Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Henry Lewis Lubeck, an Advocate of the Court of the Resident in Mysore, from the Court of the Resident in Mysore; delivered the 26th July 1905.

Present at the Hearing:

LORD MACNAGHTEN.
SIR FORD NORTH.
SIR ANDREW SCOBLE.
SIR ARTHUR WILSON.

[*Delivered by Sir Arthur Wilson.*]

The Appellant in this case is an Advocate who practised in the Court of the Resident and other Courts in Mysore, and he appeals against an Order of the Resident, dated the 19th December 1903, by which he found the Appellant guilty upon two charges of professional misconduct and suspended him from practice for a period of four months.

The transactions in connection with which the charges arose related to the estate of one Basappa Chetty, a resident of Bangalore, who died intestate and childless at Srirangam, near Trichinopoly, on the 3rd December 1898, leaving a considerable estate. The persons who were, or at one time or another claimed to be, interested in the estate of the deceased were the following: First, Munisamy, a first cousin of the deceased, being his father's brother's son. Secondly, a group of relations removed one degree further in agnate relationship with the deceased; they were Krishnia, son of a deceased first cousin, and

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Munisubbiah, Latchmia and Rachaia, sons of another first cousin. Thirdly, there were a group of persons referred to as the Hosur people. Fourthly, certain persons who alleged that the deceased had left a will.

The last-mentioned group applied in the High Court at Madras for probate of the alleged will.

On the other hand, Munisamy, the first cousin, acting in conjunction with his nephews, the persons constituting the second group, and apparently also with the Hosur people, the third group, engaged the Appellant to obtain letters of administration to the estate of the deceased, and to collect the assets, Munisamy acting as leader in the matter. Accordingly an application was made in the names of Munisamy and his nephew Krishnia on the 16th December 1898 for letters of administration, on the allegations that the deceased was a member of a joint family and that the Petitioners and others of the second group, with the Hosur people, were jointly entitled to the estate. The persons who had set up the will opposed the application for administration and it stood over to abide the result of the probate proceedings. On the 26th April 1899 the probate was refused on the ground that the alleged will was not shown to be genuine. Thus the fourth group of claimants was disposed of, and this closed the first period in the conflicts as to Basappa's estate.

The application for administration was then proceeded with, but the remaining claimants were no longer united. Munisamy applied to amend the application for administration by striking out the mention of the Hosur people, denying that they had any interest. On the 22nd May 1899 Munisamy and Krishnia applied jointly to the same effect. Munisamy died on the 26th July 1899, and his sons Thippia and Nyathia, as his heirs, continued to claim

administration of the estate of Basappa. On the 12th January 1900 a compromise was effected with the Hosur people whereby their opposition was got rid of, leaving only Munisamy's sons Thippia and Nyathia on the one hand, and their cousins, the second group above mentioned, as claimants to the estate. And it may be said at once that there never was room for doubt as to the law by which their respective rights were governed. If Basappa was a member of a joint family, and if his property was ancestral or joint, all these agnates were entitled to share. If on the other hand Basappa was separate and his estate was self-acquired, Munisamy as the agnate nearest in degree, was alone entitled to succeed, and on his death his sons took his place. On the 29th March 1900, letters of administration of the estate of Basappa were granted to Thippia and Nyathia.

Throughout these controversies the Appellant acted as legal adviser to all or some of the agnatic relations who have been mentioned.

In the course of these proceedings, too, a number of agreements were entered into amongst the parties themselves and between certain of the parties and the Appellant. Of these agreements two are of essential importance for the purpose of this Appeal. On the 17th May 1899 an agreement (referred to throughout the proceedings as Exhibit G) was entered into between Munisamy and his nephews, or some of them, in which it was stated that Basappa was the undivided agnate of the parties to the agreement and that "even though the names of all of us " are not entered in the certificate and the name " of any one of us is entered in it we are all " entitled to the whole of the said property." It must be observed that this agreement was entered into during Munisamy's lifetime and in a period when the claim set up in respect of

the alleged will had been disposed of, but that of the Hosur people had not, they were still in opposition.

On the 22nd August 1899, Munisamy being now dead, a second agreement (spoken of as Exhibit X) was executed, to which the sons of Munisamy and their cousins of the second group were parties. It was substantially to the same effect as the previous agreement G, that is it bound the parties to treat the estate of Basappa as one to which they were jointly entitled and to divide it accordingly. When this agreement was entered into the controversy with the Hosur people was still going on and was in an acute stage.

It may be well also to mention a third agreement (Exhibit Y) made on the 21st December 1899 between some of those who had been parties to Exhibit X, which in effect repeated its terms. This was very shortly before the compromise with the Hosur people. And, as has been already mentioned, on the 29th March following the letters of administration were issued.

Down to this stage the sons of Munisamy and their cousins acted together, but when the administration had been obtained their harmony did not last much longer. On the 23rd July 1900 Krishnia Chetty, one of the second group of claimants, brought a suit against a number of persons as Defendants, of whom it is only necessary to mention the present Appellant and the sons of Munisamy, who had obtained the letters of administration. The Plaintiff in that suit claimed to be entitled to a share in the estate of Basappa, and asked for partition, and for this purpose he relied upon his alleged right by inheritance, and, in the alternative, upon the agreements (Exhibits G, X, and Y), or some of them. He joined the present

Appellant as a Defendant on the grounds that he was a constructive trustee, and that he had concurred in breaches of trust. The defence of the present Appellant was in substance that in all he had done he had acted only on behalf of the administrators, and had accounted to them. The case of the administrators was that the estate had devolved upon their father, Munisamy alone, and after his death, upon them. As to the agreements, their case was that they had been entered into under a mutual mistake of fact, (that is to say under the belief that all the parties to those agreements were entitled to share in the estate), and that there was no consideration for them.

The District Judge before whom the case came for hearing decided, after consideration of the evidence, that the estate of Basappa was not joint but separate property, to which Munisamy was the sole heir. But he held that by reason of certain of the agreements which have been mentioned the then Plaintiff was entitled to share in the estate. He further held that the now Appellant was a constructive trustee and made a decree against him on that footing.

This Judgment of the District Judge was delivered on the 7th July 1902, and on the 19th of the same month that officer sent to the Resident a copy of his Judgment, together with a report, (which was treated in India as a confidential document and not disclosed to the Appellant), in which he commented upon the action of the now Appellant, and recommended that proceedings should be taken against him on the ground of professional misconduct. The Resident referred the matter to the Public Prosecutor, who framed twelve charges against the Appellant.

While these charges were pending both the now Appellant and the administrators appealed

to the Resident against the District Judge's decision of the 7th July 1902. These Appeals were duly heard, and on the 25th July 1903 the Resident delivered Judgment on the two Appeals. As against the present Appellant he set aside the Decree of the District Judge, holding that he was not a constructive trustee. The appeal of the administrators he dismissed. He agreed with the District Judge that Munisamy was the sole heir of Basappa, but he held also that the compromises embodied in Exhibits G, X, and Y were valid and binding.

On the 13th August 1903 two further charges, framed under instructions from the Resident, were served upon the Appellant. These are the charges with which their Lordships have now to deal, and they are as follows :—

"13 (1). That you being at the time the legal adviser of "B. A. Thippia Chetty *alias* Rachiah Chetty, (2) B. A. "Nyathia Chetty *alias* Chikka Rachiah Chetty, (3) B. A. "Krishniah Chetty, (4) B. A. Munisubbiah Chetty, (5) B. A. "Rachiah Chetty, and (6) B. A. Lakshmiah Chetty, and "knowing and believing at the time of the execution of the "document marked Exhibit G in O. S. No. 968 of 1900 on "the file of the District Judge, Civil and Military Station of "Bangalore (as you on the 4th July 1903 admitted before the "Honourable the British Resident in Mysore at the hearing "of your Appeal No. 6 of 1902) that they were worthless and "valueless, did either wrongfully advise and induce the "execution thereof by the said parties, or, when you should "have advised them as to what their legal rights and position "would be after they had executed the said Exhibit G, did "allow them to remain under the belief that the said document "was legal and valid, in that you at their request attested the "same yourself.

"(2). That you being the legal adviser of B. A. Thippia "Chetty *alias* Rachiah Chetty and B. A. Nyathia Chetty *alias* "Chikka Rachiah Chetty, and being in the discharge of your "professional duties, as such bound to advise them as to the "effect upon their rights to the property of the deceased "Basappa Chetty of the execution of a document, to wit, "Exhibit X in O. S. No. 968 of 1900, on the file of the "District Judge of the Civil and Military Station of Ban-"galore, did not give them the advice they were entitled to "expect, and did thereby allow them to execute the said

" document, Exhibit X, which you at the time, according " to your admission aforesaid, knew and believed to be " worthless as a legally binding agreement. Further, that " you, by attesting the said document, induced your clients " to believe that it was legal and binding."

On the 31st August 1903 the matter of the charges came before the Resident, when the Public Prosecutor applied that as the Judgment on appeal (the Judgment already referred to) had considerably modified the situation, all the charges except Nos. 13 (1) and 13 (2) should be withdrawn; and, no objection being raised, this was done.

Down to this point the Resident was Sir Donald Robertson, and the proceedings had been before him; but at this stage, apparently to meet the wishes of the Appellant, Sir Donald Robertson left the matter to be further dealt with by Mr. Bourdillon, the gentleman who was about to relieve him as Resident.

The new Resident, Mr. Bourdillon, in due course proceeded to inquire into the two charges against the Appellant, those numbered 13 (1) and 13 (2). He found those charges to be proved, and on the 19th December 1903 he made the Order now under appeal suspending the Appellant from practice for four months.

Before considering the two present charges it may be well to make a few preliminary observations. In the first place, it is perhaps hardly necessary to point out that their Lordships have nothing to do with the twelve original charges, which were abandoned, or with any of the facts disclosed in the voluminous record except those bearing upon the two charges which have been sustained.

Secondly, upon the argument of the Appeal exception was taken to several portions of the procedure followed in this case in India as being illegal, or irregular, or fairly open to censure. It was also objected that much of the evidence

received and acted upon by the Resident in investigating the charges was not properly admissible.

It would have been a matter for great regret if their Lordships had been compelled to dispose of such a case as the present upon the ground of irregularity in procedure, or improper admission of evidence, instead of upon the merits; and their Lordships do not feel themselves under any such compulsion, but are, in their opinion, able to do justice in the case without regard to the more or less technical questions which have been raised, upon which therefore they express no opinion.

But some general considerations regarding the nature of the evidence adduced and the use which has been made of it must be taken into account. The evidence against the Appellant consisted in part of certain statements made by him in the course of argument of the Appeal in the case already mentioned. These statements will be mentioned later. The rest of the evidence consisted of the records in the case already mentioned, and in some other proceedings, put in in their entirety.

When evidence has been given in one case upon the issues raised in that case, examination-in-chief and cross-examination alike having been directed to those issues, nothing can be more dangerous than to take that evidence and apply it in another case in which other issues arise. Inferences drawn from that evidence bearing upon these latter issues cannot but be regarded with much misgiving. This consideration greatly lessens the confidence which their Lordships would otherwise have been disposed to place in the inferences which have been drawn from the evidence by Mr. Bourdillon. And this hesitation is of necessity increased when the inferences drawn

by that officer are in some instances stronger than, or even inconsistent with, those drawn from the same evidence by the Judges who dealt with the case in which it was given.

The charges in question relate to the two documents already mentioned (Exhibits G and X), and as to them certain conclusions of facts may be accepted. On the 17th May 1899, when Exhibit G was executed, the Appellant was the legal adviser both of Munisamy and of his nephews, employed on behalf of them all to obtain administration and get in the estate. Having regard to the evidence, and particularly to the findings of the District Judge and of Sir Donald Robertson, their Lordships are not prepared to hold that the Appellant advised or had anything to do with the preparation of this document, but he certainly attested its execution. At the date of the execution of Exhibit X, the 22nd August 1899, the Appellant was the legal adviser of the sons of Munisamy. It cannot safely be said that he had anything to do with preparing the document, but he signed it after it had been executed. With Exhibit Y which again confirmed the arrangement embodied in the earlier agreements the Appellant has not been shown to have had any connection.

The origin of the two charges in question is stated by Sir Donald Robertson in a passage of his Judgment cited by Mr. Bourdillon. The Appellant had appealed to Sir Donald Robertson against the decree of the District Judge which made him liable as a constructive trustee.

"Mr. Lubeck at first conducted his own case before me, and "stated that he was aware that Exhibits G and X were "invalid, but that he signed them merely because he was asked "to do so. I find it difficult to describe in suitable language "the proceedings of an advocate who not only allows his "clients, who were, it must be remembered, under an agree-"ment to remunerate him on a very handsome scale, to sign

" what he believed to be (as he now candidly and almost " exultantly admits) worthless documents (G and X) but " further attests them himself. He desires, I understand, to " obtain shelter behind the plea that Exhibit W was no longer " in force *quâ* the Plaintiff, Defendants 5 and 6, when " Exhibit X was executed. But this argument can have no " avail as regards Exhibit G, dated 17th May 1899, at which " time Exhibit K was operative. Even if it be urged that " Exhibits G and X could not operate to the ultimate detri- " ment of the legal rights of Defendants 3 and 4 from whom " he had taken a separate agreement (Exhibit W), he must " have known that these documents furthered the chances of " embroiling his clients in litigation. . . . I hold that Mr. " Lubeck, as he admits, knew perfectly well that legally the " parties other than Munisamy had no claim outside the " agreements, and also that the latter irrevocably committed " his clients."

From Sir Donald Robertson's note it would seem that the Appellant gave as a reason for having thought those agreements to be void that they were *nuda pacta*, meaning apparently without consideration. Upon the basis of these admissions the present charges were framed.

Their Lordships agree with Sir Donald Robertson and Mr. Bourdillon that the explanations given by the Appellant of his action in connection with Exhibits G and X show a defective appreciation of the duties of a legal adviser. The view expressed by him seems to be that a professional man acting for clients, and taking part in connection with the execution of a compromise directly arising out of the matter in which he is employed, is not bound to warn his clients if they are acting in ignorance of the nature of what they are doing while he is in a position to inform them, or under a mistake as to their rights which he could correct, unless expressly asked by them on the subject. Their Lordships think Sir Donald Robertson was abundantly justified in expressing his disapproval of such a view. But their Lordships are called upon to deal not with views expressed as to professional duty, however lax, but with charges of actual misconduct.

It is clear from the passage already cited from Sir Donald Robertson's Judgment that he had present to his mind two perfectly distinct, and indeed scarcely consistent, views, either of which might be taken of the Appellant's conduct. The first, based entirely on his own admission, is that he knew Exhibits G and X to be invalid, and allowed his clients to execute them without warning them that this was so. The second view, based in part upon other evidence, is that the Appellant knew that Munisamy, and his sons after him, were alone entitled to Basappa's estate, and yet allowed those persons by the compromise to give away a part of their rights to the other parties.

The formal charges drawn up seem to be intended to embody the first view only. But in the Order now under appeal Mr. Bourdillon considers both views, and his condemnation of the Appellant seems, if their Lordships rightly understand it, to be based upon both. Their Lordships think it right, therefore, to consider both these aspects of the case, but they are perfectly distinct, and should be considered separately.

The first aspect of the charges then is, that the Appellant knew the two agreements G and X to be invalid, and yet allowed his clients to execute them. But they were not invalid. The same Judgment of Sir Donald Robertson, in which these charges had their origin, established their validity. In substance, the case is this: The Appellant admitted before Sir Donald Robertson that he thought at the time that the agreements G and X were invalid in law. That was a matter of opinion. The opinion he says he held proved to be wrong, but at least as regards the agreement G, the question was so far doubtful that the District Judge thought one way, and Sir Donald Robertson on Appeal

the other. The question is whether, in allowing his clients to execute the documents under these circumstances, the Appellant was guilty of such professional misconduct, as justly to call for punishment. Their Lordships think that the charges, viewed in this aspect, have not been established.

The other aspect of the case is that the Appellant, knowing Munisamy to have been the sole heir of Basappa, allowed him, and his sons after him, to compromise upon the footing that other people had equal claims. Such a charge involves of course two things; that the Appellant knew the rights of the parties, and that his clients did not know them, or did not intelligently and deliberately realise them.

If it had been necessary for their Lordships to decide, for the first time, at what moment the Appellant or anybody else could safely be said to have known who succeeded by inheritance to the estate of Basappa, they would have thought the point a difficult one. It depended entirely upon the question of fact whether Basappa died joint or separate in estate. Different views were put forward from time to time to meet the tactical exigencies arising from the shifting phases of the conflict; and the question was the subject of litigation down to the decision of the civil case already mentioned, by the District Judge on the 7th July 1902, and by Sir Donald Robertson on Appeal on the 25th July 1903. But Sir Donald Robertson in that Judgment expresses a decided opinion that the actual legal rights of the parties were quite well known before Exhibit G or Exhibit X was executed. Mr. Bourdillon thinks so too. And they are very probably right. But if so there is nothing to show that the Appellant had any knowledge or means of knowledge which his clients did not

possess ; and nothing can be more emphatic than the findings of Sir Donald Robertson that Munisamy, and his sons after him, were fully aware of their legal position, and deliberately accepted the compromise to avoid family quarrels. A few passages from his Judgment may be cited :—

"The parties really wished to effect a compromise whatever "may have been the strict legal rights."

"The intention of Munisamy (and his sons after him) "was *coûte que coûte* to compromise, notwithstanding that "his legal right to the property was unassailable."

"He (Munisamy) recognized, I believe, that it would be better "to arrange matters in a friendly manner with his relations rather "than run the risk of estranging himself from the rest of the "family and possibly also of having to incur costly litigation ; "unfortunately his sons, though at first following their father's "wise example, eventually determined, emboldened probably "by the eminent legal advice to which the Advocate-General "alluded, to set up the exclusive claim which, apart from the "family settlement and compromise effected by G. X, and Y, "the law would allow. I say unfortunately, because as I have "already remarked the effect of litigation must necessarily be "to squander the estate."

"That Munisamy was ignorant of his legal rights appears "to me incredible."

In accordance with these views Sir Donald Robertson decided, in the case before him, that Munisamy and his sons were not under any mistake when they entered into the agreements G and X. And in entire consistency with this, the charges framed under the instructions of Sir Donald Robertson were not drawn with reference to the aspect of the case now under consideration. In their Lordships' opinion the charges looked at in that light cannot be sustained.

Their Lordships will humbly advise His Majesty that the Order appealed against should be set aside.