Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Brojonath Koondoo Chowdry and others v. *Khelut Chunder Ghose, from the High Court of Judicature at Fort William, in Bengal; delivered 17th July,* 1871.

Present:

SIR JAMES W. COLVILE.
LORD JUSTICE JAMES.
LORD JUSTICE MELLISH.

SIR LAWRENCE PEEL.

IN this case the only question to be decided is whether the High Court was justified in holding that the suit was barred by the Statute of Limitations.

The Plaintiff was a mortgagee, originally a puisne mortgagee, but who had acquired the rights of the first mortgagee, as afterwards stated.

The Defendant was the purchaser from the assignee in insolvency, of a person who had purchased the property in question from the mortgagor. The original purchase from the mortgagor was upwards of twelve years before the commencement of this suit, and for upwards of twelve years had been followed by registration and mutation of names in the Collector's book, the order for which was made on the 15th January, 1850.

At the time of the sale the property was subject to mortgages, made in the form of an English mortgage, with the usual proviso for redemption, and a proviso that the mortgagor should continue in possession until default, and on default an express right of entry was given to the mortgagee.

Much more than twelve years before the commencement of this suit such default was made.

After the sale under which the Defendant claims, the first mortgagee instituted a suit for foreclosure in the Supreme Court of Fort William. This suit proceeded to a foreclosure *nisi* on the 11th December, 1850, and which was made absolute on the 9th February, 1852.

The Plaintiff, however, procured that foreclosure to be opened, paid off the first mortgagee, took a transfer of his mortgage, and then proceeded himself to foreclose the mortgagor, and obtained his final decree for foreclosure on the 15th day of July, 1862.

To these foreclosure proceedings the purchaser of the property in question was not made a party, and it was of course held by the High Court that he was in no wise affected by those proceedings.

Having foreclosed his mortgage the Plaintiff commenced this suit against the Defendant, who pleaded his twelve years' possession in bar. The plaint was filed the 27th August, 1863.

The High Court has held that bar to be sufficient. Their Lordships do not doubt that such decision was correct. It was contended before them that so long as the mortgage security was a subsisting security, and dealt with as such, time did not run as between the mortgagee, who was content to rest on his security, and the mortgagor, who was permitted to remain in possession, and persons claiming under him; and it was contended that until the foreclosure put an end to the security as a security it was a subsisting security, and that it was then, and not till then, that time began to run. It was further contended that the Defendant who derived his title under a purchase from the mortgagor could not be in a more favourable position than the mortgagor himself.

The foreclosure proceedings did not affect the Defendant or the property in question, and it is difficult to see how a right of entry or cause of action against one man in respect of his property could be either lost or gained by proceedings against another man in respect of his property.

As against the Defendant the Plaintiff has acquired no right, except that which was conveyed to him by his securities.

The right under the mortgage deed was to obtain

possession of the land, and the cause of action, accrued when default was made.

The words of the Indian law are :—

"To suits for the recovery of immovable property, or of any interest in immovable property, to which no other provision of this Act applies, the period of twelve years from the time the cause of action arose."

To this there is one exception in respect of mortgage, which is this :—

"In suits in the Courts established by Royal Charter by a mortgagee to recover from the mortgagor the possession of the immovable property mortgaged, the cause of action shal be deemed to have arisen from the latest date at which any portion of principal money or interest was paid on account of such mortgage debt."

This exception does not apply to the present case, and where there is an express exception so limited to one special case of mortgage, it might plausibly be argued that it cannot be extended to any other case, even to the case of the original mortgagor himself continuing in possession and paying interest to the mortgagee.

The Judgment of the High Court appears to be that the bar extends even to such a case where not provided for by that section. The ruling however was not necessary for the determination of this suit.

It may, however, have been deemed necessary to introduce the exception stated above, in order to put mortgages in the English form, when put in suit in the Supreme Court, which was generally governed by English law upon the same footing as that in which English mortgages are under the existing Statutes of Limitation, and their Lordships, dealing with suits upon mortgages in the ordinary Courts of India, might in the simple case of a mortgagee and his mortgagor permitted to remain in possession so long as he paid interest, have found ground for considering that there was a permissive possession, and that a new cause of action and right of entry accrued when that permission ceased. No such question, however, arises in the present case, for it is impossible to hold that the Defendant, the purchaser, was holding or supposed that he was holding by the permission of the mortgagee ; and when both things concur,—possession by such a

holder for more than twelve years, and the right of entry under the mortgage deed more than twelve years old,—it is impossible to say that such a possession is not protected by the Law of Limitations.

Therefore, without passing an opinion whether the broader and more general rule laid down in the Judgment of the High Court can be supported, their Lordships have no doubt that the decision in the particular case is correct.

It has been pressed on their Lordships that the decision will destroy the value of mortgage securities in India. Their Lordships do not share in that apprehension. It may be and probably is better that mortgagees keeping their securities locked up in their strong box and allowing the mortgagor to be the visible owner in possession for a long series of years, should occasionally, as in this case, find themselves deprived of portions, more or less small, of the mortgaged property, than that *bonâ fide* purchasers and persons claiming under them after many years' possession, and perhaps much expenditure, should be evicted under a mortgage title perhaps half a century old because somebody has been paying interest on the mortgage money. In the present case an actual mutation of names took place, and a very slight degree of vigilance would have enabled the mortgagee to assert his title earlier.

Their Lordships will recommend that the Judgment be affirmed, and the Appeal dismissed with costs.

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