Judgment of the Lords of the Judicial Committee of the Privy Council, on the Appeals of Syud Bazayet Hossein and others v. *Dooli Chund, and of Moulvie Mahomed Wajid* v. *Mussamut Bebee Teyabun and others, from the High Court of Judicature at Fort William in Bengal; delivered 9th November* 1878.

Present:

Sir James W. Colvile.
Sir Barnes Peacock.
Sir Montague E. Smith.
Sir Robert P. Collier.

THE first of these appeals is from an Order of a Division Bench of the High Court of Calcutta, passed on special appeal. The Order is dated the 23rd May 1873, and modified an Order of the Judge of Zillah Gya, dated 27th March 1872, which last-mentioned Order reversed that of the subordinate Judge, dated the 29th July 1871, and made in the Appellant's favour.

The suit was instituted by the Respondents to establish their title as purchasers in execution of a decree obtained by them against Najmooddin of 14 annas of Mouzah Bhojepore in Mehal Rewai Taturia, in Zillah Gya, and to recover possession thereof.

The suit was brought under these circumstances: Khorsheid Aly, a Mahomedan of the Soonee sect, died in October 1865. He left three widows, Mussamat Zohrun, Mussamat Begum, and Mussamat Tayyuban. He also left a son named Najmooddin, who it was contended was not the legitimate son of his father (but whose title has since been established in the suit), and a sister.

The son's title having been established as the legitimate son and heir of his father, the three

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widows became entitled under the Mahomedan law as sharers to one eighth of the estate of their deceased husband, and the son Najmooddin to seven eighths of the estate. The son claimed the whole property under a mokurruri which he alleged had been granted to him by his father on the 16th March 1862. The widows claimed large sums of money on account of dower; but on the 13th June 1866, before any proceedings had been taken by the widows to recover their dower, Najmooddin, the son, executed a mortgage bond in favour of Situl Persad for Rs. 4,890. The bond was dated the 13th June 1866, and was as follows:—

" Whereas Rs. 1,295, under a bond dated " the 14th February 1866, A.D., Rs. 1,000, the " principal amount under a registered bond, " dated 18th May, idem, and Rs. 118 4 annas, " the interest on the aforesaid two bonds, in " all Rs. 2,413 4 annas, are justly due to Baboo " Situl Persad, son of Baboo Ajoodhia Lal " 'Mahajun' (banker), by caste an Agurwala, " inhabitant of Kusba Sahebgunge, Pergunnah " and Zillah Gya, from me the declarant; and at " present having taken Rs. 2,386 12 annas in " cash for payment of the rents of the mouzahs " held in lease and mokurruri from the Ranis, " the wives of Rajah Modh Narain Sing,"—

referring to a mokurruri held by the father himself, as to a portion of the estate,—" hence " cancelling the former bonds, I execute this bond " for Rs. 4,800, and declare and give in writing, " that I shall repay the said amount, principal, " with interest at two per cent. per mensem, in " full on the 30th Magh 1274 "—corresponding with 1867—" to the Baboo aforesaid. As a " guarantee for the payment of the amount in " question, I mortgage 8 annas of the entire " 16 annas of Mehal Rewai Taturai, Pergunnah " Muhair, Zillah Gya, which I have as my

" property, and mokurruri in my possession " and holding up to the date of the execution of " this deed. As long as the amount in question, " principal with interest, is not repaid, I or my " heirs shall not transfer the same by sale, " conditional sale, gift, or mortgage, or convey " it in any other way to anybody else. Should " I and they do so, the same will be null and " void." Then at the end of the bond, "For " the further satisfaction of the banker:"—that is, of Situl,—"I have kept a mokurruri pottah, " dated the 16th March 1862, A.D., of the mehal " mortgaged in this bond with the banker," meaning that he had deposited with the banker the mokurruri under which he claimed to hold the whole estate from his father.

Some question has arisen upon the construction of this bond, whether it was merely a mortgage of the mokurruri which he alleged to have held from his father, or whether it was a mortgage of his estate so far as he could charge it.

Their Lordships are of opinion that the mortgage operated to transfer his interest in the estate, and not merely the mokurruri which he alleged had been granted to him by his father. It is important to determine this question, because in a subsequent proceeding, to which advertence will presently be made, the mokurruri, alleged to have been granted to him by his father, was held to have been made merely benamee for the benefit of the father. The mortgage was on the 13th June 1866. At that time, if Najmooddin were the legitimate son of the deceased,—and it has now been decided that he was,—he had the right to convey his own share of the inheritance, and was able to pass a good title to the alienee, notwithstanding any debts which might be due from his deceased father.

For that position the 6th Bengal Law Reports, page 54, was cited as an authority. In that

case the share of an heir was seized and sold in execution of a decree against the heir in his individual and not in his representative capacity, and it was held that the purchaser had a right to hold the property against a creditor of the ancestor who had obtained a decree for her debt before the seizure in execution. In that case the creditor was the widow of a deceased Mahomedan, and her claim was in respect of dower. The principle of that case is applicable to the present, and the ruling is quite in accordance with the English law applicable to heirs and devisees as to real estate, and to executors as regards personalty. In Sugden on Vendors and Purchasers, page 655, the edition of 1862, it is laid down that, "although an heir at "law is bound by specialty debts in respect "of lands descended, yet a purchaser of "those lands, without notice of any debts, "was never holden to be subject to them." In Williams on Executors, at page 872, a similar rule of law is laid down with regard to executors. It is said, "It is a general rule of law and equity "that an executor or administrator has an abso-"lute power of disposal over the whole personal "effects of his testator or intestate, and that "they cannot be followed by creditors into the "hands of the alienee. The principle is that "the executor or administrator in many instances "must sell in order to perform his duty in "paying debts, &c., and no one would deal with "an executor or administrator if liable after-"wards to be called to account."

In the present case, in the course of the argument a distinction was attempted to be drawn by the learned Counsel for the Appellant between an absolute sale and a mortgage; but it appears to their Lordships that there is no valid distinction in this respect. An executor may very properly mortgage a portion of the assets of

his testator for the purpose of raising money to pay debts, and in many cases it may be very beneficial to the estate that such a course should be adopted.

In Williams on Executors, page 873, it is said, "As an executor may absolutely dispose of the "testator's assets for the general purposes of "the will, there seems no good reason why, in "the exercise of a sound discretion, and pre-"suming the language of the will does not "peremptorily require an absolute sale, the ex-"ecutor may not raise the money required by a "partial sale or mortgage of the assets."

In *Campbell* v. *Delaney*, Marshall's Bengal Reports, page 509: "The heirs of a deceased Ma-"homedan mortgaged some property of their "ancestor. After the mortgage a judgment "creditor, in respect of a debt due from the "estate of their ancestor, attached and sold the "mortgaged property in execution of his decree. "Held, that the sale was subject to the mort-"gage."

Their Lordships entirely concur in the view of the law which was laid down in the case cited from the 6th Bengal Law Reports, and the other authorities cited, and are of opinion that a creditor of a deceased Mahomedan cannot follow his estate into the hands of a bonâ fide purchaser for value to whom it has been alienated by his heir-at-law.

That being the law, it is necessary now to refer to what took place.

After the mortgage bond had been executed by Najmooddin, two of the widows, viz., Mussamat Zohrun and Mussamat Begum, instituted a suit against Najmooddin, and also against the sister of the deceased, who would have been entitled as an heir of the deceased in case Najmooddin was not a legitimate son. They sued to set aside the makurruri under which the son claimed to be entitled to the whole estate from

his father; to declare that he was a mere stranger; and they prayed for an order that possession of the estate should be recovered by them, and that the dower which they claimed should be paid out of the estate.

Lengthened proceedings took place in that suit, and ultimately the High Court, upon appeal by Najmooddin against whom a decree had been made in the lower Court, made the following decree: "That the Appellant is the "legitimate son and an heir of Khorshed Ali, "deceased; that the Appellant must account "for the assets of the estate of Khorshed Ali "which have come to his hands, and that to "the extent of these assets he is liable to pay "the amount due to the Plaintiffs Zohrun "and Begum in respect of their dower, the "said Zohrun and Begum, in respect of their "claim, ranking *pari passu* with other ordinary "creditors of the estate. When the debts due "by the estate of Khorshed Ali shall have been "satisfied, the residue is to be divided between "the heirs, who are Najmooddin and the three "widows Zohrun, Begum, and Tayyuban, in the "shares to which they are by Mahomedan law "entitled."

After the suit had been instituted by the first two widows, Tayyuban, the other widow, brought a similar suit, and obtained a similar decree in the High Court. Under the decrees in the suits by the widows executions were issued, and the share of Koorshed Ali in the property in question, Mouzah Bhojepore, was attached as part of the assets of their deceased husband.

On the 26th June 1867 Situl Persad sued Najmooddin on the mortgage bond, and obtained a decree in that suit, by which it was ordered that the sum due on the bond should be realised from the property mortgaged, and other property of the Defendant.

The present Respondent derived title under a sale of the mortgaged property in execution of that decree, and the High Court upheld his right to it. It should be remarked that several decrees and orders, both interlocutory and final, were made in the suits of the widows, and that the property in suit was attached in those suits long before it was attached in Situl's suit. But their Lordships consider that this is immaterial, and that it is unnecessary to refer to the several proceedings in the suits of the widows, because they are of opinion that the bond which was executed by Najmooddin to Situl gave him a title to the estate which had been mortgaged by the bond before the institution of the suits by the widows, and that the rights of Situl and of those who claim under the sale in execution of his decree are not affected by any of the proceedings in the widows' suits.

Their Lordships are of opinion that the decree of the High Court was correct, and they will humbly advise Her Majesty that the judgment and decree be affirmed and the appeal dismissed with costs.

THE second appeal to which this judgment relates is similar to the preceding case instituted by Bazayet Hossein and others against Dooli Chand, with one exception.

The Appellant claimed under a sale in execution of a decree upon a mortgage bond executed by Najmooddin to Abdul Aziz on the 30th October 1867. The great distinction between this case and the other is that in the present case the mortgage bond was executed pending the suits brought by the widows, whereas in the other case the mortgage bond was executed before the institution of the widows' suits. In this case the widows claim under a purchase in execution of the decree of the widow Tayyabun, the effect of which was stated in the judgment in the other

appeal. The High Court held that the purchaser under the decree upon the mortgage bond was bound by the decree of the widow, inasmuch as the mortgage had been executed during the pendency of the widow's suit. Mr. Justice Phear, in delivering Judgment, says, "I need hardly say that a decree of this kind, "directing the person in whose hands the "property was, to account for it in order that it "might be applied for the purpose of discharg-"ing the debts due from Khorshed Ali, was a "decree against that property, and operative to "bind it in the hands of Najmooddin, and there-"fore of any other person who took from Naj-"mooddin with notice of the decree or under such "circumstances as to make him affected by the "doctrine of *lis pendens*."

Their Lordships agree in that view of the law, and are of opinion that the Appellant in this case was bound by the decree obtained by the widow Tayyabun.

A question was raised in the course of the argument as to whether the decree of the High Court warranted the execution which the widow took out; and whether some further order of the Court was not necessary before execution could be issued upon it. No application, however, was ever made to set aside the execution upon the ground that it was not warranted by the decree of the High Court, nor was any point of this kind taken in the Lower Court. Under these circumstances their Lordships are of opinion that that point cannot now be taken.

They, therefore, hold that Abdool Aziz and all persons claiming under him, or under the sale in execution of the decree upon his bond, were bound by the decree of the High Court in the suit instituted by the widows before the bond was executed.

Under those circumstances they will humbly advise Her Majesty to affirm the decision of the High Court and to dismiss this appeal with costs.