APPELLATE CIVIL.

Before Sir. John Wallis, Kt., Chief Justice, and Mr. Justice Seshagiri Ayyar.

1918, September 20, 23 and October 22.

KRISHNA CHETTIAR (PLAINTIFF), APPELLANT,

v.

VENKATACHELLAPATHI CHETTIAR AND FIFTEEN OTHERS (DEFENDANTS), RESPONDENTS.*

Guardians and Wards Act (VII of 1890), ss. 34 and 35—Bonds given to Court by guardian and sureties—Court obligee under the bonds—Persons entitled to sue on the bonds—Breach of conditions of bond, when.

Under section 34 of the Guardians and Wards Act (VII of 1890) it is the Court that is the obligee under the bonds given by the guardian and his sureties in respect of the management of a ward's estate and except under an assignment from Court under section 35 of the Act nobody else can sue on the bonds. The conditions of bonds given under section 34 (*c*) and (*d*) of the Guardians and Wards Act and under Form No. 93 of Civil Rules of Practice, being to exhibit such accounts as may be directed by Court or pay such balance of the minor's moneys in the guardian's hands as the Court may direct, there is no right of suit as for a breach of the conditions of the bonds unless there is a preliminary order of the Court either to exhibit accounts or to pay any specified balance and a breach thereof. An assignment of the bonds by the Court without any such preliminary order, on the ground that there was a *prima facie* case of maladministration is invalid and does not give a right of suit on the bonds.

Obiter.—The loss of the bond is no impediment to its assignment.

APPEAL against the decree of C. V. VISWANATHA SASTRI, the Subordinate Judge of Kumbakōnam, in Original Suit No. 63 of 1915.

This was a suit to recover about Rs. 20,000 from the first defendant personally and by the sale of immovable properties mentioned in the plaint, under the following circumstances :— Plaintiff's father died when plaintiff was a minor, and the first defendant was appointed as the guardian of the person and properties of the plaintiff by the District Court of Tanjore. The first defendant, the deceased father of the second defendant, and a third person executed on 21st April 1896 a security bond to the District Court under which they gave, as security

* Appeal No. 138 of 1917.

for the due fulfilment by first defendant of the terms of the administration bond executed by him to the District Court, the immovable properties detailed in the schedule attached to the plaint. The first defendant acted as guardian for about three years and was then removed by the District Court on 13th February 1900 and plaintiff's mother was appointed in his stead. Plaintiff alleged that during the period when the first defendant acted as guardian he was guilty of various acts of misconduct and that in consequence he incurred a loss of about Rs. 20,000. Plaintiff attained majority on 13th February 1913 and filed this suit on 20th September 1915.

The original administration bond given to the District Court by the first defendant as guardian of the plaintiff was lost and on the application of the plaintiff the District Judge passed an order on 1st December 1914, directing that the security bond be assigned over to the plaintiff to enable him to file a suit. On 29th September 1916 an assignment in pursuance of this order was endorsed on the security bond by the District Judge and it was only on 27th November 1916 that a regular assignment deed was executed and registered. The other defendants were alienees from the first and second defendants of the immovable properties mentioned in the plaint. The first and fifth defendants were *ex parte*. The pleas of the other defendants, as far as they are material for the present report, were (1) that in absence of the original administration bond and in the absence of an assignment thereof, the plaintiff had no cause of action, (2) that as there was no assignment to the plaintiff of the security bond before the date of the suit, plaintiff had no right to sue, (3) that there was no proof of any breach of the conditions of the administration bond and of the security bond and (4) that the defendants were alienees for value without notice of the charge created by the security bond and that therefore they and the properties purchased by them were not liable. The Subordinate Judge gave a decree for Rs. 5,821 personally against the first defendant and upholding the other defences dismissed the suit as against the other defendants with costs. Plaintiff preferred this Appeal.

A. Krishnaswami Ayyar with *G. Gopalakrishna Ayyangar* for the appellant.—Though there was no formal assignment of the surety bond to my client before suit, there was an order to assign

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it to me and there was an actual assignment after the filing of the suit, i.e., after the issues were framed. After the order to assign the bond there was no further act to be done by the District Judge, but a ministerial act. Section 35 of the Guardian and Wards Act is the only provision in the Act in respect of assignment. Even there the provision is 'may assign.' No assignment is necessary. If an assignment were necessary, the order to assign itself operates as an assignment. There need not be a written assignment; see section 9 of the Transfer of Property Act and *Surat Chandra Roy Chowdhury* v. *Rajoni Mohan Roy*(1). A beneficiary such as the plaintiff can maintain a suit on the bond executed to the trustee even without an assignment. Security bonds for administration of an estate to which several persons may be entitled stand on a different footing from a security bond given for the protection of the estate of a single minor. Reference was made to section 257 of the Indian Succession Act. Without any assignment the beneficiary or legatee can sue. *Ramanadhan Chetty* v. *Katha Velan*(2), *Sowcar Lodd Govinda Doss* v. *Muneppa Naidu*(3) and *In re Culverhouse Cook* v. *Culverhouse*(4). In England personal estates will pass without formal assignment. No formal conveyance from a trustee to the beneficiary is necessary; *Rajah of Karvetnagar* v. *Saravana Pillai*(5). See section 56 of the Trusts Act. The District Judge is only a bare trustee. Acquisition of title by the plaintiff during the course of the suit perfects his title, the plaintiff already having the beneficial title; see *Doraisawmi Pillai* v. *Chinnia Goundan*(6), *Subbaraya Chetty* v. *Nachiar Ammal*(7). The fact that the bond given by the guardian has been destroyed does not disentitle my client to enforce the bond given by the surety. Moreover, the surety's bond recites the terms of the guardian's bond. When a guardian gives a bond for due administration of the ward's estate, the ward need not prove, in order to entitle him to recover damages, that the guardian acted fraudulently. The security bond being registered, subsequent purchasers for value are presumed to have notice of the terms of the bond.

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(1) (1908) 12 C.W.N., 481.
(2) (1918) I.L.R., 41 Mad., 358.
(3) (1908) I.L.R., 31 Mad., 534.
(4) (1896) 2 Ch., 251.
(5) (1916) 4 L.W., 200 at pp. 203 and 207.
(6) (1918) 34 M.L.J., 258.
(7) (1918) M.W.N., 199.

THE HON'BLE *the Advocate-General, S. Srinivasa Ayyangar* (with *S. T. Srinivasagopalachari* and *K. Bhashyam Ayyangar* and *K. Narasimha Ayyangar*) for respondents.—The question is whether there is a right of suit. The security bond gives only a charge on certain lands. There is no mortgage given on the lands. If so *Ramachariar* v. *Dorasami Pillai*(1), *Rangappa* v. *Thamayappa*(2), *Balasubramanya Nadar* v. *Sivaguru Asari*(3) hold that want of notice protects *bona fide* purchasers for value; see section 100, Transfer of Property Act. In the absence of an actual assignment before suit there is no right of suit. This is an actionable claim. A writing is required by section 130 of that Act in order to assign the same. Section 35 of the Guardians and Wards Act is borrowed from section 83 of the English Probate Act of 1857 which shows that the Court should ask the Registrar to assign to the party and the Registrar must assign; but the order to assign is not equivalent to assignment by the Registrar. Subsequent production of assignment deed will not do, as the section is not analogous to section 4 of the Succession Certificate Act. *Cope* v. *Bennett*(4), Tristam and Cootes' Probate Practice, page 345; see Seton, pages 822, and 823 for the forms of assignment of bonds by executors and administrators and also by guardians. In this case there has been no breach of the conditions of the bond. The suit is barred by limitation. Article 68 applies to the case of an administration bond given by a guardian for the due administration of the estate. The guardian was removed on 13th February 1900 and the suit was instituted on 20th September 1915. A suit on the bond must be commenced within three years from the date of the breach and time began to run from the time the guardian was removed. The security bond creates only a *charge* on the lands. Article 132 governs suits to enforce a charge; and this suit to enforce the charge is barred by limitation under article 132, as more than twelve years have elapsed from the date of the removal of the guardian. [Cases quoted to support the point of limitation are not noted here as the decision of the Court turned on other points.]

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(1) (1915) 29 I.C., 605 (Mad.). (2) (1914) 26 M.L.J., 514.
(3) (1911) 21 M.L.J., 562. (4) (1911) 2 Ch., 488.

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A. Krishnaswami Ayyar in reply.—Under section 34 of the Guardians and Wards Act the Court must be satisfied first that the engagement of the bond has not been kept. In this case the Court came to the conclusion that the conditions of the bond were broken when the plaintiff applied to the Court for assignment of the security bond for the purpose of recovering the losses from the properties given as security, and time commenced to run both as against the guardian and the sureties only from the date of the order, viz., 1st December 1914, when on being satisfied that the guardian committed acts of misappropriation the Court ordered the assignment of the bond. The guardian is liable to render accounts for the period of his administration till his death though he might have been removed previously; see *Kanti Chandra Mukerji* v. *Ali-i-Nabi*(1). The security bond, Exhibit A, charges not only immovable properties, but it also contains a covenant to pay and hence it is a mortgage, and subsequent *bona fide* purchaser for value will be affected by notice of its terms, especially as it is registered.

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WALLIS, C.J.—This is an appeal from the decree of the Subordinate Judge of Kumbakonam in so far as it dismissed the suit brought by the plaintiff as assignee of a surety bond, Exhibit A, dated 21st April 1896, charging the immovables therein mentioned for the due performance by the first defendant of his obligations under the bond given by him to the District Court under section 34 (*a*) of the Guardians and Wards Act as guardian of the plaintiff who was then a minor. The immovable properties of the other sureties being insufficient, the first defendant added certain properties of his own and became a party to the surety bond, Exhibit A, as well as to the principal bond which is now missing. The Subordinate Judge passed a personal decree against the guardian, the first defendant, who did not contest the suit, and otherwise dismissed it on the ground that the plaintiff had no right to sue on the bond, Exhibit A, at the date of the suit, as the principal bond had not been assigned to him and there had been no regular assignment to him of the surety bond, Exhibit A, but only an order by the District Court that it should be assigned. He also dismissed the suit on the ground that the

(1) (1911) I.L.R., 33 All., 414.

plaintiff had failed to prove what were the terms of the principal bond which was missing, and held that the defendants, who are alienees from the sureties under Exhibit A, took without notice and are exempt from liability.

As regards the first point, I am of opinion that the plaintiff had no title to sue on Exhibit A without an assignment to him by the Court both of the principal bond and of the surety bond, Exhibit A; but I do not think the case can be satisfactorily disposed of on this ground. The District Judge has since assigned Exhibit A by a registered instrument, and though the principal bond has not yet been assigned, we might, I think, accept the assignment even at this late stage if this was the only difficulty in the plaintiff's way. The fact that the principal bond is lost would not prevent its being duly assigned. The Ecclesiastical Courts were required by a statute of Henry VIII to take bonds with sureties from persons to whom they granted administration of the estates of deceased persons, and a statute of Charles II settled the terms of the bond to be so taken. There was a right of action on these bonds in the Common Law Courts, but the Ecclesiastical Judge to whom the bond had been given did not sue himself, but, as stated in *Bolton* v. *Powell*(1) the Ecclesiastical Court made an order in favour generally of one of the next of kin that the bond be 'attended with' and the party in whose favour the order was made was allowed to sue in the name of the Ecclesiastical Judge to whom the bond had been given. Whether under any circumstances the sureties could be proceeded against in equity without such an order of the Ecclesiastical Court was discussed in the case just mentioned. The Probate Act of 1857 first made these bonds assignable, and its provisions in this respect have been reproduced in the Indian Succession Act, the Probate and Administration Act, 1881, and lastly in sections 34 and 35 of the Guardians and Wards Act, 1890. The Court now being the obligee under the bond is alone entitled to sue on it in the absence of an assignment in due form of law.

In the present case I feel constrained to hold in the present state of the evidence that the suit fails on the broad ground that no breach of the conditions of the bond (Exhibit A) has been proved. Section 34 (*a*) of the Guardians and Wards Act

(1) (1852) 2 De G.M. & G., 1 at p. 21.

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obliges the guardian, if so required, to give a bond to the Judge of the Court

"engaging duly to account for what he may receive in respect of the property of the Ward."

By section 34 (*b*) he is to deliver an inventory within six months, and by section 34 (*c*) he is to

"exhibit his accounts in the Court at such times and in such form as the Court from time to time directs."

And by section 34 (*d*) he is

"to pay into the Court the balance due from him on those accounts, or so much thereof as the Court directs."

The form of bond prescribed in Form 93 of the Civil Rules of Practice, 1902, clearly follows the provisions of section 34 (*c*) and (*d*) just set out, the condition of the bond being that the guardian shall duly account

"at such periods as the Judge shall appoint and shall duly pay or dispose of the balances which shall from time to time be found to be due from him as the said Court or Judge has directed or shall hereafter direct."

No doubt, this form was not in force in 1896 when the first defendant as guardian executed the principal bond which is now missing, but there is no reason to assume that the bond then executed by the first defendant was of a more onerous character than the form now prescribed. Now to constitute a breach of this bond there must be a failure either duly to account at a period directed by the Court, or a failure to pay as ordered by the Court a balance found due from him: and where there is no evidence of any order to account within a fixed time, or to pay any balance within a fixed period, there is no breach of the obligation of the bond. This follows from the language of the bond, and has been expressly ruled in the case of a similar provision in the old statutory form of administration bond; *Archbishop of Canterbury* v. *Tappen*(1) and *Archbishop of Canterbury* v. *Robertson*(2). The latter case also deals with the question of what amounts to a breach of the condition well and truly to administer the estate in the old form of administration bond. To establish a breach of that condition it was not necessary to show a failure to obey a specific order of the Court. Similarly

(1) (1828) 8 B. & C., 151. (2) (1833) 1 Cr. & M., 690.

under section 81 of the Probate Act, 1857, the bond is to be conditioned for duly collecting, getting in and administering the estate of the deceased, language followed in section 256 of the Indian Succession Act and section 78 of the Probate and Administration Act; and therefore in the case of these bonds it is enough to show a failure to administer or collect and it is not necessary to show a failure to obey a specific order of the Court. Where, however, as we must assume in the present case, the only conditions in the bond were to exhibit accounts when ordered by the Court and to pay or apply the balance found due as directed by the Court, if there is no order, there is no breach and the suit on the bond necessarily fails. There is no evidence of any order to account or of any order to pay in the present case. All the District Judge did was to direct the assignment of the bond on the ground that there was a *prima facie* case of maladministration against the first defendant. In the case of bonds under the Guardians and Wards Act the proper course appears to be to get an order to pay against the guardian under section 34 (*d*) or a decree against him, and, if he fails to satisfy the order or decree, then to sue the sureties in respect of this breach as to which there will be no defence and the article of limitation will be article 68 unless, as in the present case, the bond charges immovable property, when that article may be inapplicable. It is unnecessary to consider this point, or the other question raised in argument before us as to when time begins to run when the condition in the bond is duly to administer. In my opinion the appeal fails and must be dismissed with costs against defendants Nos. 3 to 9 the alienees. As those grounds apply also to the decree against the first defendant, we set aside that decree also, but without costs in the exercise of our powers under Order XLI, rule 33.

SESHAGIRI AYYAR, J.—I agree.

N.R.