The papers went up to Mr. Thackeray. It is admitted in three documents that his decision was passed in the presence of both parties, that the respondent before him had an opportunity of being heard; and the result was the reversal of Mr. Munroe's order, and a direction that restitution of the village should be made to the appellant, which was done.

Whether that was a conclusive determination upon the title or not, it seems to their Lordships hardly necessary to decide. It was a clear adjudication of the right of possession at that time; and whether title could have been tried, as in regulation provinces, afterwards by a regular suit, it is not necessary to determine. But there was a clear adjudication that the possession upon the asserted title was in the respondents, the possession taken from them was restored, and there was (which is the essential thing to be considered) a clear reversal of whatever was found by the order of Mr. Munroe in favor of the alleged mortgage which is the foundation of the appellant's title.

It appears then that since the year 1824 up to the commencement of the suit the estate had been held by the respondent's branch of the family on the title on which they rely. The only way in which their title thus fortified by long enjoyment can be disturbed is by clear and unmistakable proof of the alleged mortgage.

There is really, when Mr. Munroe's order is out of the case, not the slightest evidence that the village was held upon a mortgage title.

Under these circumstances, their Lordships think that the attempt to disturb the concurrent judgments of the Courts below wholly fails, and they must humbly recommend Her Majesty to dismiss the appeal, with costs.

The 24th November 1871

Present:

Sir James W. Colvile, Sir Joseph Napier, Sir Montague Smith, and Sir Lawrence Peel.

Mortgage—Proof of Bona fides.

On Appeal from the High Court of Bengal,

Woomesh Chunder Roy

versus

Gooroodoss Roy and others.

Suit by mortgagee (respondent) after foreclosure of mortgage against mortgagors, incumbrancers, and present appellant who was in possession of part of the mortgaged property as purchaser at an execution sale. Mortgagors admitted plaintiff's title. Appellant pleaded that the mortgage was a collusive transaction between mortgagors and mortgagee in fraud of creditors. The Principal Sudder Ameen found that the mortgage was not a *bonâ fide* transaction, but the High Court reversed his decision; and the Privy Council, upon a consideration of the evidence, came to the conclusion that the Principal Sudder Ameen was right, because it was not only necessary for, but also in the power of, the respondent to adduce better evidence than he had given in this case in order to make out the reality and *bonâ fides* of the transaction on which he relied.

The respondent in this case brought the suit to recover possession of the property included in his mortgage deed, having perfected his title under that deed by the usual proceedings in foreclosure. He brought the suit against the mortgagors, against some other incumbrancers whose case it is unnecessary now to consider, and against the present appellant, who was in possession of part of the mortgaged property as purchaser at an execution sale. The mortgagors admitted the title of the plaintiff the respondent. The appellant, however, defended his possession by insisting that the mortgage was from the first a collusive transaction, an arrangement between the mortgagors and the mortgagee designed to protect the property of the mortgagors from the claims of their creditors. One of the issues framed in the suit is whether that proposition is correct or whether the mortgage transaction was *bonâ fide*? The Principal Sudder Ameen, the Judge of First Instance, found that issue in favor of the appellant, but a division bench of the High Court reversed his decision. It does not appear to their Lordships to be necessary to consider upon whom the burden of proof in such a case must fall, because they think that in the present case the facts are such,

* On appeal from the judgment of Loch and Seton-Karr, JJ., in Regular Appeal No. 271 of 1864, decided 5th December 1864,—1. W. R., *Civ. Rul.*, 272.

ciently before them to enable them to give a judgment upon them, and that there were sufficient circumstances proved and apparent in the case to render it necessary for the respondent to give better evidence of the *bona fides* of the transaction on which he relied than he has given in this case. Their Lordships observe, among other things, that by the petition filed by one of the mortgagors at page 70, the transaction, though spoken of as a real transaction, is spoken of as one of those arrangements under which the parties had every hope and probability of getting back the lands in future from the Baboo "in case we can pay the amount due to him."

Their Lordships also find that the respondent did so far undertake to prove what the consideration really was that he examined one or two witnesses upon that point. Those witnesses prove no more than that a colorable consideration passed in the shape of certain notes at Sreedhurpore, a payment which may easily be explained by the admitted relation between the parties, and is one of those payments which would be ostensibly made before witnesses of that character in order to give color to the transaction. But part of the alleged consideration for the original mortgage was a balance found upon a settlement of account, and no evidence whatever is produced as to the fact of the settlement of that account or to show in respect of what transactions it was settled, or that a balance was really struck and found due to the respondent upon that occasion.

Then again, the High Court, in its judgment reversing the decision of the Principal Sudder Ameen, relies upon the sum of money which was paid into Court, whether Rs. 15,000 or Rs. 16,000 does not very clearly appear, in order to stay the first execution of Punchanon Bose and another; but that payment throws no light upon the original transaction, certainly does not go to establish that that original transaction in its inception was a *bonâ fide* transaction, or the ordinary transaction of mortgagor and mortgagee, in which the parties would be dealing at arm's length with each other. On the contrary, if any thing, it tends the other way, because if the respondent had then completed his title by foreclosure, if he was in a position to claim this land against all persons by virtue of a *bonâ fide* mortgage title made absolute by foreclosure, what possible motive was there for advancing a very much larger sum than the sum originally secured by the mortgage?

Their Lordships, considering the whole of the evidence, are obliged to come to the conclusion that the Principal Sudder Ameen was right in finding that, as against the appellant, this was not a *bonâ fide* mortgage, but one of those transactions into which a friendly party might have been induced to enter in order to protect the young men, the mortgagors, from the demands with which they seem to have been pressed. The case is not presented, perhaps, in quite so satisfactory a way as it might have been in respect to the amount and nature of these demands. The Principal Sudder Ameen speaks of them in terms which the evidence, as sent over on this record, hardly supports; but there is, even upon the face of the plaint, an admission of outstanding demands sufficient to show that there may have been a motive that the property should be protected in the way in which it has been attempted to protect it.

Their Lordships think that, had the transaction been what it purported to be, the respondent, who might have given his own testimony, who might have called the person spoken of as his Moonshee and as having taken a principal part in the original transaction, and who might have examined the mortgagors and others, had it in his power to adduce far better testimony than has been given in this case, in order to make out the reality and *bona fides* of the transaction.

Their Lordships therefore are of opinion that the decree of the High Court cannot stand, and that it ought to be reversed. All that the present appellant asks is, that the decree of the Principal Sudder Ameen should be affirmed. Against that decree, so far as it was favorable to the respondent, the plaintiff in the case, there was no appeal to the High Court; and therefore nothing which their Lordships do here will in any degree disturb that decree, or alter or affect whatever relations may under it exist between the mortgagee and the mortgagors or anybody who may hereafter claim under them.

Their Lordships therefore will humbly advise Her Majesty to allow the appeal, to reverse the judgment of the High Court, and to affirm the judgment of the Court below, the Principal Sudder Ameen, with the costs of the appeal to the High Court. The appellant must also have the costs of this appeal.

The reservation at the end of the Principal Sudder Ameen's decree concerning the right to four annas of the property asserted in another suit seems to be unnecessary, because whether the appellant held

three-fourths by virtue of his execution sale, and one-fourth by virtue of the decree in that other suit, or whether he holds the whole as purchaser at the execution sale, seems to be, for the purposes of this suit, an immaterial consideration.

The 30th November 1871.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Right of Way.

Case No. 758 of 1871.

Special Appeal from a decision passed by the Judge of Chittagong, dated the 13th April 1871, reversing a decision of the Moonsiff of Hathazaree, dated the 21st July 1870.

Futteh Ali (one of the Defendants) *Appellant,*

versus

Asgur Ali and another (Plaintiffs) *Respondents.*

Baboo Grish Chunder Ghose for Appellant.
Mr. G. A. Twidale for Respondents.

To constitute a right of way, there must have been an uninterrupted user as of right, and not one exercised at the mere will and favor of the other party.

Glover, J.—This was a suit for a declaration of plaintiff's right of way over a waste piece of land belonging to defendant, and for an order to pull down a house which defendant had erected across the pathway. The defence was that the path was not a public road, and that there was no right of way to the plaintiffs.

The first Court found that there was no right of way over this land, but that plaintiff along with other villagers used to pass over the land to the public road by consent of the defendants. The Judge, however, although he found that so much of the plaintiff's statement that the road was used for marriage and burial processions was false, still considered that the plaintiff's suit should not be altogether dismissed, because the plaintiffs had actually been in the habit of using the path as a means of proceeding directly to the high road. At the same time, the Judge appears to admit the existence of another way by which processions and cattle, &c., were wont to pass.

It appears to us that the Judge's decision is not maintainable. It is admitted that the waste land, through which the path in dispute runs, is the defendant's land; and there is nothing whatever to disprove the allegation of the defendant, that plaintiff used the land for some years by his sufferance and permission. To constitute a right of way, there must have been an uninterrupted user as of right, and not one exercised at the mere will and favor of the other party.

In this case, it is clear from the finding of the Lower Appellate Court that the plaintiff has another way to the public road when going with cattle, procession, &c., but that he has been in the habit of making use of this pathway by the sufferance of the defendant. This creates no right of way.

The Judge's decision is therefore reversed with costs.

The 8th December 1871.

Present:

The Hon'ble G. Loch and W. Ainslie, *Judges.*

Separate Estate—Possession—Adverse Possession—Limitation—Fraud of Life-tenant—Suit by Reversioners.

Case No. 752 of 1871.

Special Appeal from a decision passed by the Judge of Sarun, dated the 13th April 1871, reversing a decision of the Subordinate Judge of that District, dated the 30th June 1870.

Gunesh Dutt and another (two of the defendants) *Appellants,*

versus

Mussamut Lall Muttee Kooer (Plaintiff) and another (Defendant) *Respondents.*

Baboos Mohesh Chunder Chowdhry and *Gopal Lall Mitter* for Appellants.

Baboo Chunder Madhyb Ghose for Respondents.

Suit by a Hindoo daughter, for herself and as guardian for her minor son, to recover possession of her deceased father's separate estate. The legal representatives of the estate were, first, the deceased's widow, and after her the plaintiff and her son. The widow not only failed to occupy and manage the estate, but, in collusion with the other defendants claiming under a hostile title