meant to be risked, and is put in the risk, the estate created as part of a mortgage security, whatever be its form or duration, can be viewed only as a security for a mortgage debt, and must be restored when the debt, interest, and costs are satisfied by receipts.

Upon the whole, their Lordships are of opinion that the cause must be sent back for further inquiry. They think it desirable, however, in order to prevent a future miscarriage, to state the general principles which should be applied to the final decision of the case.

The power of the Manager for an infant heir to charge an estate not his own, is, under the Hindoo law, a limited and qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate. But where, in the particular instance, the charge is one that a prudent owner would make, in order to benefit the estate, the *banâ fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded. But of course, if that danger arises or has arisen from any misconduct to which the lender is or has been a party, he cannot take advantage of his own wrong, to support a charge in his own favour against the heir, grounded on a necessity which his wrong has helped to cause. Therefore, the lender in this case, unless he is shwon to have acted *malâ fide*, will not be affected, though it be shown that, with better management, the estate might have been kept free from debt. Their Lordships think that the lender is bound to inquire into the necessities for the loan, and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the Manager is acting in the particular instance for the benefit of the estate. But they think that if he does so inquire, and acts honestly, the real existence of an alleged sufficient and reasonably-credited necessity is not a condition precedent to the validity of his charge, and they do not think that, under such circumstanees, he is bound to see to the application of the money. It is obvious that money to be secured on any estate is likely to be obtained on easier terms than a loan which rests on mere personal security, and that, therefore, the mere creation of a charge securing a proper debt cannot be viewed as improvident management; the purposes for which a loan is wanted are often future, as respects the actual application, and a lender can rarely have, unless he enters on the management, the means of controlling and rightly directing the actual application. Their Lordships do not think that a *bonâ fide* creditor should suffer when he has acted honestly and with due caution, but is himself deceived.

Their Lordships will, therefore, humbly report to Her Majesty in the following terms:—

"Their Lordships are of opinion that the Ranee ought to be deemed to have executed the mortgage Bond, dated *Assar Soodee Poornumashee*, in the pleadings mentioned, as and in the character of guardian of the infant Lal Inderdowun Singh.

"And their Lordships are of opinion that the validity, force, and effect of the Bond, as to all and each of the sums, of

which the sum of Rs. 15,000, thereby purporting to be secured, is composed, depend on the circumstances under which the sums, or such of them as were advanced by the Appellant, were respectively so advanced by him, regard being had also, in so far as may be just, to the circumstances under which the same were respectively borrowed.

"And their Lordships are also of opinion that, assuming the Bond to be invalid and ineffectual, the Appellant would, nevertheless, be entitled to the benefit of any prior mortgage or mortgages paid off by him affecting the property comprised in the Bond, if and in so far as such prior mortgage or mortgages was or were valid and effectual.

"And their Lordships, therefore, are of opinion that the decrees of the Zillah and Sudder Courts respectively ought to be reversed, and the cause remitted to the Sudder Court, with directions that inquiry be made into the several matters aforesaid, and that all such accounts be taken and such other inquiries made as, having regard to such matters and to the circumstances of the case, may be found to be necessary and proper, with directions also that the Sudder Court do proceed therein as may be just, both with respect to the said mortgage Bond and the several instruments of even date therewith; and that the costs of the appeal be costs in the cause, to be dealt with by the Sudder Court."

125—26

11th July, 1856.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. T. Pemberton Leigh, the Right Hon. Sir Edward Ryan, the Right Hon. Sir John Dodson, and the Right Hon. Sir William H. Maule.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the Governor in Council of Bombay.

BODHRAO HUNMONT* ... *Appellant*,

and

NURSING RAO and others ... *Respondents.*

The terms of the *sunnund* being absolute, certain *Enam* villages in the Southern Mahratta Country were held, in a partition suit, to be governed by the general principles of the Hindoo law respecting partition of the father's estate among his heirs.

THE RIGHT HON. T. PEMBERTON LEIGH:

THERE appears no reason why the *Enam* villages in question should not be governed by the general principles of the Hindoo law respecting partition of the father's estate among his heirs. The terms of the *sunnd* are absolute. There is nothing peculiar in the case; it is an ordinary partition suit, which is an everyday's occurrence in India, and the division must be according to the Hindoo law. The mode of collecting the revenue has nothing to do with the question. We, therefore, must reverse the decree of the Governor in Council of Bombay, and consequently, affirm the decree of the Political Agent of the Southern Mahratta Country, of the 6th of October, 1852, with costs, as well here as of the appeal to the Governor in Council of Bombay.

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* 6, Moore's I A., p. 426.