[3 Mad. 359.]

APPELLATE CIVIL.

*The 13th September, 1881.*

PRESENT:

SIR CHARLES A. TURNER, KT., CHIEF JUSTICE, AND MR. JUSTICE MUTTUSAMI AYYAR.

Magaluri Garudiah and others.....(fourth, fifths and sixth Defendants), Appellants.

and

Narayana Rungiah.....(Plaintiff), Respondent.*

*Liability of executor* de son tort *in Hindu Law, extent of—How far enforced by English Courts—Liability of trustee mixing funds distinguished—Joinder of causes of action—Limitation—Plea of misjoinder in second appeal—* Onus probandi *where fact is peculiarly within knowledge of party.*

In a suit upon a registered bond payable in eleven yearly instalments, to recover instalments 5-10 from the representatives of two deceased co-debtors, (who, as managing members of an undivided Hindu family, had contracted the debt for family purposes) the plaintiff impleaded G, the son-in-law of one of the deceased co-debtors and his two brothers on [360] the ground that they, in collusion with the widow of such deceased co-debtor had, as volunteers, intermeddled with, and possessed themselves of, substantially, the whole property of the family of the deceased co-debtor:

*Held* that G and his brothers were properly joined as co-defendants and were liable for the debt of the deceased to the extent of the assets received by them.

*Held* also that even if there had been a misjoinder the plea could not be allowed in second appeal as the defendants had not been prejudiced.

*Held* also that, as the plaintiff had shown that some property of the deceased co-debtors has passed to G and his brothers, the burden of proof lay on G and his brothers to show that they had not received so much of the deceased debtor's property as would satisfy the debt.

*Held* also that as the bond was registered bond and the property had been misappropriated within three years of the date of the suit, the suit was not barred by Limitation.

*Held* also that interest, in the nature of damages, from the date of suit was properly awarded.

THE facts and agruments in this case, appear in the **Judgment** of the Court (TURNER, C.J., and MUTTUSAMI AYYAR, J).

Mr. *Shaw* for Appellant.

*A. Ramachandrayyar* for Respondent.

**Judgment**:—On the 26th March 1870 *Makum Kondiah* and *Venkatramudu* executed in favour of the respondent a bond for Rupees 2,360 payable in eleven instalments; the first instalment of Rupees 160 was to be paid on the 23rd June 1870; the second and other instalments, amounting each to Rupees 220, were to be paid yearly on the 16th March in each succeeding year.

* Second Appeal No. 72 of 1881 against the decree of J. Wallace, acting District Judge of Kadapa, confirming the decree of S. Dorasami Ayyar, District Munsif of Badvel, dated 18th December 1880.

The suit was brought to recover the amount of the fifth, sixth, seventh, eighth, ninth and tenth instalments : the earliest instalment sued for fell due on the 13th March 1874.

*Kondiah* having died before suit, his son *Chinniah* was impleaded, and, being a minor, was represented by his mother.

The appellants, who are undivided brothers, are impleaded on the ground that they had, as volunteers, intermeddled with, and possessed themselves of, substantially, the whole of *Kondiah's* property.

It appears that *Kondiah* and his brothers were undivided, and that *Kondiah* resided at *Badvel* and his brothers at *Proddatur*. After *Kondiah's* death there was a partition of the coparcenary property, and the Munsiff found that, in the course of this partition, the appellant, *Magaluri Gurumurti* possessed himself of certain moveable property, jewels and gold, in order to defeat the claims of **[361]** the other coparceners, and that the account he gave of the sale of jewels and the division of the proceeds among the coparceners was unproved. The person to whom it was alleged the sale of one jewel had been made was summoned as a witness for the defence, but was not examined. The Munsif also found that the account given by the same appellant of another jewel which had come to his possession was contradicted by the evidence given by this appellant in another suit, and that an entry made in his accounts to support the statement was false.

It was shown that *Kondiah* was in fair circumstances during his lifetime; he carried on trade and acted as an agent for the plaintiffs. On the other hand it was shown the appellants had in *Kondiah's* lifetime but little means; that subsequently to *Kondiah's* death the appellant, *Magaluri Garudiah*, married the daughter of *Kondiah* and thereafter the appellants opened a shop and carried on trade to the extent of Rupees 2,000. It was alleged by the respondent, and the Munsif considered it probable, that the funds requisite for carrying on this business had been obtained from *Kondiah's* estate. Furthermore, it was shown that the wife of the appellant *Garudiah* was possessed of jewellery of the value of Rupees 300 or Rupees 400, and the Munsif refused credit to the explanation offered to show that a portion of this jewellery had been obtained otherwise than from the estate of *Kondiah*. The whole of the moveable property of *Kondiah* had disappeared before the institution of this suit.

After issues had been settled the widow of *Kondiah* executed in favour of the appellant, *Gurumurti*, a mortgage for Rupees 599 of all the immoveable property of her husband (Exhibit B). At the time of the mortgage there was a crop on the land estimated to be worth Rupees 150, and of this the mortgagee was to receive the benefit. The consideration for the mortgage was alleged to have been a judgment-debt of Rupees 200 and the balance cash. The judgment-debt was due on a decree passed on the widow's admission in a suit instituted by the appellant *Gurumurti* after this suit was filed. The respondent at the time applied to be made a party to that suit in order to show the claim was fictitious. The widow asserted that, of the cash received by her, she had advanced Rupees 100 to her Vakil, and that she had the balance with her. She was ordered to produce it whilst the appellants remained in **[362]** the Court. She replied she was unable to do so at once, but would do so in the evening, and that she might have given it on loan to people. The Munsif considered the alleged consideration for the deed partly fictitious. He also adverted to a consent at one time expressed by the appellant *Gurumurti* to give the respondent Rupees 1,100 in satisfaction of his claim. In the result, the Munsif found that the appellants had acquired possession of, and intermed-

dled with, the estate of *Kondiah* in such a manner as to be liable to the respondent for *Kondiah's* debt, and gave the respondent a decree against all the defendants.

The Judge overruled a plea of *Limitation* which was set up in respect of some of the earlier instalments claimed. He held that the suit was governed by the 116th* article of the 2nd schedule of the *Limitation Act* of 1877 which prescribes a period of six years in the case of a suit for compensation for the breach of a registered contract. He also overruled a plea of misjoinder. He held that persons who in fraud of creditors possessed themselves with the estate of a deceased person were, as " *Correi* improperly so called," liable to be impleaded with the representative of the deceased in a suit brought by the creditor for the recovery of the debt. The Judge in the main agreed with the Munsif as to the facts. Although he expressed some doubt of the evidence adduced to prove that the appellant, *Gurumurti*, had at one time consented to pay 1,100 rupees to compromise the claim, he considered the respondent had traced considerable property of the deceased to the hands of the appellants, that the accounts produced were forged, and that this property had been misappropriated by them.

Regarding the appellants as constructive trustees, he held that having been guilty of a conversion of trust property, it was immaterial whether they were shown to be in possession of the bulk of the property of the deceased or of so much as to render payment out of the assets impossible; that the appellants were personally liable for the whole amount; and inasmuch as the property of the deceased had been employed by the appellant *Gurumurti* in trade, he increased the rate of interest awarded by the Munsif from 6 to 12 per cent., and in other respects affirmed the decree.

In this Court it is again argued there had been a misjoinder of causes of action; that the respondent had no cause of action [363] against the appellants; that there was no evidence that any property of the deceased passed to the possession of the appellants *Garudiah* and *Chenchu*, and that the judgment, so far as it affects the appellant *Gurumurti* is based on conjecture; that the appellants should have been held liable only to the extent of assets which it is proved have come to their hands; that the suit was in respect of the earlier instalments barred by *Limitation*; and that the respondent was not entitled to interest.

The question as to whether or not there has been misjoinder depends on the answer to the question whether or not the appellants have so conducted themselves in respect of the property of the deceased that a creditor is entitled to sue them as *quasi*, representatives of the deceased. It is a common feature of Hindu and English law that persons who take the property of the deceased person subject themselves to liability for the debts of the deceased. A person who intermeddles with the estate of a deceased person is known to English law as an executor *de son tort* and in that character an action will lie against him

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Art. 116, Sch. II :—

| Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|
| Art. 116 :—For compensation for the breach of a contract in writing registered. | Six years ... | When the period of limitation would begin to run against a suit brought on a similar contract not registered. |

for a debt due by the deceased, and where there are several co-obligors, he may be sued as a co-debtor. Ordinarily, a person is not liable as an executor *de son tort* unless his hand has been the first to take the goods of the deceased. He is not an executor *de son tort* if he has received the goods from an executor or an executor *de son tort*. *Paull* v. *Simpson* (9 Q.B. 365: S.C. 15 L.J.Q.B., 382).

But if a person colludes with an executor or executor *de son tort* so that he may obtain the property of a deceased person without consideration, and defeat or hinder creditors, he thereby becomes responsible as an executor *de son tort* (445 Eliz., c. 8).

These principles appear to us highly equitable, and, inasmuch as the case made by the respondent was that there was such collusion between the appellants and the widow, we are not prepared to hold there has been a misjoinder of causes of action in impleading the appellants in this suit. If we are in error on this point, if the appellants have not rendered themselves liable as *quasi*-representatives of the deceased, we should not allow the plea of misjoinder to prevail on second appeal, for it is clear that the appellants have not been prejudiced by the irregularity. They have had the opportunity of making any defence and of adducing in this suit any evidence which would **[364]** have been available for them had they been sued separately from the other defendants.

In disposing of the plea of misjoinder, we have also disposed of the plea that the respondent, on the facts alleged by him, has a cause of action against the appellants. If he can show, and in the opinion of the Courts below he has shown it, that the appellants have, in collusion with the widow, misappropriated the estate of his deceased debtor, he had a cause of action against them. It is not true that the evidence against the appellant *Gurumurti* rested only on conjecture and hearsay. There was direct evidence that moveable property of the deceased had come to his hands and that he had failed to account for it; there was also direct evidence that the immoveable property of the deceased had passed into his possession, and the consideration he alleges he gave for it he failed to prove. It is true that the Courts below have inferred that the proceeds of the property for which he has failed to account have been invested in the business which he opened subsequently to the death of the deceased and to the marriage of the appellant, *Garudiah*; but this inference was drawn from circumstantial evidence, the position and property of the appellants in the life-time of the deceased, and their failure to account for the sudden change in their circumstances after his death when the appellant *Gurumurti* is shown to have been acting with the widow in the disposal of his estate. It must be allowed that the evidence by which property is traced to the hands of the appellants is weaker in the case of the other appellants than it is in the case of the appellant *Gurumurti*, for he is represented as the chief actor; but the appellants are undivided, the trade in which they are engaged is carried on by them jointly, the consideration for the alleged mortgage was an alleged debt for goods supplied and cash lent and an advance in cash out of common funds, and the wife of the appellant *Garudiah* is found with jewels which the Munsif believed were supplied from the estate of her father. We are not prepared to hold that there was not evidence on which the Courts below were entitled to find that property of the deceased was traced to the hands of all the appellants. The plea of *Limitation* cannot be sustained; the bond was registered, and the ruling of the Judge as to the article in the *Limitation Act* which governs suits for the **[365]** recovery of moneys payable under such instruments is supported by the decisions of this and other High Courts. If, on the other hand, the appellants are not liable to an action on the

bond, but for misappropriation of funds to defeat creditors, the acts imputed were committed since December 1877. Nor can we hold that the Courts below were not entitled to award interest in the nature of damages from the date on which the suit was instituted. There is, however, one objection raised in this appeal which is not without foundation. Although the Judge has not in so many words held that the extent of the liability of the appellants is irrespective of the value of the property which has come to their hands, we understand this to be the effect of the penultimate paragraph of his judgment.

Although in Hindu Law it has been declared that the liability of one who takes any portion of the estate of a deceased person extends to the whole of his debts, this is not the doctrine of the English Courts; nor is it the doctrine which has been accepted by the Legislature and the Courts of British *India*. The *Succession Act* limits the liability of an executor *de son tort* to the amount of the assets received, and this limitation has been accepted by the Courts in other cases which are not governed by the *Succession Act*. While justice demands that the liability should be enforced to the extent of assets received, it would work injustice if the liability were enforced to any greater extent. In the cases in which it has been enforced to an apparently greater extent, it will be found, we apprehend, that the decision proceeds generally on a rule of evidence unconnected with the principle on which the liability itself rests. Where a trustee has misappropriated trust property and mingled it with his own in such a manner that it is impossible to distinguish the one from the other, the lack of evidence compels the Court to risk injury to the culpable party, and to treat the whole as available to make restitution.

Although it is a general rule that the burden of proof rests on the party who asserts the affirmative of the issue, there are cases in which it is difficult or impossible for him to procure such evidence though it may be available to his opponent. An exception to the general rule has therefore been established :— "Where a fact is peculiarly within the knowledge of any [366] person, the burden of proving that fact is on him." Doubtless, as observed by Baron *Alderson* in *Elkin* v. *Janson* (13 M. & W., 662) some evidence should be given that there is ground for the affirmative assertion, and that the fact is peculiarly within the knowledge of the party to which it is sought to apply the rule; but when the proper occasion for the application of the rule has been established, if the party having the knowledge fails to comply with it and to discharge his obligation, the Court is at liberty to find the issue against him.

Thus in the case now before us it is difficult, if not impossible, for the respondent to ascertain to what extent the property of *Kondiah* has passed into the hands of the appellants; but if he has shown that some property has passed to the appellants, the extent to which such property has been received by the appellants is peculiarly within their knowledge, and they are bound to show that they have not received so much as would satisfy the debt.

The application of this rule of evidence will probably be found to explain many of the cases in which parties not liable as parties to a contract have been affected with a liability on the ground of the possession of assets and even to a greater extent than the assets proved to have come to their hands.

But while we are unable to affirm the ruling of the District Court that the appellants are liable independently of the extent of the assets they have received, it appears useless to remit an issue on the point; because by reason of the rule to which we have referred, it would undoubtedly be found against the appellants. The respondent has laid a foundation for the application of the rule, he has traced property to their hands, and they have met the case by parol

evidence to which the Courts below have refused credit and documentary evidence which the Courts have pronounced fictitious or forged. They have had the opportunity to put in whatever evidence it was in their power to produce, and it is not suggested that they did not avail themselves of this opportunity to the fullest extent they desired.

We shall, therefore, affirm the decree of the Lower Appellate Court and dismiss this appeal with costs.

**NOTES.**

**[INTERMEDDLING CONSTITUTES ONE EXECUTOR 'DE SON TORT'—**

*See* also 7 Mad. 586; 18 Bom. 337; 21 Bom. 400; 17 Cal. 620; (1907) 35 Cal. 276.

But mere application for probate without grant thereon will not:—(1894) A. C. 437; *see* also (1910) 7 M. L. T. 211 (213 as to whether members of a joint family may be regarded as executor *de son tort*.

**LIABILITY OF LEGAL REPRESENTATIVE—**

*See* (1897) 20 Mad. 446; (1911) 10 M. L. T. 272.

**JOINDER OF PARTIES—**

Where the party was not an executor *de son tort*, he could not properly be joined with the legal representative:—(1896) 6 M. L. J. 186.

**LIMITATION—COMPENSATION—**

Upon the applicability of the Art. 116, *see* the observations of SUNDARA AIYAR, J., in (1912) 23 M. L. J. 519.

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## [367] APPELLATE CIVIL.

*The 21st September, 1881.*

PRESENT:

MR. JUSTICE MUTTUSAMI AYYAR AND MR. JUSTICE TARRANT.

Sri Mahapatnam Sitaramarazu Garu.....Defendant, (Appellant)

and

Sri Raja Jaganada Narayana Ramachendraraju, Pedda Baliya Simhulur Bahadar Garu.....(Plaintiff), Respondent.*

*Grant of village on service tenure—Right to resume when services not required.*

R sued S to recover instalments of kist due on the ground that S held a village on service tenure (granted on condition of paying kist and performing service); that the services of S were not at present required as the Court of Wards had assumed the management of the estate of R; that the assessment had, accordingly, been increased; and that defendant had declined to accept a lease at an enhanced rate and to execute a counterpart.

S denied that he held on service tenure and set up a gift from one of the ancestors of R.

*Held* that, as S failed to prove the alleged gift and had not traversed R's allegation that he was entitled to resume the grant when the services were not required, and as it was proved that the kist had been enhanced on one occasion without objection from S, there was evidence to warrant the conclusion that the village was neither 'Inam' nor granted in perpetuity burdened with a certain service and that R was entitled to the enhanced rate claimed.

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* Second Appeal No. 608 the 1880 against the decree of E. C. G. Thomas, District Judge of Vizagapatam, confirming the decree of Vakkalanka Kamavazu, District Munsif of Parvatipur, dated 12th April 1880.