*Privy Council Appeal No.* 17 *of* 1926.

**John Agabog Vertannes and others** - - - - - *Appellants*

*v.*

**James Golder Robinson and another** - - - - *Respondents*

FROM

## THE HIGH COURT OF JUDICATURE AT RANGOON.

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 31ST MARCH, 1927.

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*Present at the Hearing :*

LORD PHILLIMORE.
LORD WARRINGTON OF CLYFFE.
SIR JOHN WALLIS.

[*Delivered by* LORD PHILLIMORE.]

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The narrative in this case is to the following effect. Sarkies Vertannes was an Armenian Christian practising as a solicitor in Rangoon. In 1886 he made his will, and the material part is as follows :—

> " This is the last Will and Testament of me Sarkies Vertannes of No. 68A, Halpin Road, in the town of Rangoon, British Burma. I do hereby appoint Mary my wife the sole executrix of this my will. I do hereby revoke all wills and dispositions heretofore made by me, and do publish and declare this to be my last will and testament. I give and devise and bequeath my three houses numbered respectively 68, 68A, 68B, in Halpin Road, in the said town of Rangoon, together with land thereto belonging and all the out-offices and buildings standing thereon, and all my household furnitures, carriages, horses, chattels and effects, and all moneys and debts due and owing to me which I shall be possessed of at the time of my death unto my said executrix absolutely."

He died in May, 1897. At that time he was possessed of other immovable property besides that mentioned in his will—namely, certain land at Kokine in a suburb of Rangoon—and it is concerning this land that the dispute has arisen.

His widow obtained probate of the will and administered the estate, sold the three houses in Halpin Road which are specified

in the will, paid all the debts including a mortgage on the Kokine land and was left finally with this land free from incumbrances and R. 19,000 in August, 1904.

The family then moved to the Kokine land and have resided there ever since, none of them having married. The eldest son died in 1917 intestate.

There is valuable brick earth upon the Kokine land, and the widow embarked on a brick-making business in which she was assisted by her eldest son as long as he lived.

The second son, who is the first defendant in the suit, came to England and acquired a call to the Bar, returned to Rangoon in 1900 and has practised as a barrister there ever since. The widow is the second defendant. The third defendant is the one daughter. She was of full age before 1904 and carried on a dairy business on the same land.

The fourth and fifth defendants were boys at the time when the family settled at Kokine. The fourth defendant was, for a short time, in the Port Commissioners' Office and then volunteered for service in the war, and was absent from January, 1915, till February, 1922. The fifth defendant is in a mercantile office at Rangoon. This completes the family.

The widow appears to be a masterful and capable woman. She is stated to have helped her husband in his legal work, and she took full control of the family and of the property. It is probable that she thought that the Kokine land had been devised to her by virtue of some of the general words in the will; but it may be that she accepted the position that there was an intestacy as to these lands, and that her beneficial interests were limited to her widow's share, and that she notwithstanding had as executrix full power of disposition. Which view her children took is uncertain.

The first defendant, who ought to have known as much law as his mother, says, in his deposition, that he always thought that there was an intestacy as to this land, but that his mother convinced him that as executrix she had full power of disposition. Whether this be a correct statement of what passed between them and of his original view of the situation, is somewhat uncertain. But the point becomes immaterial.

The younger children certainly acquiesced in the assertion by the mother of her full right of disposing of the property, very likely without minute enquiry as to the origin of this right. But they all deposed that they always believed that they had shares in the land. Nothing appears as to the view taken by the deceased son.

Though it is said that very good bricks were made, the business was not carried on at a profit; or, perhaps, it should be stated that it was not carried on at such a profit as to maintain the widow and to maintain the children so far as they were not maintaining themselves; and the widow began a course of borrowing on mortgage—probably in the first instance to purchase plant for the business.

On the 3rd November, 1904, she mortgaged the property to a Chetty to secure R. 20,000. The deed contains no recital of the will or of her title as executrix. It was made by her as if she were absolute owner. The first defendant, however, joined in it as a surety. He thus became aware of its contents, and if he really, at the time, thought that there was an intestacy as to this property, it is remarkable that he, being a barrister, should have allowed the deed to take the shape which it did.

On the 15th November, 1905, this mortgage was paid off, and a fresh mortgage given to the Burmah Building and Loan Association Limited for R. 30,000. The first defendant was not required to act as surety in this transaction.

On the 1st February, 1909, the Burmah Building and Loan Association Limited assigned its mortgage to the firm of Robinson and Mundy, in which the present plaintiff, Mr. Robinson, was one of the partners. The firm were engineers and contractors and purchasers of the bricks. The widow was one of the attesting witnesses to this assignment, and presented it for registration. Shortly after this, the firm of Robinson and Mundy were requested by the widow to make further advances, and began, on the 6th January, 1910, with an advance of R. 800; and seventy-three further receipts for similar advances—all for comparatively small sums—and certain promissory notes were produced at the trial.

Early in 1916 Robinson and Mundy dissolved partnership, and the debt due from the widow was agreed to be assigned to Robinson.

By deed dated the 17th February, 1916, Robinson and Mundy reconveyed the property to the widow; but the plaintiff Robinson kept the title deeds to secure an equitable mortgage for the debt, which was reckoned up on the 1st April, 1916, as amounting to R. 91,600. The widow also gave a promissory note for this sum to the plaintiff.

On the 21st April, 1917, the plaintiff required his money, and wrote to the first defendant to say that he must tell his mother that if the interest due was not paid off he would call in the whole of the loan. The first defendant states that this came as a surprise to him, and that he had no idea of the extent of his mother's borrowing till he then came to inquire.

However this may be, negotiations by the first defendant and his mother with the plaintiff then began. They resulted in an agreement of the 9th May, 1918, between the three, whereby the widow, described as the mortgagor, agreed to transfer forthwith absolutely to the plaintiff the land, the bricks, and the brick-making plant. The plaintiff agreed not to sell the property for a year, though he was to be allowed to sell bricks or any part of the plant. He agreed to convey the property to the mortgagor or to any person she might name for the sum of R. 109,660, which was agreed as the then existing amount of debt.

The plaintiff agreed to let the premises to the first defendant, who was described in the agreement as the bailee, for twelve months from the 1st May at the rent of R. 150 per month. There were some other provisions not necessary to relate. Of even date with this agreement was a conveyance of the property in the ordinary form by the widow to the plaintiff, the consideration being the release of the debt.

When the year came to an end, the first defendant asked to be allowed to continue tenant, and was allowed to remain on for a time from month to month. Towards the end of 1919 the plaintiff's representative entered upon the land for the purpose of making bricks, but the family remained living there, and the dairy business was kept on.

On the 14th May, 1920, formal notice to quit at the end of the month was sent to the first defendant, and this was countered by a lawyer's letter sent on behalf of the three younger children objecting to the plaintiff manufacturing bricks and injuring the property, and claiming shares in the land as heirs of their father, stating further that they had been in occupation since his death.

Thereupon on the 17th September, 1920, the plaintiff brought suit.

By his plaint the plaintiff averred that the property had passed to the widow by the will of her husband, that probate of the will had been obtained by her as executrix, that she lived on the land with her children, had mortgaged it and finally conveyed it to him. He related the circumstances of the lease to the first defendant and payment of rent up to a certain date, and put the other defendants in the position of persons living on the premises during the tenancy by the leave and licence of the first defendant, then stated the notice to quit and the contention raised by the third, fourth and fifth defendants, and claimed ejectment, possession, rent in arrears, mesne profits and costs.

The second defendant put in no defence. The first defendant by his written statement set up his father's intestacy as regards this property and his claim as one of his sons to a share in it, and said that he entered into the agreement of the 9th May, 1918, under the mistaken belief that his mother as executrix had power under the Indian Succession Act to mortgage and sell the property. He contended, therefore, that he had attorned tenant under a mistake as to the plaintiff's legal position, and that he was entitled to resist ejectment.

The third and fifth defendants delivered a joint statement setting up the intestacy, saying that they and the fourth defendant had lived upon the land in their own right and denying all knowledge of the transactions between the plaintiff, the first defendant and their mother. The fourth defendant delivered a written statement substantially to the same effect.

When the issues came to be settled, the plaintiff asked for an issue No. 11 in the following words :—

> "Are the defendants or any of them estopped from disputing the plaintiff's title by the provisions of Section 115 and 116 of the Evidence Act ?

This was allowed on terms that he gave particulars of the estoppel which he relied upon; and these particulars, as will appear later, are of importance.

When the case came to trial, three questions arose: the first turns on the construction of the will; the second upon the power of the widow if she was not devisee under the will to sell the property as executrix; and the third as to the alleged estoppel of the defendants, or, as it might otherwise be put, their conduct disentitling them to equitable relief.

The District Judge came to the conclusion that the will did not pass the Kokine land, and that the widow did not convey the land as executrix, but that the conveyance was nevertheless valid, subject to the right of the children if they were not estopped by conduct or otherwise to charges on the land for the value of their shares.

He held that the first defendant was estopped from disputing the landlord's title under Section 116, but that none of the defendants were estopped under Section 115.

He therefore gave a decree for ejectment of all the defendants and delivery of possession of the land and premises to the plaintiff, who was to have possession subject to charges for such distributive shares under the Indian Succession Act as the first, third, fourth and fifth defendants should be able to substantiate in properly instituted proceedings; and a decree for mesne profits against defendant No. 1, with costs against defendants Nos. 1 and 2.

Both sides appealed from this decision, and the Judges in the High Court differed in opinion from the District Judge. They thought that the word " effects " in the will was sufficient to pass the Kokine land to the widow, and that if it were otherwise the first, third and fifth defendants would be estopped by conduct. They agreed with the District Judge in thinking that the first defendant was also estopped as tenant, and that the fourth defendant was not estopped by conduct. On the whole, they granted the plaintiff the decree which he sought for and dismissed the appeal of the first, third, fourth and fifth defendants with costs.

It is from this decision that these four defendants have appealed to His Majesty in Council.

Upon the first point—that of the construction of the will—their Lordships agree with the District Judge and are not of the opinion of the Judges in the High Court.

No doubt the word " effects," like many other words of general and indefinite meaning, may be sufficient in a certain context to pass immovable as well as movable property. Further, it was rightly submitted by counsel for the respondent that if this would be so in Great Britain, it would be so *a fortiori* in India, where there is little distinction between movable and immovable property when matters of succession have to be considered.

But the context in this case is not capable of such a construction. After the specific devise of the three houses in Halpin Road, the

will proceeds " and all my household furniture, carriages, horses, chattels and effects . . . which I shall be possessed of at the time of my death." It does not say " all other." The words " which I shall be possessed of at the time of my death " refer solely to " the household furniture, carriages, horses, chattels and effects." And after the specific reference to the Halpin Road property, it is not lightly to be inferred that the testator intended that his other lands, whether then owned by him or to be acquired thereafter, should pass by general words, as such general words.

A number of cases were cited by the District Judge in which the word " effects " appears in the will and in some of which the word was held sufficient, in others insufficient, to pass land. Primarily, no doubt, the word refers to personal estate or movables.

At their Lordships' bar, counsel further relied on two authorities, *Hogan* v. *Jackson* (1 Cowper, 299) for the special expression of Lord Mansfield's opinion (at p. 304); and *Attorney-General for British Honduras* v. *Bristowe* (6 App. Cas. 143) for the language (at p. 149). No doubt in the first of these cases Lord Mansfield did say that the word " effects " was enough to pass the freehold interest in land. But the words of the devise were " all the remainder and residue of all the effects both real and personal which I shall die possessed of "; and the only plausible suggestion for a meaning of " real effects " if they did not carry freehold land, was that they should be limited to chattels real which in the context was most unlikely.

In the case of *Attorney-General for British Honduras* v. *Bristowe* (*supra*), one Grant, who carried on an enterprise called " Grant's Work," cutting log wood on a particular piece of land under licence from the Spanish Government, ultimately after a series of circumstances, came to acquire a holding title to the land itself, He, by his will, after denouncing the evil effects of slavery, manumitted all his negro slaves, making them subject to certain legacies, and in order that they might be able to pay these legacies off, left to them " and to their heirs and assigns, all my effects of what kind soever I may have in the Bay Honduras, money in Great Britain or elsewhere ; my lands and effects in Jamaica excepted." He proceeded to establish regulations for the government of the slaves as a community, and, in the opinion of their Lordships, evidently intended that the slaves should enjoy the land and undertaking as a community under the regulations which he laid down by his will. This case is far removed from that which their Lordships now have under consideration and cannot help the respondent.

Their Lordships can accept the view of the High Court that effects might include real estate, and that the words " due and owing to me " only qualify the words " moneys and debts " and may be omitted for the purpose of construction. But even so, they cannot hold that there is any indication of the testator's intention to devise any land which he had or might hereafter have beside the Halpin Road property.

The first point being, therefore, disposed of in favour of the appellants, the next question turns on the power of the widow to convey this property as executrix. By Section 4 of the Probate and Administration Act, all the property of the deceased vested in the executrix as such, and if it had been necessary in the course of winding up the estate to part with or charge this property, the executrix could have made a good title. But the estate had been wound up by the year 1904, completely wound up, unless it be said that the executrix had not discharged her duty by transferring to the children their various shares. Her neglect to discharge that duty did not confer on her a title nor give a good title to one who took from her with knowledge of the circumstances, and inasmuch as the plaintiff knew of the will and had taken legal advice upon its construction, he must be deemed to have been aware of the infirmity of the title of the widow.

The case of *Bijraj Nopani* v. *Pura Sundary Dassee* (41 I.A. 189) was cited on behalf of the plaintiff; but in that case the property was charged with two annuities and had then been mortgaged to pay the cost of past litigation, and the mortgage was being called in, and so the property had to be sold, and the executor was the proper person to make a good title. The doubt in the case arose because it happened to be the fact that the executor was one of the sons of the daughter of the testator, and that both his two brothers were also parties to the conveyance as grantors to the exclusion of their sisters, while in law the sons of the testator's daughter were not the heirs, and had no interest to convey, because the daughters took their mother's stridhan. The contention raised against the validity of the conveyance was that it was made by people who had no title, but their Lordships thought that whatever might be the impression under which the vendors conveyed, the one of them who was executor could make a good title to a purchaser for value. The head note of the report is unfortunately misleading. It describes the executor and his brothers as having beneficial interests in the property, whereas in fact they had no such interest.

In their Lordships' view the plaintiff cannot here rely upon the conveyance by the executrix being more than a conveyance of her own share or as passing the beneficial interests of the children.

The question of estoppel remains.

As regards the first defendant, his case seems concluded by Section 116 of the Evidence Act, which is as follows :—

> "No tenant of immoveable property, or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immoveable property; and no person who came upon any immoveable property by the license of the person in possession thereof shall be permitted to deny that such person had a title to such possession at the time when such license was given."

Upon this point both Courts below have come to the conclusion which commends itself to their Lordships.

The case of *Bilas Kunwar* v. *Desraj Ranjit Singh* (42 I.A. 202) is an authority, if any were necessary, in support of the view that has been taken.

Their Lordships are therefore relieved from the necessity of considering whether this defendant might also be held estopped under the general provisions of Section 115, or whether, as counsel for the plaintiff preferred to put it, he was deprived by his conduct of a claim to equitable relief.

The case of the third, fourth and fifth defendants is different. It was, indeed, suggested that they also came under Section 116, because they were in occupation under the leave and licence either of the plaintiff or of his tenant, the first defendant. But their Lordships do not take this view of the facts.

As regards estoppel properly speaking, when the particulars given by the plaintiff come to be considered, any such case disappears. There was no representation by these defendants to the plaintiff that the property was wholly their mother's, or that she had the title to dispose of it as executrix. If the plaintiff supposed that the property was the mother's, it was not by reason of any representations made by these defendants. It was a common error. He had as long ago as May, 1909, taken the opinion of counsel upon the construction of the will and had unfortunately received erroneous advice. Moreover, the dates given in the particulars for the supposed representations are too late. The plaintiff made no change in his position at or after those dates. He had committed himself to the advances to the widow long before. The case of *Kuverji* v. *Babai* (19 I.L.R. Bom. 374), which was cited in the course of the argument, is a useful authority.

Counsel for the plaintiff appreciated this position, and submitted that it was not so much a case of estoppel as a case of parties seeking equitable relief who must do equity. In their Lordships' view, however, these defendants are not seeking equitable relief, but standing on their beneficial title. No doubt, to perfect their title, they, in strictness, might require conveyances of their shares from the executrix (Section 113 of the Probate and Administration Act not applying). But it is well known that except, perhaps, in the old Presidency towns, such niceties of conveyancing as transfers by executors of shares of lands are not in familiar use, and these appellants can at any rate as defendants rely on their beneficial title.

In their Lordships' view, these three defendants are entitled to succeed, but the first defendant is not so entitled.

Their Lordships will humbly recommend His Majesty that the judgments of the District Judge and of the High Court should be discharged, and that in lieu thereof the plaintiff should have a decree for ejectment against the first and second defendants, and that it be declared that he (the plaintiff) is entitled to one-third and one-quarter of the remaining two-thirds of the property in suit; and that the third, fourth and fifth defendants are each entitled

to one-quarter of the two-thirds, with liberty to the plaintiff or to any one of these last three defendants to apply for a partition ; that the plaintiff have judgment against the first defendant for his costs before the District Judge and in the High Court, and against the second defendant for his costs before the District Judge ; and that the third, fourth and fifth defendants have their costs in the Courts below and the whole costs of this appeal before their Lordships. Their Lordships do not consider that the joinder of the first defendant has increased the costs of the appeal.

Their Lordships will further recommend that the cause be remitted to the High Court at Rangoon to act in accordance with these directions, with liberty to the parties to apply as they may be advised.

**In the Privy Council.**

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JOHN AGABOG VERTANNES AND OTHERS

*v.*

JAMES GOLDER ROBINSON AND ANOTHER.

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DELIVERED BY LORD PHILLIMORE.

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