Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Ikbaloodowlah v. *Sah Bunarsee Doss, from a Decree of the Judicial Commissioner of the Province of Oudh; delivered* 11*th March*, 1869.

Present:

Sir James W. Colvile.
The Judge of the Admiralty Court.
Lord Justice Selwyn.
Lord Justice Giffard.

Sir Lawrence Peel.

THIS Appeal is brought from a Decree of the Judicial Commissioner of Oudh, confirming a Decision of the Civil Judge of the Court of Lucknow, which dismissed the Plaintiff's suit.

The Plaintiff by his suit, the Plaint in which is set out at page 10 of the Record, sought to recover from the first Defendant, Sah Bunarsee Doss, certain promissory notes, commonly called Company's Paper, of the Indian Government, which he alleges to have been illegally sold during the Indian mutiny. He claims either restitution of the notes, or alternatively their value. He states that his claim is based on inheritance. It is obvious on the face of the Plaint that he means to describe inheritance as the base or root of his title to the property, and that he alleges the illegal sale or transfer of, and the illegal dealing with the notes, as the wrong done to him, and that the alleged violation of his right constitutes his cause of action. The Plaintiff was the eldest son of his mother, who died possessed of a considerable property, consisting of land, moveables, and certain promissory notes, of which those in question are part.

It was a Mahometan family The family consisted of two sons and a married daughter. The eldest son claimed the land under an alleged gift from his mother in her life-time, a gift the validity of which was disputed by his brother at least. The sister survived her mother but a few days: the brothers and sister were entitled to the mother's property as heirs under the Mahometan law: the brothers taking equally each the double of their sister's share, and on the sister's death they took certain shares with her husband in the sister's share. Soon after the mother's death, the sons and daughter proceeded to make some division of the moveables: the elder son claimed the land: that title was litigated by the younger brother, but it does not appear with what justice or success. The more valuable part of the moveable estate consisted of Government paper, amounting to 59,100 rupees, in which each son's share would be of the value of 23,640 rupees; and the daughter's of 11,820 rupees. The daughter is stated to have received her share of this part of the property. The daughter's husband appears to have disclaimed.

The Plaintiff's right of suit in this action, is founded upon an alleged illegal dealing by the younger brother with his elder brother's share of this property, and he seeks to extend his right and remedy against the first Defendant, by treating him as an illegal purchaser under and consequent upon his brother's alleged spoliation. The mode in which the Plaintiff alleges this wrong to have been effected is this, viz., that the notes were secured under the separate seals of the heirs, in a house belonging to the estate, in which the mother died, and her sister continued to reside; that the younger brother, about the commencement of the Mutiny, broke the seals, carried off the property, and, alone, sold and purported to transfer it. If his statement be true, and reference be had to the nature of the property sought to be recovered in this suit, viz., Company's paper, and reference also he had to the first Defendant's letter of the 30th July, 1865, it follows that the first Defendant would be under the legal obligation of showing title to the notes purchased. The law applicable to the acquisition of title to notes passing by indorsement, as these appear to have been capable of being passed, must not be confounded with that applicable to the acquisition of title in ordinary chattels.

The Plaintiff had, previous to the institution of this suit, brought a suit of a similar nature against his brother, the second Defendant, and one Shenoah to whom two of the notes had been traced. In that suit he recovered Judgment against his brother, who did not deny the case made, but excused it on insufficient grounds. The Plaintiff having succeeded in this suit, is not shown to have taken any steps to enforce his Judgment against his brother. There is no proof whatever that the brother is insolvent, or incapable of satisfying that Judgment: nor is there any proof whether the elder brother's alleged title to the land is valid, nor of the value of that part of the property of the deceased.

After this Judgment had been obtained, the Plaintiff having acquired some information (at what precise time, however, does not appear), desired to enforce it by process against the promissory notes, the subject of the present suit, which he alleged he had traced to the possession of the first Defendant. If this could be done at all, under the execution of the process of the Court, it could be done only by attaching specific property still in the possession of the person against whom execution of the Decree was sought to be extended. But such a proceeding would be totally irregular and infructuous against a person who had parted with the notes.

The application appears to have been for an attachment and sale. A process of Injunction was issued instead. This was held by the Court as a wilful abuse by the Plaintiff of the process of the Court, and its own officer was treated as an accomplice in the wrong; but as it would be substantially little more operative than the process actually prayed, and neither process in terms sought discovery, there appears to be quite as good reason to attribute this proceeding to ignorance and blundering as to conscious fraud in the Plaintiff or his advisers. The result was to obtain from the first Defendant an admission of which the Plaintiff claimed to make use as evidence, but which the Court rejected as proof.

The Plaintiff having obtained this advantage, which involved a partial discovery, filed his Plaint, in this suit, to which the first Defendant's defence was:—1st. That the Plaintiff ought not to be allowed to reap any benefit from the discovery

which he had thus obtained. 2ndly. That notes sold in the Bazaar under the genuine seal of the owner were validly sold. 4th. The Limitation Law; and 5th. That the Plaintiff had already sued on the ground of inheritance, and had obtained a Decree. The evidence adduced by the Plaintiff seems to have been entirely documentary. The admission of the brother in the former suit was used in this, and as against the brother it was legitimate evidence, though not evidence such as to establish the case of wrong against his co-Defendant. The letter of the first Defendant of the 30th June, 1855, on the occasion of the Injunction, was also attempted to be put in evidence. There was no clear or distinct evidence of the state of the Indorsements on the paper, and no sort of evidence was given or attempted, of any legal transfer of the paper to the first Defendant.

In this state of things the first Court dismissed the Plaintiff's suit—first on the ground that the suit was barred by limitation; and next, that holding a money Decree against his brother, the Plaintiff had no right to another against Bunarsee Doss; and lastly, the letter of the 30th June, 1865, was excluded, but in their Lordships' judgment erroneously, on the ground of its having been obtained by the Plaintiff as being a party to an illegal and collusive Injunction.

From this Decree the Appellant preferred his Appeal to the Judicial Commissioner. Bunarsee Doss put in an Answer to the Appeal.

The Judicial Commissioner dismissed the suit with costs as against Bunarsee Doss, on the ground that there was nothing whatever to show, nor any reason to suppose, that the transaction on the part of Bunarsee Doss was not *bonâ fide*.

The statement of these decisions shows that the case of the Plaintiff has been viewed and treated by the Courts as though the onus of proof rested on him to rebut a presumable *bonâ fide* title by transfer in the first Defendant, Bunarsee Doss. But the case made as to these papers is that they were not in a state wherein a transfer, by delivery to a *bonâ fide* holder, would confer a title. On the contrary, it is stated that the legal title was in the mother, and required a transfer by endorsement from her, or all her heirs. Supposing that a mere

imposition of a seal by a native lady would be recognized as a legal transfer by endorsement, of which there is no allegation or proof, still such a transfer would not be valid after the death of the mother. An invalid transfer might still confer a valid equitable title, either in part or in entirety; but such a transfer, being exceptional and dependent on special circumstances, cannot be raised by legal intendment or presumption. Consequently, the Plaintiff's case required an answer, unless met on other grounds; those on which the Court proceeded, of suspected collusion between the brothers, would, if alleged and proved, have constituted a valid defence. A Plaintiff, however, ought not to have a defence of this sort urged against him at the hearing without due notice by the pleadings and issues of a case of fraud; and, as in a suit before the same original Tribunal, the admission made by the younger brother had been credited and acted on, and formed the basis of a decision against him in the Plaintiff's favour, the Plaintiff had the less reason to come provided with proof to rebut that charge. The existence of a Judgment against the brother is no bar to this suit.

Again, the objection that the suit is barred by limitation seems to have been founded on a neglect to consider the Act of Limitation applicable to the suit, viz., the Act 14 of 1859, which, on the facts alleged, furnishes no ground whatever for it.

Then there is another objection founded on the want of a certificate. This appears not to have been taken in the Court below, and is entirely inapplicable to a suit of this character.

The Act which provides for the granting of a certificate is intended for the protection of debtors to a deceased's estate; but Bunarsee Doss was never a debtor of the mother, nor did his taking the share or property, or part of the share or property, of the Plaintiff, by an invalid title, constitute him a debtor to the estate. The right of action is founded entirely on wrong, and not on privity of contract. Their Lordships therefore must humbly advise Her Majesty to allow this Appeal, and direct that both Decrees be reversed, and that the cause be referred back to the Judicial Commissioner, in order that he may give the necessary directions that it be reheard by the Civil Judge of

the Court of Lucknow, with liberty to either party to add to or amend the pleadings; and that the costs of the Appeal on both sides should be taxed, and be costs in the cause, and abide the result of the suit.

In arriving at this conclusion, their Lordships have no intention whatever of giving any judgment on the merits. They are simply of opinion that the facts ought to be inquired into on proper pleadings and evidence, including the first Defendant's letter of the 30th January, 1855, if the Plaintiff so desires it; and if the Plaintiff should prove his title as against the first Defendant to the whole or part of the notes, then that the first Defendant ought to be called on to show, if he can, either title in himself, or some grounds displacing the Plaintiff's right to complain of his acts; and that thus the facts and the real merits of the case should be arrived at.

Their Lordships are further of opinion that the second Defendant ought not to have been dismissed; for if the Plaintiff has any right against the first Defendant, it may be that the first Defendant, if he makes satisfaction to the Plaintiff, ought to have the benefit of any subsisting judgment against the second, or, at all events, to have some remedy by way of indemnity or otherwise over against him; it must in this point of view be obviously for his benefit that the second Defendant should be bound by all the proceedings in this suit; the Plaintiff having brought the second Defendant before the Court, he, under the circumstances, ought not to be dismissed unless the whole suit should eventually fail on the merits against the first Defendant.

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