Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Wilson and another v. Traill, from the Supreme Court of Victoria; delivered 8th July, 1869.

Present:

SIR JAMES W. COLVILE.
SIR JOSEPH NAPIER.
LORD JUSTICE GIFFARD.

IT may be well, before stating the views of their Lordships upon the particular point involved in this Appeal, to consider what the position of the parties was. The Plaintiffs in the action, the Appellants in this Appeal, being resident in Melbourne, made a contract through their agents at Sydney for the purchase of certain teas. Upon the face of the contract those teas appeared to be the teas of Threlkeld, who now is found to have been the agent of an undisclosed principal, Mr. Tange. The teas were sent to Melbourne, and the form of the action shows that the purchasers, the Appellants, had treated them as not being such teas as they had contracted to purchase, and they accordingly brought their action to recover the moneys which they had paid under the contract. Therefore that clears the question as to the property in the teas. The teas in the hands of the garnishee were the property of the vendor, whoever that vendor might be.

The action was brought against the ostensible vendor, Threlkeld, in the Court of Melbourne. Neither Threlkeld nor Tange was personally subject to the jurisdiction of that Court. The Plaintiffs, therefore, took advantage of this law of foreign attachment, and upon the return of the writ of summons *non est inventus*, they attached these teas as the teas of Threlkeld in the hands of the garnishee.

Then took place those various proceedings which their Lordships do not think necessary to enter into particularly, but the result was that the gar-

nishee, (for it will be convenient in dealing with this Appeal to treat the acts of the Bank of which he was an officer as his acts), finding, as he says, that the teas were not the teas of Threlkeld, that they were claimed, and properly claimed, by Tange, and that the Bank had not any lien upon them, parted with the teas, and sent them back to Sydney.

In these circumstances the Appellants applied against the garnishee for a summons under the 215th Section of the Common Law Procedure Act. It is scarcely necessary to read again that clause which has been so much commented on, because it is perfectly clear—it is almost admitted—that it was essential both to the validity of the original attachment and to the prosecution of the remedy which the 215th Clause gives against a garnishee who parts with the property that has been attached, that the property should belong to the Defendant in the action.

The question to whom these teas belonged cannot, in their Lordships' opinion, be affected by any of those principles which are sometimes applied to sales by an agent on behalf of an undisclosed principal, and give to the vendee such rights of set-off or the like as he would have had, if the property in the thing sold had been really and not ostensibly in the agent.

In those cases the contract subsists, and the question is in what mode it is to be carried out. Here there has been a breach of contract, and the party is suing in a particular way for the money which he has paid under that contract as upon a failure of consideration, and for damages sustained by reason of the breach of contract. The words of the Statute require that the property attached should belong to the Defendant. They imply an actual and not merely a constructive ownership in him. Their Lordships have already in the course of the argument intimated that there is no ground for saying that the garnishee was estopped by his conduct from showing in whom the actual ownership was.

Upon the summons various affidavits were filed upon both sides, and the Judge came to the conclusion that the property in the teas was really in Tange and not in Threlkeld, the Defendant in the action, and therefore that it was impossible to say that the Defendant had sustained any damage by

reason of the garnishee parting with property which was not properly subject to the attachment at all and accordingly he dismissed the summons.

The only substantial questions that seem to be raised by this Appeal, are whether the Court on the evidence before it should have come to a contrary conclusion, or whether the case was left in such a state of doubt that the Court ought, under the power which a subsequent section gives it, to have directed an issue as to the question of property to be tried?

Their Lordships are of opinion that the first question must be answered in the negative; that upon the affidavits it is impossible to say that the balance of testimony was not against the contention of the Appellants.

With respect to the other question, although at times in the course of the argument their Lordships may have felt more doubt concerning it, yet, looking to the affidavits as corroborated by the acts of the parties, and the inferences which arise from the Bank at Sydney giving up its claim of lien against Threlkeld on the conviction that the property was the property of Tange, they cannot say that there was such a case of doubt that the Court below, in the exercise of its discretion, has erred in not granting an issue to try that question. They were asked to presume a sort of universal conspiracy against the Appellants in this case, and that these parties have all sworn falsely in order to enable Threlkeld or the garnishee to escape from their responsibility for the benefit of Tange. Judging by the ordinary principles of human action, their Lordships think that they would not be justified in drawing any such conclusion.

Their Lordships, therefore, feel that it is impossible for them to say that the Judgment of the Court below is wrong, or that the Court was bound in its discretion to grant an issue, and they must humbly advise Her Majesty to dismiss this Appeal, with costs.