Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Chan Kit Sun and Another v. *Ho Fung Hang, from the Supreme Court of Hong Kong; delivered the* 12*th March* 1902.

Present at the Hearing:

LORD MACNAGHTEN.
LORD DAVEY.
LORD ROBERTSON.
LORD LINDLEY.

[*Delivered by Lord Davey.*]

In this case the Respondent as administrator of the estate and effects of Ho I. Shek deceased on the 13th January 1899 commenced an action in the Supreme Court of Hong Kong against the Appellants for an account of certain alleged partnership transactions between the deceased and the Appellants. The Appellants (Defendants in the action) pleaded the Statute of Limitations. An order was made on the 1st of December 1899 that the issue of law with regard to the Statute of Limitations be tried before any other issues in the suit. The terms of the issue were "Assuming that all the facts stated in the "Petition are true is or is not the Plaintiff's "claim herein barred by the Statute of Limi-"tations?"

The material facts and dates thus admitted for the purpose of argument are the following:—

(1.) Ho I. Shek died intestate on the 19th June 1880.

(2.) No administration to his estate was taken out until the month of November 1886 when probate of an alleged will was granted by the

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Supreme Court in its Probate Jurisdiction to Ho Chik Fuk the person named as executor in such alleged will but Ho Chik Fuk did not intermeddle with the shares claimed in the alleged partnership transactions.

(3.) On the 17th November 1896 the alleged will was declared to be a forgery and the probate was revoked.

(4.) On the 21st June 1897 administration was granted to the Respondent. The relevant Statute of Limitations is contained in Section 8 of Ordinance No. 13, 1864 whereby it was enacted that all actions of account must be commenced within six years after the cause of such actions. These are the same words as those of 21 Jac. 1. c. 16.

It was not seriously and could not be successfully disputed that according to the well-established rule in English law the statute runs against an intestate's estate from the date of the grant of letters of administration only. But the Appellants contended (1) that according to the law of the Colony a right of action accrued on the intestate's death to the Registrar of the Court and the statute therefore ran from that date—or alternatively (2) that the statute commenced to run from November 1886 when the grant of probate of the forged will was made to Ho Chik Fuk.

On the trial of the issue the Supreme Court (Original Jurisdiction) decided in favour of the Respondent and its decision was affirmed by the Supreme Court (Appellate Jurisdiction). The present Appeal is from the Order of the latter Court dated the 14th March 1900.

The argument of the present Appellants in the first Court was based chiefly on the grant of the probate of the forged will. Now it is quite true that so long as that probate was in existence the title of the grantee could not be impeached in any common law Court and he could have sued

for and given a good discharge for any debt due to the deceased. It is indeed questionable whether in the present case the alleged executor could have maintained an action against the present Appellants because the title of an executor is derived not from the probate but from the will and the probate when granted relates back to the death. As more than six years had elapsed between the date of the death and the grant of the probate any right of action by Ho Chik Fuk under his probate would (it is said) have been barred. The acting Chief Justice decided in the Respondent's favour on this ground. It is replied by Counsel at their Lordships' Bar that the cause of action vested though the right to sue was barred. Without giving any opinion on this somewhat subtle point their Lordships think that the general argument may be disposed of on a broader ground. By the revocation the grant of probate was made void *ab initio* for there was not in fact any will to be proved. It is now known that the apparent title of the so-called executor although it could not be impeached in any Court except the Court of Probate was founded on a fiction and a fraud and for the purposes of the present argument the probate must be treated as a nullity and as never having had any real existence. The Court cannot be bound to take notice when the facts are known of an apparent right of action obtained by fraud.

In the Court of Appeal no reliance appears to have been placed on this point though it has been resuscitated before their Lordships. The point there argued was the first contention of the Appellants that a right of action vested in the Registrar on the death of the intestate. This depends on certain sections of the Ordinances. By Section 39 of Ordinance No. 8 of 1860 which was the one then in force it was

enacted that from and after the decease of any person dying intestate and until letters of administration should be granted in respect of his estate and effects the personal estate and effects of such person should be vested in the Registrar of the Supreme Court. By Section 1 of Ordinance No. 9 of 1870 it was declared that the Registrar of the Supreme Court was *ex officio* official administrator under Ordinance No. 8 of 1860. And by following sections large powers were given to the official administrator for the purpose of enabling him to get in and protect the estate of the deceased pending the grant of letters of administration but no power to sue was conferred on him. It was argued that by these Ordinances all the rights of action included in the estate of the deceased were vested in the Registrar or official administrator and he therefore had, by implication, a statutory right to enforce them by action. But their Lordships think that there is nothing in the sections to which they have been referred to overrule the established rule of law that no action can be maintained in respect of the estate of a deceased person except by a duly constituted administrator or executor. The sections referred to seem to place the Registrar pending the grant of letters of administration in the position of a receiver and to give him powers incident to such an office but nothing more. And the result of the inquiry made by the Chief Justice as to the practice under Section 39 of the Ordinance of 1860 confirms this view.

Their Lordships will therefore humbly advise His Majesty that this Appeal be dismissed and the Appellants will pay the costs of it.