Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Tareeny Churn Bonnerjee v. *Maitland and Another, from the High Court of Judicature, Calcutta; delivered on the* 12*th July*, 1867.

Present:

Lord Cairns.
Sir James W. Colvile.
Sir Edward Vaughan Williams.
Sir Richard Torin Kindersley.

Sir Lawrence Peel.

THEIR Lordships are of opinion that the only question in this case is the validity of the deed which the bill was filed to set aside.

It has been contended for the Appellant that, even supposing the deed were out of the way, the present Appellant, as against Obhoychurn and those who claim under him, would be entitled to have a lien or security upon the share of Obhoychurn in the estate of the testator for any money which might be coming from Obhoychurn to that estate; and that the Appellant would be entitled to that security or lien, not by virtue of the contract, but upon a well-known principle of equity independent of contract.

Their Lordships have very considerable doubt whether, having regard to the will in this case, and the nature of the property, viz. immoveable or real estate, any such lien could be maintained; and further, the right to maintain a lien would depend on the proof of the two debts due from Obhoychurn to the estate, which, if not proved for the purpose of maintaining the deed in this case, would of course not be proved for the purpose of maintaining an equity independent of the deed. But, putting aside those difficulties, their Lordships think that if any such lien could be introduced, or be attempted to be enforced, the attempt to enforce it could only have been made by other

proceedings, viz. by a bill in the nature of a cross-bill filed by the Plaintiff, insisting upon that equity, and undertaking to prove the facts which it would be necessary to prove in order to give effect to the equity, if the equity did exist.

Their Lordships, therefore, address themselves to consider the question of the validity of the deed.

Now, in the first place, an objection has been made to the title of those who were the Plaintiffs in the suit below to impugn that deed. It is said that the Plaintiffs in the revived suit represent, as they do, Richard Stuart Palmer, the sole Plaintiff in the original suit; that he was merely purchaser at the Sheriff's sale, who took a conveyance from the Sheriff of all the interest of Obhoychurn in the property in question; and it is contended that he and the Plaintiff must take that interest as Obhoychurn held it, and that, because Obhoychurn could not set aside the deed which he had executed, therefore no more can those who claim by sale from the Sheriff.

There might be considerable foundation for that argument if the execution had gone against Obhoychurn, and the sale had been made by the Sheriff of his property, and then, without anything more, a conveyance to the purchaser under that sale had been executed by the Sheriff. But that was by no means the case with regard to the execution we have now to deal with, because, after execution levied and before sale, the first suit was instituted which is referred to in the bill in the present suit. That first suit was instituted by the firm of Mackillop, Steward, and Co., against Obhoychurn and against his mother; and the result of that suit was that, before any sale took place, a decree of the Court was made, by which the Court declared that the deed in question, so far as related to the Defendants in the suit, and their respective interests and claims thereunder, was fraudulent and void as against the complainants in the suit,—reserving, nevertheless, to Nanychurn Bonnerjee and Ramessur Chowdry, the trustees under the deed, and to all persons other than the Defendants in the suit, all their rights and interests under or by virtue of the indenture.

Therefore, before any sale, there was a determination of the Court in a suit to which the creditors

were parties,—to which Obhoychurn and his Assignee were parties,—to which Hurrosoondery, the mother of one of the parties to the deed, was a party,—a determination that the deed was fraudulent and void as against creditors; and after that determination it was that the property was sold.

Now, it is perfectly clear that the object of obtaining that decision was that the property upon the sale might fetch the higher price that would result from the decision, the Court having declared that the deed in question was no impediment to a purchaser obtaining possession of the property which had belonged to Obhoychurn.

Their Lordships think, therefore, that the title of the purchaser under the sale is a title which, in consequence of that decree, is in no way affected by any right of Obhoychurn or of Hurrosoondery. It is, true, the decree reserves the right, if there be any right, in third parties; notwithstanding the decree, therefore, the conveyance by the purchaser would be no impediment to third parties asserting a right, if they had a right, under the deed. But that leaves open this question, and this only, whether any third party,—the Appellant, for instance,—had such a right? And that their Lordships will express their opinion upon, in their observations on the next part of the case.

Passing, therefore, from this subject of the title of the Plaintiff in the original suit to sue, their Lordships proceed next to consider the main question of fact which has been raised, and which has occasioned so much argument in the case.

That is the question of fact with regard to the large debt of Rs. 43,674 professed to be secured with interest by the deed.

Now the learned Judges in the Courts below,—the two Judges in the Primary Court and the three Judges in the Court of Appeal,—have all arrived, without hesitation, at the conclusion that that debt of Rs. 43,674 was not a *bonâ fide* debt due from Obhoychurn; and it would be far from consistent with the rules which their Lordships have always laid down in dealing with cases of this kind for them to reverse a decision upon a question of fact thus arrived at by five Judges unanimously, unless the very clearest proof were adduced to their Lordships that that decision was erroneous.

It is true that only the two primary Judges had before them the witnesses, or the witness, who were or was examined; but the three Judges of the Court of Appeal, conversant with testimony of the kind which has to be dealt with in this case, were of opinion that the two Judges of the Court below had arrived at a just conclusion upon the evidence that was adduced.

But passing from the great respect which, upon a question of this kind, would be shown to the determination of the Judges below upon a question of fact, their Lordships have examined with care the whole of the evidence which was before those learned Judges, and they are of opinion that there is no ground whatever, to be dissatisfied with the conclusion at which the learned Judges arrived.

It appears that Obhoychurn, at an early age, had been sent by his family into the employment of Mr. Marjoribanks. It is clear from the evidence that Mr. Marjoribanks was largely indebted to the estate of the grandfather of Obhoychurn, and there is abundant ground to conclude that the reason for which Obhoychurn was placed in the service of Mr. Marjoribanks was that he might, as far as possible, recover and realize for the estate of his grandfather the debt which was due to that estate from Mr. Marjoribanks.

Large sums, beyond all doubt, were received by Obhoychurn in the course of that employment under Mr. Marjoribanks; nor do their Lordships intimate any doubt but that these sums, in the year 1830, had amounted to the sum of Rs. 43,674; but the question is, what did Obhoychurn do with that money? Did he appropriate it to his own purposes, leaving himself the debtor to his grandfather's estate; or did he pay it over, from time to time, to those who represented his grandfather's estate?

Now the story which is told upon that subject by Obhoychurn appears to their Lordships to be utterly incredible. He says he received the money. He admits that he did not pay it over, but he is unable to account in any satisfactory way for his application of the money,—as to how he employed or spent it, or as to where he invested it; and it is extremely difficult to believe that those who sent this young man into the employment of Mr. Marjori-

banks for the purpose of obtaining payment for his grandfather's estate of the money in question, should have taken no care to secure that money as it was received by Obhoychurn from time to time.

There are certain Exhibits printed at page 81 of the Record,—Exhibits, the genuineness of which is not challenged, and which are appealed to by the Appellant in corroboration of the statement which he has made. But assuming that Obhoychurn from time to time received from Mr. Marjoribanks the amount of Rupees 43,764 for the purpose of satisfying the debt due by Mr. Marjoribanks to the grandfather's estate, and assuming that Mr. Marjoribanks owed that amount at one time to the grandfather's estate, these Exhibits are really nothing more than the formal record or evidence which might be made, or might be preserved, as between Mr. Marjoribanks and the grandfather's estate, at the close of their dealings in 1830.

Mr. Marjoribanks commences by writing a letter on the 25th of March, 1830, to Obhoychurn, in which he desires him to bring up his private account with him, Mr. Marjoribanks, and compare it with his book; he says it must be rather large against Obhoychurn; however, he adds, we shall have no difficulty in coming to a settlement.

These are expressions by no means inconsistent with Obhoychurn having been from time to time receiving moneys which otherwise would have belonged to Mr. Marjoribanks for the purpose which has been referred to.

It appears that a few months afterwards, on the 21st of August, 1830, Mr. Marjoribanks wrote a letter, addressed to Obhoychurn, desiring him to pay to the two acting executors of his grandfather's estate, Rupees 43,764—to pay that sum to the executors—not to pay it to their order, and not in point of fact making any negotiable instrument for the payment of the amount. Mr. Marjoribanks, it appears, sent that order to the two acting executors, and it reached their possession. At the same time, Mr. Marjoribanks wrote a note to Obhoychurn in these terms:—"On paying Gourcechurn Bonnerjee and Bissonath Muttyloll, executors to the estate of your grandfather, the draft I have given them for 43,674 Sa. Rs., all accounts between us are settled."

The acting executors, in whose favour the draft was made, appear to have signed their names on the back of it, and to have handed it over to Obhoychurn, and at the same time to have given to Obhoychurn two bonds from Mr. Marjoribanks, by which Mr. Marjoribanks had become bound to the estate of the grandfather for a sum almost the same in amount as that for which the draft was made.

Now it appears to their Lordships entirely contrary to what would be, and what must be presumed to be, the natural course of business on such an occasion, to suppose that these executors would have handed back this draft endorsed by themselves to Obhoychurn, and to have handed over to Obhoychurn the evidence which they had against Mr. Marjoribanks of the debt due from Mr. Marjoribanks to the estate, thereby releasing Mr. Marjoribanks, and thereby putting in the hands of Obhoychurn the evidence of any sum due from Mr. Marjoribanks, unless in point of fact the estate had at that time received payment in some shape or other of the whole of the sum of 43,764 Rupees.

Again, passing from the year 1830, and going down to the year 1843, when the deed was executed, it appears to their Lordships incredible that those who were interested in protecting the estate of the grandfather, would during that period have remained perfectly quiescent, taking no security and exacting no payment from Obhoychurn in respect of that amount, if the amount really were due from Obhoychurn.

The books of Obhoychurn have been produced. They appear to have been appealed to on behalf of Tareeneychurn Bonnerjee, and it is possible that under an act of legislature on the subject, they might have been admissible, but, if so, only as corroborative evidence of the testimony of Obhoychurn; and their Lordships do not dissent from the view of the learned Judges below, that if they are right in concluding that the evidence of Obhoychurn is not to be received as truthful, neither can these books kept by Obhoychurn be considered as satisfactory evidence of that which when taken by itself is not more credible.

Their Lordships therefore agree with the learned Judges that there is no evidence whatever which can be relied upon that this sum of 43,764 Rs.,

which, with the interest thereon, is part and a very large part of the amount secured by the deed, was a *bonâ fide* debt due from Obhoychurn.

Now this question of fact being once determined, the consequence appears to their Lordships to be inevitable. They are compelled, arriving at this conclusion of fact, to hold that the deed professing to secure that amount on the estate of Obhoychurn was a deed executed with intent to defraud and delay the creditors of Obhoychurn. He was much pressed by his creditors at the time the deed was executed, and insolvency supervened very shortly afterwards.

But then it is said that the deed secured the further sum of 13,873 Rupees, and that there is nothing to impeach the statement that this was a debt due from Obhoychurn to the estate of his grandfather, and that the deed, therefore, at all events, should stand as a security for that amount.

It appears to have been considered by the Court below that on the principle of the appropriation of payments, it might be taken that there were payments on the opposite side of the account which would wipe out this lesser sum. But their Lordships do not rest their decision upon that ground. If the deed was executed with a view to defraud and delay creditors, and if the facts which have been referred to with regard to the sum of 43,764 Rupees are sufficient to show the deed was executed with that intent, it appears to their Lordships to be utterly impossible for any party to that deed, or any person claiming under those who were parties to that deed, to maintain the deed for any purpose whatever.

The deed is one which, in that view of the case, is not executed to secure the 13,873 Rs., but it is a deed executed to defeat and to delay creditors; the deed therefore utterly falls to the ground, and cannot be maintained, as their Lordships think, as a security for any sum whatever.

Upon the question of the form of the decree, their Lordships, agreeing entirely with what has been done by the Court below in point of substance, consider that the decree has, in point of form, gone too far in providing for the cancellation of the deed, the Plaintiff in this suit not being interested to cancel the deed as a whole, but being interested

only to remove the deed out of the way of the assertion of his own rights in regard to the property which he has purchased; and their Lordships think that portion of the decree which retains the deed for cancellation should be omitted.

Their Lordships, therefore, with that alteration, will humbly recommend to Her Majesty to affirm the decree in other respects, and to dismiss the Appeal; and the alteration their Lordships have made is not of that kind which, according to their general rule, would induce them to vary their view with regard to the general costs, therefore they will humbly recommend that the Appeal be dismissed with costs.