

lant to forfeit the security, and therefore the appellant applied to the respondent to repay the deposit. The respondent refused, denying the deposit. The appellant brought this suit to recover the deposit, but failed to establish to the satisfaction of the Court of first instance that the deposit had been made. The lower appellate Court found that the deposit of the sum of Rs. 600 with the respondent on the terms alleged was proved, but refused relief on the ground that the consideration of this agreement was unlawful in that it defeated the object of the law.

In special appeal the appellant challenges the propriety of this ruling.

In our judgment the conclusion at which the Judge has arrived is right. The Criminal Procedure Code, ch. xxxviii, empowers the Magistrate to require a person of notoriously bad livelihood to procure sureties who shall be responsible for his good conduct in the amounts required from them. If the amount for which a surety is responsible is deposited with him by or on behalf of the person for whose conduct he undertakes responsibility, it is obvious that he is responsible only in name. No Magistrate with a knowledge of the facts would be justified in accepting the surety under this chapter. The object of the law would be defeated. We must then affirm the decision of the Judge and dismiss the appeal, but seeing that the respondent denied the deposit, and that he was a party to the agreement, and that the point raised is novel, we order each party to bear his own costs in all Courts.

*Appeal dismissed.*

## APPELLATE CIVIL.

*Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Oldfield.*

VAUGHAN (PLAINTIFF) *v.* HESELTINE AND OTHERS (DEFENDANTS).\*

*Will—Devise of Immoveable property subject to its being charged in a particular manner by the Devisee—Property not charged in accordance with the Will—Suit to enforce Charge—Assignment by a Legatee to Executor of Legacy.*

Certain immoveable property was devised by will upon condition that the devisee, who was also an executor of such will, should execute a mortgage of such property

\* Regular Appeal, No. 77 of 1873, from a decree of W. E. Kinsey, Esq., Subordinate Judge of Dehra Dún, dated the 13th May, 1873. Reported under a special order of the Hon'ble the Chief Justice.

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to the Official Trustee of Bengal for the time being to secure the payment of a certain legacy. The devise, with the intention of giving effect to such condition, mortgaged such property to his co-executors. *Held*, in a suit by one of such co-executors to enforce the mortgage, that the mortgage, not being executed in accordance with the terms of the will, was invalid, and the suit was not maintainable.

*Scilicet* that an assignment by a legatee to an executor of a legacy is void.

ONE Joseph Nelson Heseltine by the 9th clause of his will, dated the 16th February, 1864, devised his estate known as the Ellenborough Hotel estate to the use of his son Robert Henry, upon condition that he should, when so requested by the trustees of the will, execute and deliver to them a mortgage of such estate for securing to the trustees the payment of the sum of Rs. 16,000 bequeathed in the will to the trustees upon certain trusts therein mentioned. The testator further directed that such payment was to be made by annual instalments of Rs. 3,000 each without interest, and that the first of these instalments was to be paid at the expiration of one year after his death. The testator by his will appointed his son Robert Henry and his son-in-law Joseph Hurst the executors of his will, and Charles Frederick Vaughan and the Administrator-General of Bengal for the time being trustees of it. By a codicil to his will, dated the 24th February, 1865, the testator revoked the appointment of Charles Frederick Vaughan and the Administrator-General of Bengal as trustees, and appointed the Official Trustee of Bengal for the time being the sole trustee of his will. He thereby further appointed Charles Frederick Vaughan to be an executor of his will in addition to his son Robert Henry and his son-in-law Joseph Hurst. He also thereby gave and bequeathed to his daughter Charlotte, wife of Joseph Hurst, the sum of Rs. 12,000 "for her own sole use and benefit, free from the control, debts, and liabilities of her then or any future husband," and he directed that such sum of Rs. 12,000 should be paid to Charlotte Hurst "on her sole and personal receipt" out of the sum of Rs. 16,000 charged upon the Ellenborough Hotel estate. He further directed that such payment to his daughter Charlotte was to begin from the receipt by the trustees of his will of the second instalment of Rs. 3,000.

On the 2nd March, 1866, Robert Henry Heseltine executed a mortgage of the Ellenborough Hotel estate to Joseph Hurst and

Charles Frederick Vaughan to secure the payment of the sum of Rs. 16,000, with the intention of giving effect to the condition imposed upon him by the 9th clause of his father's will.

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On the 20th July, 1870, Charlotte Hurst assigned by sale to Charles Frederick Vaughan the sum of Rs 12,000 bequeathed to her under the codicil to her father's will. The consideration for the sale was stated in the sale-deed to be Rs. 8,000. This deed contained a power of attorney authorising Charles Frederick Vaughan, for Charlotte Hurst and in her name, but for his own use and benefit, to demand, sue for, and receive the legacy from the proper persons, and on payment of the money to give a receipt for the same.

On the 11th February, 1873, Charles Frederick Vaughan brought the present suit against Robert Henry Heselstine to enforce the mortgage of the 2nd March, 1866. The plaintiff claimed to recover Rs. 19,427-8-0, being the amount of the second, third, fourth, fifth, and sixth annual instalments of Rs. 3,000 each, and interest, by the sale of the Ellenborough Hotel estate, making Joseph Hurst a defendant in the suit, as he refused to join in it as a plaintiff. The suit was instituted in the Court of the Subordinate Judge of Dehra Dun. The Mussoorie Bank, which held a prior mortgage of the Ellenborough Hotel estate, was made a defendant in the suit on its own application. The plaintiff did not describe himself in the plaint in the suit as an executor, and did not produce the will of J. N. Heselstine, but only the deed of mortgage. The plaint was therefore returned to him by the Subordinate Judge for amendment and the case was adjourned for the production of the will. At the second hearing of the suit Joseph Hurst consented to be made a co-plaintiff. The issues for trial were fixed at this hearing, the first of them being as follows: "Can Vaughan, as executor, purchase of a legatee?" At this hearing the defendant admitted his liability to the extent of the instalments sued for. At the final hearing of the suit Joseph Hurst did not appear. The Subordinate Judge dismissed the suit on the first issue, on the 13th May, 1873, on the ground that the plaintiff was not suing as an executor for the benefit of the estate but to enforce the assignment to him by Charlotte Hurst of her legacy, which assignment the Judge considered invalid.

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The plaintiff appealed to the High Court against the decree of the Subordinate Judge.

Mr. *Warner*, for the appellant, contended that the Subordinate Judge was wrong in dismissing the suit upon a point foreign to it; that the assignment by Charlotte Hurst to the plaintiff of her legacy was not void, but merely voidable at the option of the assignor; that Charlotte Hurst was no party to the suit, nor had she taken any steps to have the assignment set aside; that the assignment could only be set aside upon repayment of the consideration-money, together with interest, and the costs incurred in connection with the assignment; that the suit was not based on the assignment but on the mortgage, and the mortgage was valid, and should have effect given to it; that as the defendant had admitted the claim to the extent of the instalments due, a decree should have been made against him; and that the Mussoorie Bank had erroneously been made a party to the suit.

Mr. *Howard* (with him Messrs. *Hill*, *Newton*, and *Quarry*) contended that the mortgage was invalid, as it had not been made in accordance with the wishes of the testator as expressed in his will, viz., to the Official Trustee of Bengal for the time being, but to two of the executors of the will, and that the suit was consequently not maintainable.

The following judgments were delivered by the Court :

STUART, C. J.—This is a regular appeal from the Court of the Subordinate Judge of Dehra Dun in a suit by the plaintiff, Vaughan, against the defendants, Heseltine and Hurst, to recover Rs. 19,247-8-0 principal and interest alleged to be due on a mortgage on certain property called the Ellenborough Hotel estate, under the following circumstances: The plaintiff, Mr. Charles Frederick Vaughan, sued as one of the executors of the late Mr. J. N. Heseltine, who died on the 8th March, 1865, leaving a will dated the 16th February, 1864, and a codicil thereto bearing date the 24th February, 1865. By the will the testator disposed of his estate and effects, and various legacies were left to different parties, and among others two sums both of Rs. 6,000, Rs. 12,000 in all, on certain conditions and contingencies to the testator's grand-children, Joseph Hurst and Isabella Hurst, but in the event of their deaths, as therein explained, he directed the said two sums

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of Rs. 6,000 to be paid "unto my daughter Mrs. Charlotte Hurst, the mother of Joseph Hurst and Isabella Hurst, for her absolute use and benefit, and her receipt for the same, whether covert or sole, shall be a sufficient discharge for the same." The will appointed the testator's son, Robert Henry, and his son-in-law, Joseph Hurst, one of the defendants, to be executors thereof, and by a separate nomination he appointed the plaintiff "and the Administrator-General of Bengal for the time being" to be trustees of the will for the carrying out the trust thereby declared, and by the 20th clause of the will the testator made the usual provision for the continuance of the trust in the event of death or failure. By clause 9 of the will the testator specially devised the Ellenborough Hotel estate to the use of "my said son Robert Henry, his heirs and assigns, upon condition that he or they do, upon being so requested by my trustees, execute and deliver to them a good and sufficient mortgage of the said Ellenborough Hotel estate for securing payment of the sum of Rs. 16,000, &c." Such were the provisions of the will on these points; but the codicil, which is of considerable length, altered and revoked the will in various particulars, and among other things it altered the will as to the trustees as follows: "And whereas by the 19th clause of my said will I have nominated and appointed the said Charles Frederick Vaughan, in the said will styled Mr. Charles Vaughan, and the Administrator-General of Bengal for the time being to be trustees of my said will, now I do hereby revoke such said appointment, and I do nominate and appoint the Official Trustee of Bengal for the time being to be sole trustee of my said will for the purpose of carrying out the trusts therein and herein declared, and I declare that my said will shall accordingly be so read and construed as if the said Official Trustee of Bengal for the time being had in my said will been named and mentioned instead of the said Mr. Charles Vaughan and the said Administrator-General of Bengal for the time being." There was therefore to be but one trustee and that the "Official Trustee of Bengal" in place of Mr. Vaughan and the Administrator-General of Bengal as provided by the will. The codicil then goes on to revoke the said 20th clause of the will, and also the clauses providing for the legacies to the grand-children, "and in lieu and instead thereof" the codicil provided as follows: "I do hereby give and bequeath to my daugh-

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ter Charlotte, wife of my said son-in-law Joseph Hurst, and mother of my said grand-children Joseph and Isabella Hurst, the sum of Rs. 12,000 absolutely, for her own sole use and benefit, free from the control, debts, and liabilities of her present or of any future husband with whom she may hereafter intermarry; and I direct such said sum of Rs. 12,000 to be paid to my said daughter Charlotte on her sole and personal receipt from and out of the sum of Rs. 16,000 charged upon my Ellenborough Hotel estate, situate at Rajpur aforesaid, under the terms and conditions of the 9th clause of my said will, such said payment to my said daughter Charlotte to begin and commence from the receipt by the trustee of this my will of the second instalment of Rs. 3,000 provided for in the said 9th clause of my said will, and to continue until the said sum of Rs. 12,000 shall be fully paid and satisfied from and out of the said fund, and any balance that may remain due after payment of the last of such said instalments shall be paid and satisfied out of the general assets of my estate." We may presume that the testator had good and sufficient reasons for this change in his testamentary arrangements, and the circumstances which gave rise to this suit may well suggest what these reasons were. They are at least intelligible. But it will be observed that, while the codicil revoked the appointment of trustees as made by the will, it contained no express revocation of the testator's direction to his son to execute and deliver the mortgage itself for Rs. 16,000, and in fact, on the 2nd March, 1866, which was within a year from his father's death, the son did, with the apparent approval of all concerned, including the plaintiff himself, execute a mortgage-deed of the Ellenborough Hotel estate in favour of Joseph Hurst and Mr. Vaughan, and who, it will be recollected, were the trustees originally appointed. It is not disputed that the testator's estate was ample for all his testamentary purposes, and that there would be little or no difficulty in raising the Rs. 16,000 on the security of the Ellenborough Hotel estate. But some delay occurred, and it would appear that at the end of 1869 or beginning of 1870 Mr. Vaughan, the plaintiff, commenced negotiations with Mrs. Hurst for the purchase of her legacy, the result of which was that he, being an executor of the will, purchased for the price of Rs. 8,000 a legacy of Rs. 12,000. Vaughan himself states that he does not

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recollect by whom the proposal for the purchase was made, but in the opinion of the Subordinate Judge it came from himself. This was the crisis of the suit in the Court below, and the Subordinate Judge's decision was that such a transaction could not stand, and he dismissed the suit with costs. Without pronouncing any judicial opinion on the question, which from what I am about to explain we are not called upon to do, I may be permitted to say that such negotiations between the executor of a will and a legatee are very questionable and improper, and if this case had been argued before us on the basis of the lower Court's judgment, it is I think probable that we would not have found much fault with it. But at the hearing of the appeal before us the counsel for the respondent, disregarding the appellant's arguments on the merits of the Subordinate Judge's decision, took the objection that the mortgage deed which is the basis of the suit is invalid, and affords no cause of action to the plaintiff, on the ground of its not being conformable with the true construction of the will and codicil, and I am of opinion that this objection is well-founded. Although in the form of a suit to recover on a mortgage of a portion of the estate, it is really in the nature of one for the administration *pro tanto* of that estate, and it is important to consider what were the testator's wishes and intentions. I observe that in the mortgage-deed itself the codicil is referred to by date, and is there described as "in no way revoking that portion of the 9th clause of the will hereinbefore recited," but whether this was the idea of the mortgagor himself or the opinion of his legal advisers or draughtsmen, it is in my judgment altogether erroneous. The direction to the son contained in the will was to execute and deliver a mortgage-deed to the trustees, that is to Mr. Vaughan and the Administrator-General of Bengal. The appointment, however, of these gentlemen was expressly revoked by the codicil, and a single trustee, in the person of "the Official Trustee of Bengal," was appointed in their stead. It is impossible therefore to contend that the mortgage, as actually made, was an administration *pro tanto* of the testator's estate according to his true intentions. The objection is indeed an obvious and substantial one, and it is extraordinary that the codicil to the will on which it is founded should have been overlooked, not only by the Subordinate Judge himself, but by all the parties before him.

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Without prejudice therefore to any suit which may be instituted for carrying out the intentions of the testator with respect to the direction to mortgage, or generally for the proper administration of the estate, I would dismiss this appeal, and dismiss the present suit, but seeing that the objection allowed by this judgment was not taken in the Court below without costs. The Mussoorie Bank, however, who are the holders of a mortgage by the testator himself, and who have been obliged to intervene as co-defendants and co-respondents, are entitled to their costs, and these the plaintiff, appellant, must pay.

OLDFIELD, J.—The plaintiff in this suit, C. F. Vaughan, is one of the executors to the will of J. N. Heseltine. The defendant, R. H. Heseltine, is the son of J. N. Heseltine, and also one of the executors. The suit is to recover, as one of the executors, Rs. 19,427-8-0, principal and interest, on a mortgage-deed of the Ellenborough Hotel estate. It appears that, under the will and codicil of the late J. N. Heseltine, the estate known as the Ellenborough Hotel estate was devised to the use of his son R. H. Heseltine, defendant, respondent, upon condition that he should execute and deliver to the trustees under the will a mortgage of the said estate for securing to the said trustees payment of Rs. 16,000, to be paid by equal yearly instalments of Rs. 3,000 each, the first to be paid at the expiration of one year after the death of the testator, a sum of Rs. 12,000 to be paid out of the above sum to testator's daughter Charlotte Hurst, and the rest as otherwise devised. The will and codicil further made R. H. Heseltine, defendant, J. Hurst, and C. F. Vaughan, plaintiff, executors, and the Official Trustee of Bengal for the time being the sole trustee for the purpose of carrying out the trusts named in the will. After the death of the testator the mortgage-deed on which this suit is based was executed by R. H. Heseltine in favour of the other two executors, Hurst and Vaughan, and the latter now sues to recover under it.

The claim was dismissed by the lower Court on a preliminary objection, and the appeal rests on the same ground, which has been fully discussed in the judgment of the Chief Justice. It is unnecessary for me to notice this point, as I am of opinion that the appeal must be dismissed on a ground taken before us by the respondent's counsel, that the mortgage-deed is absolutely void, and



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the claim on it unmaintainable. The title of the parties to the mortgage-deed and to execute the mortgage rests solely on the will and codicil of J. N. Heselstine, and if these be examined it will be found that they convey no power to execute such a mortgage. The will directed by the 9th paragraph that the Ellenborough Hotel estate was devised to "R. H. Heselstine his heirs and assigns, upon the condition that he or they do, on being so requested by my trustees, execute and deliver to them a good and sufficient mortgage of the said Ellenborough Hotel estate for securing to the said trustees, their executors, and administrators, payment of the sum of Rs. 16,000 hereinbefore bequeathed to them upon trust &c.," and by the codicil the Official Trustee was appointed sole trustee, while R. H. Heselstine, Hurst, and Vaughan were appointed executors.

There has been no conformance with the terms of the will and codicil in the execution of the mortgage-deed the basis of this claim, which is executed, not in favour of the trustee, but of two out of three executors. The intention of the parties was to carry out the condition of the will and codicil, but these gave no power to execute such a mortgage-deed, which has been made contrary to the will and codicil and under a mistake as to the facts on the part of the parties to it, that they were thereby carrying out the conditions of the will and codicil. Such a deed is invalid and can convey no right to the property to the plaintiff. The claim therefore must fail.

There is one plea raised in appeal which is to be noticed, whether the Manager of the Mussoorie Bank was properly made a party to the suit, and I consider he was, inasmuch as, holding an alleged prior mortgage on the property, he had an interest in asserting its priority in this suit, which included a claim to bring to sale the property.

I would therefore, though on different grounds, affirm the decision of the lower Court, and dismiss the appeal, but without costs as regards all the defendants except the Manager of the Mussoorie Bank who should get his costs.

*Appeal dismissed.*