Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Bhoopnarain Chowbey and another v. *Rughoonath Godbindroy and another, from the late Sudder Dewanny Adawlut, North Western Provinces, Agra; delivered June 12th* 1872.

Present:

SIR JAMES W. COLVILE.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.

SIR LAWRENCE PEEL.

THE circumstances which give rise to this case are as follows. In 1845 some land was sold which belonged at that time to a joint Hindoo family consisting of five brothers, to the Plaintiffs in the suit, who are the Appellants. It appears now that at the time of this sale three of those brothers were minors, and therefore incapacitated from being parties to it. The deed of sale is not before their Lordships. It would appear, according to the statement of the Defendants in this suit, that it purported to be executed by all the brothers, and there is reason to suppose that it purported to be executed by each on his own behalf, inasmuch as there is a finding in a suit, which will be subsequently referred to, of the three brothers against the present Plaintiffs, that "the deed of sale in dispute has not been executed through a guardian on the part of the "minors but by all the sellers themselves; its "execution, in good faith or otherwise, is not a "point for consideration." At all events it purported to be executed by all the brothers, either each executing on his own behalf or the two executing on behalf of the other three.

It appears that this transaction was regarded by the Plaintiffs as well as by the two elder brothers as open to question, for it was thought necessary at the same time to take an ikrarnamah, executed by the two brothers in favour of the Plaintiffs, which states "We the two elder "brothers are owners of the property which is "sold;" and further: "We have unconditionally "sold our own respective rights and interests "in this estate and those of Balka Gobindroy, "Balkurum Gobindroy, and Byjoo Gobindroy, to "Ramdial Chowbey, son of Moteeram Chowbey, "for Rs. 5,500, and have executed the deed of "sale and receipt for the sale price on the part "of all the five brothers, and have delivered "them to the purchaser." The reason of the non-execution by the younger brothers is thus explained: "Balka Gobindroy and others could "not come to this city for the execution of this "deed of sale as they were not at leisure." This is obviously a false excuse for the non-execution by the brothers, whose non-execution was owing to their being incompetent to execute the deed, and probably they were altogether unaware of this sale.

As soon as the younger brothers came of age they instituted a suit against the present Plaintiffs to recover their share of this property, and they succeeded in that suit. It may be as well to observe what were the issues which were framed and the judgments which were then given as far as they are material to the present case. That suit was decided on the 6th of December 1861. One of the issues is, "whether at the time of the "execution of the deed of sale the Plaintiffs were "minors, and Rughonath Gobindroy and Balka "Gobindroy were the only two of the sellers who "had attained majority;" and then it goes on: "and the deed of sale in dispute was executed by "collusion of the adult sellers with the insertion

" of the Plaintiffs names, or whether at the " time of execution of the deed of sale, all " the Plaintiffs had attained their majority and " were living together, and the deed of sale in " dispute was executed without collusion and in " good faith." Collusion between the Defendants and the elder brothers appears to have been one of the issues, perhaps not very formally stated. Upon that issue there was this finding : " Whereas " the deed of sale in dispute has not been exe- " cuted through a guardian on the part of the " minors but by all the sellers themselves, its " execution in good faith or otherwise is not a " point for consideration. All that requires to " be determined in this case is whether the " Plaintiffs, at the time of the execution of the " deed of sale, had attained their full age or not, " and as their minority has been proved, the " deed as to the sale of their share is to be con- " sidered null and void, and there is no doubt " that the execution of the sale deed was effected " collusively by the purchasers and the adult " sellers." Upon an application for a review of this judgment, the Judge, Mr. Swindon, also finds this : " There is no doubt that the sellers " who were adults did, in collusion with the " purchasers, sell the Plaintiffs' share with their " own." There appear, therefore, to have been findings in that suit, both in the Court of first instance, and in the Court of Appeal, that the sale was fraudulent and collusive on the part both of the vendors and the purchasers. In the present suit the finding of the Court below is very much to the same effect. The Principal Sudder Ameen finds that, " although the Defen- " dants' total denial of the agreement relied on " by the Plaintiffs, which is registered and has " been proved by witnesses, is utterly false and " dishonest, all proceedings of Plaintiffs also " from first to last are not free from the taint

" of bad faith. For in the first place Ramdial, " the Plaintiffs' father, made Defendants execute " in his favour a sale deed in their own names " jointly with those of Balka Gobindroy and " others, three minor brothers, without making " any mention of the fact of their minority, with " the object of appropriating the whole village, " and took possession of the whole, in which " unlawful act the Defendants took part with " him." Then he goes on to say: " He made " Defendants also execute an ikrarnamah as a " pre-contrivance, and in order to conceal the " fact of minority of the Defendants' brothers " he caused the following clause to be entered " therein, viz., 'that for want of leisure Bulka " Gobindroy, &c. cannot come to this city to " execute and complete the sale deed,' whereas " the sale was not completed by registration, " while the agreement was registered." He also adverts to this, that instead of registering the deed of sale in the ordinary manner, a fictitious suit was instituted against all five brothers, and that what may be called a fictitious confession of that suit appears to have been given in the names of all five.

Such is the finding of the Court below in this case, a finding which is in substance confirmed by the Court above. The main difficulty which has pressed upon their Lordships has been this: whether in this suit the question of collusion between the vendors and purchasers with a view to defraud the infants was raised as distinctly as it ought to have been by way of plea or statement by the Defendants, or whether at all events it was raised with sufficient distinctness in the issues in the cause. Unquestionably the defence on which the Defendants have succeeded, and on which the judgment of both Courts proceeded, is not raised as clearly as would be required in pleadings in this country by the statement of the Defen-

dants, nor by the issues which were framed in the cause. The only issue at all referring to this question appears to be the second, which is in these terms: "In the event of the plea in bar "being overruled, are the Plaintiffs entitled to "recover from the Defendants Rs. 3,300 prin- "cipal, and Rs. 3,300 interest, being the portion "of the purchase money due on account of "three-fifths share of Bijjo Gobindroy, and other "brothers of Defendants, under the ikrarnamah "dated 3rd June 1845, or, as pleaded by Defen- "dants, is the ikrarnamah alleged by Plaintiffs "false, and did the Plaintiffs cause a sale deed to "be executed by Defendants and their brothers "without any mention of the minority of the "latter." It is only under those words that, according to their Lordships' view, this question if it could be raised at all was raised in the suit below. At the same time it is to be borne in mind that the learned Judge of the Court below does appear to have considered that this question was in issue, and it is further to be observed that in the grounds of appeal the Plaintiffs do not contend that his finding was beyond his powers on the ground that it was not. If they had so contended it is possible that the High Court might have framed an issue distinctly raising it.

Under those circumstances, although their Lordships undoubtedly cannot regard as satisfactory the form of the issue in this case, they are not disposed to take upon themselves to reverse the finding of the two Courts upon a question of fact, which both appear to have supposed to be before them, and which neither party seems to have denied to be before them.

With respect to the evidence in support of this finding it is not for their Lordships to deal with the case as a Court of first instance. It is enough for them to say that they are unable to declare that the Courts below were not justified by the

evidence in coming to the conclusion at which they arrived. It appears certain that the present Respondents at the time of the transaction in question, in 1845, were minors. It is probable that the present Appellants knew this. It is certain that they knew that the transaction was one liable to be impeached, otherwise they would not have thought it necessary to take an indemnity. That indemnity shows that they themselves had notice that three of the brothers were unable for some reason to execute the deed of sale. If they knew that they were minors they must have been aware that the reasons alleged for their non-execution of the deed of sale was a false one; and the further proceeding of obtaining a fictitious judgment against five brothers, and getting the three minors to confess that judgment, instead of the ordinary course of registering the deed, is certainly a proceeding of a suspicious character.

Their Lordships therefore are unable to say that there was no evidence to support a finding, which appears to be in fact a finding of four Courts. In the ejectment suit two Courts have found that there was collusion between the vendors and purchasers. In the present suit the Court below and the Court above have found substantially to the same effect, though not precisely in the same language.

Under these circumstances it appears to their Lordships that the decree of the Court below ought to be supported. It is not for the public benefit that a party engaged in a transaction such as this must now be taken to be, wherein both vendors and purchasers are aware that they are dealing with the property of infants, who have not by law the power of sale, and that they are obtaining possession of this property in a manner calculated to injure those infants, should be able to sue another party to the transaction for damages.

For these reasons their Lordships will advise Her Majesty that this Appeal should be dismissed; but considering the circumstances which have been alluded to, the nature of the defence, the absence of a distinct plea raising this question, and above all the fact that both parties must be considered *in pari delicto*, their Lordships are of opinion that neither party should have the costs of this Appeal.