Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Lalla Banseedhur v. *Koonwur Bindeseree Dutt Singh, and after his death, Mussumat Gunaish Koer, from the Sudder Dewanny Adawlut at Agra, North-Western Provinces of Bengal; delivered 26th February*, 1866.

Present:

LORD CHELMSFORD.
SIR JAMES COLVILE.
SIR EDWARD VAUGHAN WILLIAMS.

SIR LAWRENCE PEEL.

THE suit out of which this Appeal has arisen was brought by the late Koonwur Bindeseree Dutt Singh, (whom, though he has since died, and is now represented on the record by his widow and heiress, it will be convenient to call the Respondent,) to recover from the Appellant a talook and other ancestral property, with mesne profits. The adverse title, set up by the Appellant, is thus derived. Sheodutt Singh, the Respondent's father, died on the 3rd of July, 1849. He had had, in his lifetime, pecuniary dealings with one Seetaram, the Appellant's father, and these had involved him in a long course of litigation with the Appellant. For advances to carry on that litigation or otherwise, he had become largely indebted to another and probably rival capitalist, named Mohun Lall. At the time of his death his only son and heir (the Respondent) was but four years old; and his stepmother, Goolab Koonwur, became his guardian. In February 1850, a negotiation took place between that lady and the Appellant, which resulted in her executing to him on the 17th day of that month, an Ikrarnamah, or Deed of Agreement. By that instrument, which will be afterwards more

particularly considered, she, amongst other things, charged the minor's estate with the payment of a sum of rupees 27,000 to the Appellant, and undertook to prosecute certain claims against Mohun Lall; the Appellant undertaking to advance money on certain terms for that purpose, as also for the purpose of resisting the claims which Mohun Lall was prosecuting against the estate. In February 1851, Mohun Lall having obtained judgment against the estate for rupees 26,986 : 15 : 4, and taken out execution thereon, had advertised the property, now in dispute, for sale on the 20th of that month. To prevent this sale, the Appellant advanced the amount of the judgment debt; and, on the 19th of February, commenced a suit against Golab Koonwur, as the guardian of the Respondent, in which he claimed, as due to him from the estate, the amount of that advance, the sum of rupees 27,000, which was stipulated by the Ikrar to be paid to him; and a further sum of rupees 1354 : 1 : 0, alleged to have been advanced for the purposes of the proceedings against Mohun Lall, making, in all, the sum of rupees 55,341 : 1 : 1. On the following day the guardian, as Defendant, filed a confession of judgment, admitting the whole amount claimed to be due; undertaking to pay it by annual instalments of rupees 7000, reciting the Ikrar and the advance of the rupees 26,986 : 15 : 9; hypothecating the minor's estate as a security for the whole amount admitted to be due; and providing that in the event of any failure in the payment of the annual instalments, the Appellant should be at liberty to take out execution against the hypothecated property for the whole amount of his judgment debt with interest. It was stipulated, however, that the rupees 27,000 should bear no interest, and that the rate of interest on the rest of the debt should be 6 per cent.

The instalments were not paid; and, in 1853, the Appellant took out execution on the judgment confessed for the sum of rupees 70,168 : 7 : 11, put up the property for sale under that execution, and on the 20th of June, 1853, purchased it himself for rupees 51,635. In consequence, however, of a mortgage on the talook, which was held by Mohun Lall, and gave rise to a protracted litigation, he did not obtain possession of that portion of the property purchased until the year 1860.

The Respondent attained his majority in December 1860, and commenced this suit on the 22nd of July, 1861. By his plaint he impeached as invalid and collusive the Ikrar, the cognovit or judgment by confession, and the execution sale. The Principal Sudder Ameen of Zillah Allahabad made a decree in his favour on the 11th of November, 1861, awarding him possession of the property sued for, with rupees 36,470:11:6 for mesne profits and damages, but allowing the Appellant to set off against this sum the sum of rupees 28,418:3:10, which was compounded of the before-mentioned items of rupees 26,986:15:4 and rupees 1,354:1:9. On appeal, the Sudder Court of Agra, by its decree of the 20th of July, 1863, generally affirmed this decree, but reduced the damages awarded by an allowance of 5 per cent. for the cost of collection and management, and by the sum paid for income tax; and also reduced the deduction or set off allowed to the Appellant by the item of rupees 1354:1:9. And by its decree of the 31st of May, 1864, made on an application for review of judgment, the same Court modified its own decree by allowing the Appellant interest on the principal sum of rupees 26,986:15:4, which was to be deducted by him at the rate of 5 per cent.

The present Appeal is against these three decrees, and the first and principal question that arises upon it is whether the Ikrar of the 17th of February, 1850, which was executed by his guardian during his minority, is binding upon the Respondent.

In dealing with this question we have no difficulty about the *ratio decidendi*, since it is admitted that the principles which govern it have been authoritatively laid down in the case of *Hunoomanpersad Pandy*, 6 Moore's Indian Appeals, p. 423. It is there said, "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. 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." And again, "The lender is bound to inquire into the necessity 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." It follows, from the passages above cited, and from the rest of this judgment, that he who sets up a charge upon a minor's estate, created in his favour by the guardian, is bound to show, at least, that when the charge was so created, there were reasonable grounds for believing that the transaction was for the benefit of the estate.

The learned counsel for the Appellant have not ventured to contend that the stipulations of the instrument to which these principles have now to be applied, were, upon the face of them, beneficial to the Respondent's estate. Their arguments have been directed to show that the whole transaction might be justified by a consideration of the circumstances in which the parties stood, and of the nature of the litigation in which Sheodutt Singh had in his lifetime been engaged. It becomes necessary therefore to review, as briefly as may be, the very tedious and intricate history of that litigation.

In 1828, Seetaram Singh, the father of the Appellant, had lent, or agreed to lend, rupees 29,500 to Sheodutt Singh, on a mortgage of the ancestral talook now in dispute. The talook consisted of twenty nine villages, and the mortgage was to be a usufructuary mortgage by way of a lease for ten years of the whole talook. Before this arrangement was completed, it appeared that two other persons, named Baijnauth and Bishun Dayal, claimed to be prior mortgagees of part of the talook.

It was at first settled between Sheodutt Singh and his mortgagees, that Seetaram should apply part of the rupees 29,500 in paying off Baijnauth and Bishun Dayal; but it was ultimately arranged between those two persons and Seetaram, that the three should be jointly interested in the mortgage; the share of Seetaram being taken to be rupees 17,700, and that of the other two rupees 11,800. The instrument of the 27th of May, 1828, by which this so called partnership was effected, provided that if it should be deemed advisable thereafter to dissolve the partnership, the property should be divided and held separately in the proportions above specified.

They entered into possession of the mortgaged property in June 1828, and in 1831 dissolved their so called partnership; thereupon Bishun Dayal and Baijnauth became mortgagees in possession of twelve, and Seetaram became, or ought to have become, mortgagee in possession of the remaining seventeen villages of the talook.

We say "or ought to have become," because it appears, from the subsequent proceedings, that he never was in possession of five of these villages; they having been transferred by Sheodutt Singh prior to the mortgage to his wives and two other persons.

Seetaram carried on his general business in partnership with one Sheosuhai; and on the dissolution of their partnership, and a consequent division of its assets, this mortgage fell to the share of Sheosuhai. He was never, however, recognized as mortgagee by Sheodutt Singh, nor was his name recorded as mortgagee until after June 1838, when the period of ten years, during which the possession of the mortgagee was to continue, expired. Sheosuhai and the other parties then in possession of the mortgaged premises, retained possession after June 1838; they allowed the Government revenue to fall into arrear, in consequence of which the estate was attached, and let in farm, for six years, to one Ilahee Buksh, whose security Torab Ali acquired by assignment the whole of the interest, as mortgagee (if any) of Sheosuhai, and also the mortgage rights of Baijnauth. Those of Bishun Dayal became vested in some other parties.

Torab Ali instituted proceedings on the mortgage securities against Sheodutt Singh, claiming the balance alleged to be due on them; but these proceedings, though successful in the Court of First Instance, were ultimately dismissed by the Sudder Court, apparently on the ground that the mortgage debt had been satisfied by the perception of rents during the possession under the ten years' lease.

In this state of things, and on the 17th of June, 1842, Sheodutt Singh brought the first suit of which we have any mention against the Appellant and his brother, since deceased, as the sons and representatives of Seetaram Singh, and against all the other persons who in the course of the transac-

tions lastly above stated had become interested in the mortgage securities or had been in possession of the mortgaged premises. The object of the suit was to recover possession of the property, on the double ground that the principal and interest of the mortgage debt had been liquidated by the collections, and that the period for which the property had been mortgaged had expired; and it also claimed a large sum for the mesne profits of the four years during which it was alleged possession had been wrongfully retained.

It is unnecessary to consider very minutely the merits of this suit, because a final decree had been made in it before February 1850, when the widow of Sheodutt executed to Bunseedhur the Ikrarnamah in question. It is sufficient to state that although the Plaint expressly stated that the principal and interest of the mortgage debt had been liquidated by the collections, the Appellant did not dispute that fact. His defence was simply that by reason of the assignments to Sheosuhai by his father Seetaram, he had ceased to have either interest or liability in the matter. The course of the suit was as follows: On the 26th of June, 1843, the Principal Sudder Ameen decreed in favour of the Plaintiffs for redemption and possession of the estate after the expiration of the farm, but nonsuited the claim for mesne profits and damages. On a remand from the Sudder Court, the same officer, by a Decree dated the 28th of November, 1843, made the Appellant and his brother, as coheirs of Seetaram, liable jointly with Sheosuhai in the sum of rupees 16,570 : 7 : 9 as mesne profits for the year 1246, but dismissed the claim for damages for the years 1247, 1248, and 1249, F.S. It should also be mentioned that he expressly found in his judgment that the mortgage debt had been discharged. There was an Appeal from this second decision, and the Sudder Court by its original Decree on that Appeal held that the Appellant, as the then sole heir and representative of Seetaram (his brother having died), was solely liable to the Plaintiffs for the mesne profits and damages due to him; and that the sum awarded by the Principal Sudder Ameen ought to be increased by the mesne profits for the years 1247, 1248, and 1249. Their Decree seems to have proceeded on the ground that See

taram and his estate were primarily liable to the mortgagor for the non-delivery of the possession when it ought to have been re-delivered; and were accountable for the mesne profits of the whole estate, notwithstanding the transfer to Baijnauth, Bishun Dayal, Sheosuhai, and others.

The Appellant applied for and obtained a review of this Decree on the grounds that he was improperly charged with the mesne profits of the twelve villages held in possession by Baijnauth and Bishun Dayal; that he was improperly charged with the profits of the five villages of which, by reason of their assignment to Sheodutt's wives and others, Seetaram was never in possession; and that he was improperly charged with a certain amount under the head of Sayer. And he again raised the question that the effect of the transfer to Sheosuhai was to determine the liability of Seetaram for the profits of any part of the estate. The majority of the Court decided against the Appellant on the last point, and in his favour on the three others; and the final Decree was against him for the sum of rupees 14,865 10, being the amount of the profits claimed in respect of the twelve villages of which Seetaram was unquestionably in possession after the dissolution of the so called partnership between him and Baijnauth and Bishun Dayal. This final Decree was dated the 1st of March, 1846. The Appellant satisfied this judgment by payments into the Court to the amount of rupees 26,211: 12: 9; and these moneys were afterwards paid out through the Mooktar of Sheodutt Singh, and are those or some of those which in the third clause of the Ikrarnamah are alleged to have found their way into the hands of Mohun Lall.

The Appellant, having thus satisfied this Decree, instituted in the year 1847 a suit against Sheodutt Singh. His claim was founded on the wrong done to Seetaram by reason of his not getting possession of the five villages assigned to the wives of Sheodutt Singh, and was for the profits of those villages during the ten years of the mortgage lease. The gross amount claimed was rupees 27,129: 6: 6 principal, and an equal sum for interest. The proceedings in this suit are not amongst the documents in the Appendix, and for the facts we are referred to the short report of the case in the fourth volume of

the Sudder decisions for the North-Western Provinces (1849), p. 60.

From that, it appears that the Principal Sudder Ameen, on the 31st of December, 1847, decreed in favour of the Appellant upon the ground, certainly erroneous, that he had been made to pay the profits of these villages; but he awarded him only so much of the profits as fell within the period of twelve years prior to the institution of the suit; treating the rest of the claim as barred by the Regulation of Limitation. The Sudder Court on Appeal reversed this Decree, and by its Decree of the 26th of March, 1849, dismissed the Appellant's suit altogether. The reasons for the judgment are not very clearly expressed; but the Court seems to have been of opinion that if Seetaram had any claim for damages in respect of the failure to give him possession of these villages, he should have sued during the currency of the lease; and that at all events his representative (the Appellant) could not then maintain that action. The Appellant obtained leave to appeal to Her Majesty in Council against this Decree; and his Appeal was pending in 1850 when the Ikrarnamah was signed.

In the meantime, and in 1848, Sheodutt Singh had brought his suit against the Appellant for the profits of the talook during the years of the farming lease which were not covered by the former suit, and had obtained a judgment for the sum of rupees 7,480 : 4 : 9 which is the subject of the 4th clause of the Ikrarnamah. He had also commenced a third suit against the Appellant in the name of his son, the Respondent, in respect of property derived by the Respondent from his mother. That suit was undecided on the 3rd of July, 1849, when Sheodutt Singh died.

Hence at the date of the Ikrarnamah the position of the Appellant and the Respondent's guardian with reference to the antecedent litigation was this. The Appellant had been decreed to pay and had paid rupees 26,211 : 12 : 9 in respect of the final Decree of 1846. By the Decree of 1848 he had been found liable to pay, but had not paid rupees 7480 : 4 : 9, with (probably) interest and costs. Another suit was pending against him, but had not been decided. On the other hand, he had brought a suit to enforce a claim for upwards of

rupees 50,000 against the estate of Sheodutt Singh. But this claim had been only partially decreed in his favour by the Zillah Court, had been wholly dismissed by the Sudder Court, and was the subject of an Appeal to England.

This being the position of the parties, what were the provisions of the Ikrarnamah which the guardian was induced to sign? The first clause, after stating that the Appellant had been unjustly made to suffer the losses which he had sustained, by reason of Sheodutt Singh's first suit, partly in order to compensate him for such losses, and partly in order to induce him to abandon the Appeal in his own suit, made the estate liable to pay him rupees 27,000 without interest. This clause was obviously against the minor's interest, in so far as it re-opened the questions closed by the final Decree of the 1st of March, 1846; admitted the injustice of the claim on which it was founded; and gave compensation to the Appellant for the loss which it had inflicted upon him. It is contended, however, that the success of the Appeal was so probable, and the consequences of that success were so serious, that the guardian was justified in spending rupees 27,000 to avert that danger from the estate. This is the point which has been most laboured at the bar, but their Lordships can find in the facts before them no reasonable grounds for such a conclusion. In the course of their ingenious argument, the learned counsel for the Appellant were almost constrained to admit that the particular action was misconceived, inasmuch as it was brought to recover the mesne profits of certain villages of which *ex concessis* the Defendant had not been in possession. They were further obliged to admit that under Regulation XXXIV. of 1803, the interest of the holder of a usufructuary mortgage in the property would cease on the liquidation by the usufruct of the principal and interest of his debt; and consequently that in any action founded on the breach of the agreement, express or implied, to give possession of the five villages, it was essential to allege and prove that, by reason of the non-delivery of such possession, something still remained due on the mortgage.

Their Lordships have extreme difficulty in seeing how such a suit could have been maintained by

the Appellant; since in the first suit of Sheodutt Singh against him it had been alleged and proved as a fact that the mortgage debt had been fully discharged; and he, instead of taking issue on that allegation, had sought to escape liability by showing that by reason of Seetaram's assignment to Sheosuhai he had no interest whatever in the mortgage. But assuming that he might have maintained such a suit, they have to observe that it would have been founded on a cause of action different from that on which the suit actually brought proceeded; and that it is not to be supposed that if the Appeal had come here, this Committee would have taken the unprecedented course, suggested by Mr. Pontifex, of reversing a Decree that had dismissed a suit improperly conceived, and of remanding the cause in order that it might be moulded into a suit of an entirely different character. To their Lordships it appears that the Appeal occasioned no such danger to the minor's estate; and that there are no grounds for saying that the stipulations of the 1st clause, so favourable to the Appellant, were for the benefit of the minor, or could have been reasonably supposed to be so.

The 3rd clause appears to their Lordships to be of the same character. No plausible reasons have been assigned why the guardian should embark in an expensive litigation in order to recover back from Mohun Lall sums for which he would necessarily have to account in the general account then open, and unsettled between him and the estate; or why, in consideration of advances for the purposes of that litigation, she should agree to divide with the Appellant moneys which, if recovered, would belong to the minor's estate. The latter objection affects also the 7th clause.

There is a conflict of evidence concerning the alleged payment of the sum of rupees 7480 : 1 : 9 mentioned in the 4th clause. The oral evidence to negative the payment is undoubtedly very loose and unsatisfactory, and the gomastah of the Appellant has given some evidence of the fact of payment, which he corroborated by the production of an entry in the Appellant's books. On the other hand, it is remarkable that the Appellant, though examined as a witness on other points, did not de-

pose to this payment; and the circumstance that the claim in respect of which this sum had been decreed was of precisely the same character with those which the first clause of the document had pronounced to be unjust tends to justify the conclusion of the Courts below, that this clause was under colour of an admission of a payment that was never made,—the release of a judgment debt to the prejudice of a minor's estate. Their Lordships do not think it is necessary to decide the question whether this payment was really made. If it was not made, the clause, no doubt, affords another strong argument against the validity of the Ikrar; but if it was made, it would not in any degree cure the other defects of that instrument, which would have to be considered as if this clause were not inserted in it. The 5th clause seems to imply the abandonment of the suit pending at the date of Sheodutt Singh's death. It was therefore also to the prejudice of the estate.

If the above-stated view of the particular clauses of the Ikrar be correct, the only ground on which the instrument can be supported is, that the transation, as a whole, was for the benefit of the estate, because the necessity for obtaining the pecuniary assistance of the Appellant was so urgent that the guardian was justified in submitting to the extraordinary and usurious terms on which it was to be given. There is no proof of such a necessity; and it might be sufficient for the purposes of this Appeal to say that, in their Lordships' judgment, the Appellant has wholly failed to relieve himself of the burthen which the law casts upon him of showing that he had good grounds for supposing that this transaction was for the benefit of the estate.

Their Lordships, however, are disposed to go further, and to say that the Courts below were warranted in imputing the character of fraudulent contrivance to this transaction.

The negotiation out of which it sprang was one between a Purdah woman, acting as the guardian and manager of an infant's estate, and a keen man of business, at that time a debtor to the estate. She is induced to sign an instrument which transforms the debtor into a creditor, and heavily burthens her ward's property without consideration,

except the merely colourable one of the abandonment of the Appeal, and the promise of future advances for the purposes of litigation, of which a portion, at least, was neither necessary nor prudent; of litigation which, if unsuccessful, would be ruinous to the estate, and, if successful, was to result in a division of spoils absolutely incompatible with her duty as guardian. It is not shown that, in coming to this agreement, she had the assistance of proper or independent advisers. On the other hand, it is not shown affirmatively by what practice (if any) upon her ignorance or her fears she may have been induced to execute the document. She may or she may not have been fully informed as to what she was doing. But whether she was herself defrauded, or whether she acted in collusion with the Appellant, the transaction was in either case a fraud upon the Respondent.

It has, however, been strongly urged that this finding of the invalidity of the Ikrar is not fatal to the title of the Appellant as purchaser at the execution sale. It has been contended that his rights are identical with those which a stranger purchasing at the same sale would have had; that the execution was good, at least, to the extent of the rupees 26,987 advanced to save the property from sale at the suit of Mohun Lall; and that the rights of the Respondent against the Appellant, taking them at their highest, are limited to the recovery of the difference between the last-mentioned sum and the price bid at the execution sale. Another argument in favour of this conclusion was, that the Respondent had not really been injured by the sale of his ancestral property under this execution, because he would equally have lost it if it had been sold at the suit of Mohun Lall.

As to the latter argument, it seems sufficient to observe that we have to deal with the rights of the parties in the events that have happened, not in those that might have been happened; that the salvation of the property by other means from the sale at Mohun Lall's suit was not absolutely impossible; and that, in any case, an execution for rupees 26,987 is less formidable than one for upwards of rupees 70,000. Again, it is to be observed that if the Respondent has been wronged by the sale of his property at the suit of the Ap-

pellant, the relief suggested falls very far short of an adequate remedy for that wrong. The property of which he has been deprived was ancestral; and the feeling on the subject of ancestral property is so strong in those provinces, that the policy of allowing it to be taken in execution and sold under judicial sales has been seriously questioned. And even if no account is to be taken of that feeling, it is notorious that landed property, when sold under an execution, rarely, if ever, realizes its full value. It follows, therefore, that to restore the property to the Respondent on the terms of paying to the Appellant what may be justly due to him is far more equitable than the proposed limitation of his remedy to the surplus proceeds of the sale; and the only question is, whether the sale has interposed an effectual bar to the application of the more appropriate equity.

Their Lordships concur with the learned Judges of the Sudder Court in dissenting from the authority of the case which, at page 110 of the Appendix, is stated to have been decided in 1847 by two out of three of the then Judges of the Sudder Court of the North-Western Provinces. The proposition that no difference is to be made between an innocent purchaser and one tainted by the fraud which has brought about the execution sale seems to them to be wholly untenable. The question is, in the former case, which of two innocent parties shall suffer; in the latter, whether he who has wronged the other party shall be allowed to enjoy the fruits of his wrongdoing. A Court exercising equitable jurisdiction may withhold its hand in the one case, and yet set aside the sale with or without terms in the other.

In the present case, the Judgment by *cognovit*, the execution, and the sale are all tainted with the fraud which entered into the original transaction, the execution of the Ikrar. All are parts of the contrivance by which the Respondent has been deprived of his property, and the Appellant has acquired it. Their Lordships, therefore, are of opinion that both the Courts below were right in decreeing that possession of the property should be restored to the Respondent. In considering on what terms this should be done, their Lordships concur with the Sudder Court in thinking that the

only principal sum for which the Appellant was entitled to receive credit was the rupees 26,987. That he had no title to the rupees 27,000 follows obviously from what has been already said. Nor has he, in their Lordships' opinion, shown any better title to the rupees 1,354. That sum had been advanced for costs for the litigation in which he involved the guardian under the 3rd clause of the Ikrar. Of that litigation, if it had been successful, he would have had half the fruits. It was unsuccessful. He cannot be allowed to carry on this kind of speculation at the risk and costs of an infant's estate.

The only remaining point—and it is one on which their Lordships have felt some difficulty—is the rate of interest to be allowed on the rupees 26,987. The Attorney-General has insisted that it was a favour to the Appellant, in the circumstances, to give him any interest at all on that sum; that the rate was in the discretion of the Court below; and that their Lordships should not interfere with that discretion. On the other side, it has been argued that the rate ought to be 12 per cent., such being the current rate of interest, and that which the judgment debt of Mohun Lall would naturally have carried. The contention below on the hearing of the application for a review was, that the rate should be 6 per cent., or the contract rate, as shown by the confession of judgment. Their Lordships have come to the conclusion that the third course is that which should be adopted. If interest was to be allowed at all,—and they think the Court below was right in allowing it,—the rate should be fixed according to some principle, not according to the arbitrary discretion of the Judges. On the other hand, the Appellant has no right to complain if he receives interest at the rate for which he stipulated when he made the advance. It may be true that he would not have advanced his money on terms so favourable to the estate if he had not had in view the corrupt advantages for which he had stipulated in the Ikrar. But there is no reason why the Court, because it will not let him reap the benefit of those improper stipulations, should make a new contract for him in respect of this particular advance.

On the whole, then, their Lordships will humbly

recommend to Her Majesty that the decree of the Sudder Court be modified by the allowance of interest on the rupees 26,987 at the rate of 6 per cent. instead of that of 5 per cent. per annum, but that in all other respects that decree be affirmed with costs. They do not think that so slight a modification ought to deprive the Respondent of the costs of this Appeal.