Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Gavin v. *Hadden, from the Supreme Court of Ceylon; delivered 17th July*, 1871.

Present:

Sir James W. Colvile.
Sir Joseph Napier.
Lord Justice James.
Lord Justice Mellish.

Sir Lawrence Peel.

THIS suit was brought by one executor and trustee to recover for the estate property sold under an execution in a suit against his co-executor and trustee.

It is not the province of a fresh suit to show irregularity or error of fact or of law in another suit, otherwise there would be no end to litigation, and the humblest Court in the kingdom might be called on to set aside the decision of the highest.

Irregularity, error of fact or of law, must be shown in the suit itself, must be rectified by application to the original Court, or by way of appeal from or review of the judgment. In this case the fresh suit is not by the original Defendant, but by a co-executor and co-devisee. That makes no difference. It would do the most incalculable mischief if it were once supposed that an action and judgment against an executor or other legal representative, as such, is not as binding against the testator's estate as any action or judgment against any Defendant is binding against him.

The only ground on which it is competent for any other executor or any other person interested in the estate to question in a new suit the proceed-

ings in a former action which has resulted in a judgment against the property of the testator is fraud.

Fraud will suffice to open anything.

If a creditor of a person who happens to be executor, by colluding with such executor, dishonestly obtains judgment and execution against the assets, when his claim was only against the executor personally, such a transaction can be unravelled.

Was there any such frand or collusion in this case ?

The action itself was certainly anything but collusive. It is quite clear that the Defendant to it deliberately allowed the proceedings to go on, not by way of collusion with the Plaintiff, but with the settled intention to avail himself of what he conceived to be a defect in the Plaintiff's title.

It is, however said, that the record itself shows that the Plaintiff was not entitled to sue the Defendant in his representative capacity, and that he was suing on an instrument which merely gave him a personal right against the Defendant.

That would be so, no doubt, if the action had been brought in an English Court of Common Law. On a bond given by an executor after the testator's death, even for moneys due from the testator, or moneys advanced for the purposes of the estate, the judgment on the bond must have been against the executor personally, and not a judgment against him, as executor, to be satisfied *de bonis testatoris*.

If that objection to the proceedings were well founded, it would really not advance the Plaintiff's case, for it would not show a ground for a new suit, but only show that a Judgment had been obtained on insufficient allegations and evidence, which would be merely ground for proceedings in error or Appeal in the original suit. Their Lordships, however, are not satisfied that the objection is well founded with reference to proceedings in Ceylon. In England on such an instrument as that sued on the creditor would have obtained Judgment in a Court of Law against the executor personally, and would have obtained a Decree in a Court of Equity against the assets of the testator. But the Court in Ceylon is a Court both of Law and Equity, and

from several precedents with which they have been furnished it appears to be in accordance with the practice in Ceylon that for moneys *bond fide* advanced to an executor or administrator for the purposes of the estate, a suit may be sustained against him in his representative character, and to have judgment and execution against the testator's assets. A proceeding which, to say the least of it, is quite as consistent with natural equity, and quite as convenient a mode for the administration of justice as that which is open to a creditor under the complicated and technical procedure which exists in England.

Their Lordships must, therefore, deal with the case as it was in fact dealt with in the Court in Ceylon, which tried what appears to their Lordships to be the real question in the cause. Was there anything fraudulent in the concoction of the instrument which was the foundation of the suit? If the creditor had knowingly obtained from the executor an instrument which the executor ought not to have given him,—if that instrument giving a right of action against the estate were tainted with fraud, that taint would vitiate all the proceedings, however formal and regular, as against all participators in such fraud, and all persons fixed with knowledge of the fraud and claiming benefits under it; and it is therefore necessary to inquire whether there was such fraud in the inception of the claim.

On this question their Lordships have had the benefit of a learned argument, illustrated by many authorities, for the purpose of establishing this proposition, which their Lordships are disposed to accept as an elementary principle of English and of all law, viz., that great as are the powers of a legal representative over assets, if he deals with those assets in breach of his duty, a person who is a party to such dealing, or takes with knowledge of the breach of trust, will not be allowed to retain any benefit therefrom.

But what were the facts of this case?

Mr. Martin Lindsay died in Ceylon possessed of a coffee plantation in full work, and of the piece of forest land, the subject of this suit, which he had taken with a view to its conversion into another coffee plantation.

He left in the island his eldest son, who had

been engaged actively in the management of the plantation, and who had reason to believe that he was executor; but beyond that knew nothing of the will which was in Scotland.

There were no available funds. The mercantile agents in the Colony had advanced as much as they could, and all the works on the plantation must have stopped if funds were not forthcoming.

In this emergency, the son, David Baird Lindsay, raises 1,000*l.* from Mr. Clerihew, and gives the best security he can.

The mercantile agents were themselves so pressed for money that, in order to raise it, they pledged securities of their own. But it was part of the arrangement that, within nine months at farthest, David Baird Lindsay would substitute for that security a security on the testator's estate, obtaining proper authority for the purpose. The money was paid to the agents with an agreement or understanding binding in good faith and honesty, and probably in law, that they would then continue to make the advances requisite for the cultivation and upkeep of the plantation.

David Baird Lindsay (whose suit this is as much as it is the suit of the Plaintiff Hadden) was examined as a witness for the Plaintiff, and was cross-examined. The Court below rejected his testimony as that of a witness not trustworthy. Their Lordships are unable to concur in that view. Evidence extracted by cross-examination from an unwilling witness is generally the evidence which it is most safe to rely on. From that evidence it appears that every farthing of the money was actually drawn out and expended on the estate, in fact in its salvage, for what would have become of it if all the labourers had been discharged and everything suspended? Probably, what would happen to a colliery in England if everything was suddenly stopped. There is no proof—which it was for the Plaintiffs to supply—that there was any private debt or any private purpose of David Baird Lindsay for which the money was borrowed. Their Lordships are satisfied that the money was honestly borrowed, and honestly applied for the benefit of the estate.

Then the will came out to the Colony, and it appeared then that David Baird Lindsay was one of

the executors, and, as the only one in the Island, he took out probate. It is stated in the Judgment in Ceylon (and the form of the probate and all the proceedings in this case, and in the other cases with which they have been furnished show their Lordships that it is correctly stated), that an executor in Ceylon has the same powers as an English executor, with this addition, that it extends over all real estate, just as in England it extends over chattels real.

He, the executor, armed with this power, gave the instrument in question in substitution for his former security.

It appears to their Lordships that it would be a perversion of justice to hold that a man, supposing himself to be executor, and borrowing money, and using money, for the estate, pledging his own security, and his friends' property for it in the first instance, with such a stipulation as was made in this case; then, finding that he really was executor, clothing himself with proper probate, and giving a security on the testator's assets in substitution for the provisional security, was guilty of any wrong, and to hold that the transaction is to be treated as a fraud or as a breach of trust in which he and the creditor were participators. Their Lordships are satisfied that it was an honest bond and charge, honestly given and honestly accepted; and that whatever legal rights it conferred remain unaffected by any equitable considerations.

It is, however, suggested, or apparently suggested, in the judgment of the Court of Ceylon, that the power of the testator to deal with the property had been affected by the assent of the executors to the specific devise to themselves as devisees in trust. This assent is inferred from the fact that there were communications between the executors themselves, and that the English executors had sent out a power of attorney to Ceylon. No such assent is, however, proved, or even pleaded.

It is not lightly to be presumed that a sole acting executor in one country would, while the debts were unpaid, assent to a bequest to devisees in a distant country, so as to deprive himself of his power honestly to deal with the assets for the payment of the debts. It would be a grave wrong in him to do so. And it would be most mischievous to

hold that a purchaser or creditor dealing with or suing the sole legal personal representative in the country could be affected by private communications between the executors which are supposed to have changed their title from that of executors to that of specific devisees.

Their Lordships are of opinion that the bond and security was an honest bond and security, and did effectually pledge the property of the testator; that the action was an honest action; and that even if there were, which they do not think, any error of law or of fact in the judgment, the judgment legally warranted the writ of execution—the writ of execution legally authorized the sale by the Fiscal, and the sale by the Fiscal effectually transferred the property to the purchaser. It is in that respect the exact converse of the Rajwallee case formerly decided by this Board.

Their Lordships do not think that the title of the Appellant at all depends on the power of attorney on which so much evidence was given, or on the order of the Court authorizing the executor to mortgage; but they think it right to observe that the gravest mischiefs would ensue if such an order could be questioned on the ground of some mistake made in granting it or some impropriety in the application for it.

But evidence has been gone into to show that there was grave misconduct in respect of what took place at the sale by the Fiscal. No such case is, however, made in the Plaint, nor could it well be.

It is obvious that a judgment debtor coming to complain of a sale by the sheriff, and get back his property, must come promptly. If he does not so come, and come prepared to redeem the property by paying the judgment debt, the utmost relief he could ever have been entitled to would have been to have the real value of the property taken *pro tanto* in satisfaction of the judgment.

But their Lordships do not think it right to pass that part of the case by unnoticed. It is quite obvious that the 100*l.* was a nominal price as compared with the real value of the property. But what was done in this case appears to be a common practice in the island. When property is taken in execution, and it is reasonably certain that it will not realize sufficient to satisfy the execution, it is

understood that the creditor will take it. No one thinks it worth while to attend the sale, and the property is knocked down to the agent of the execution creditor for some small sum.

In this case the execution creditor sent his agent to the sale to buy for him, having previously arranged to sell to the agent for the full amount of the execution debt, and there is evidence that persons were dissuaded from attending, and that one person attending was bought off. The creditor, it should be stated, agreed to give credit for the purchase-money, and to lend all the money necessary for bringing the land into cultivation.

It is not for their Lordships to suggest what the mode or extent of relief would be in such a case. But they are satisfied that in a proper proceeding by and against the proper parties some means of giving adequate relief would be found. As they have said, however, the case is not before them in this suit, and with one exception about to be pointed out, no wrong has been done. The property, in its then state, however sold, was clearly not worth more than the amount of the debt.

What would it have realized at a fiscal's sale, even if the judgment creditor had done his utmost to obtain the highest price, when the judgment debtor had done all he could to render it valueless by letting it be known that the purchaser was purchasing a lawsuit ?

The testator's assets have gone in satisfying a debt more than their value, and if the property had been openly taken in satisfaction of the judgment, there would have been no ground of substantial complaint. But the Defendant Clerihew seems to have thought himself justified in using other securities, some bills of exchange, to get an additional sum from the estate of the acceptor. As he is not before their Lordships, they abstain from commenting on his conduct, which he has had no opportunity of justifying or extenuating before them. But this impropriety, if it be an impropriety, does not affect the appellant, Mr. Gavin.

The grounds on which their Lordships have arrived at a conclusion in favour of Mr. Gavin, render it unnecessary to consider the many grave equitable considerations which were alleged on his

behalf as distinguishing his case from that of Mr. Clerihew, and as an answer to the suit, or as leading to a modification of the relief given.

Being of opinion that the very foundation of the Plaintiff's suit fails, they will recommend Her Majesty to allow the appeal with costs, to reverse the judgment of the Supreme Court, and to direct that in lieu thereof a Decree be made dismissing the Appeal to that Court from the Decree of the Court of First Instance, with costs, and to remit the cause to the Court in Ceylon, with directions to cause the property to be restored to the Appellants, and to take an account of the profits of the estate received by the Respondent, and of the amount of compensation, if any, for any damage which the property has sustained during the Respondent's possession, which are to be paid by the Respondent to the Appellant.

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