belongs to yourself. We need hardly say, that we do not decide that a vendor is entitled fraudulently to insert property, to which he has no title, in the sale deed for the purpose of inflating the price or otherwise fraudulently to defeat pre-emption. In the present case it is perfectly clear from what took place in the court below that the vendor has (or *bona fide* thinks he has) some title not necessarily a perfect title, to the property which the plaintiff in the present suit claims belongs to his son. We dismiss the appeal with costs.

Appeal dismissed.

Before Mr. Justice Chamier and Mr. Justice Piggott.

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May, 11.

DAMBAR SINGH (DECREE-HOLDER) *v.* MUNAWAR ALI KHAN AND ANOTHER (JUDGEMENT-DEBTORS).*

Execution of decree—Plea of adjustment—Previous adjudication.

Upon an application being made for the execution of a decree, a compromise was entered into between the decree-holder and the respondents by which the latter were exempted from liability for costs. The assignee of the decree-holder applied for execution against the respondents. The respondents objected and their objections were upheld by the High Court. Notwithstanding this the decree was again put into execution against the respondents who again objected but allowed their objection to be dismissed for default.

Held, that the dismissal of the objection for default must be taken to be an adjudication that the decree had not been adjusted, and that the later decision neutralised the earlier one and the respondents were consequently liable for the balance of the decretal amount.

THE facts of the case were as follows :—

A decree was put into execution against the respondents and others. The matter was compromised between the decree-holder and the respondents and the decree-holder absolved them from liability under the decree. After that the appellant as an attaching creditor of the decree-holder put in execution the same decree against the respondents, upon whose objection the court decided that they had been fully absolved by the compromise and were not liable under the decree. This decision was upheld by the High Court on appeal. But the appellant again put the decree into execution against them and attached a sum of money lying in court to their credit. They objected

* First Appeal No. 96 of 1914, from a decree of Udit Narain Sinha, Subordinate Judge of Meerut, dated the 19th of January, 1914.

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that they had been held not to be liable under the decree. Their objections, however, were dismissed for default of appearance and the court allowed the appellant to take out the sum attached. Thereafter the decree was once again put into execution for the balance remaining due and the respondents advanced the same objections as before. The court allowed the objections, and dismissed the application for execution. The other side appealed to the High Court.

Babu *Pieri Lal Banerji*, for the appellant:—

The order dismissing the judgement-debtors' objections for default of appearance was in effect, an adjudication that the objections were not well-founded. The fact that the objections were dismissed for default and not after a trial on the merits was immaterial for this purpose. It did not make the order of the court any the less an adjudication against the soundness of those objections. *Abadi Begam* v. *Muhammad Abdul Ghafur* (1), *Sheoraj Singh* v. *Kameshar Nath* (2), *Muhammad Husain* v. *Muzaffar Husain Khan* (3). That order barred the respondents from raising the same objections again. It was true that the judgement of the High Court passed on a former occasion did also decide the same matter and in favour of the respondents. But where there were two conflicting judgements of competent courts each of which decided the same matter between the same parties the latter prevailed. *Mallu Mal* v. *Jhamman Lal* (4), *Rai Sham Kishore* v. *Ugrah Narain Singh* (5).

The Hon'ble Mr. *Abdul Raoof*, for the respondents:—

By means of the compromise the decree-holder absolutely absolved the respondents from all liability under the decree. Therefore the decree was discharged or abrogated so far as the liability of the respondents was concerned. There was no subsisting decree against the respondents. If somehow the respondents' name was put in the application for execution and something realized from them the effect could not be to create or revive a decree which had been wiped out. The effect

(1) (1906) 3A. L. J., 198.
(2) (1902) I. L. R., 24 All., 282.
(3) Weekly Notes, 1905, 237.
(4) (1904) 1 A. L. J., 416.
(5) (1909) 6 A. L. J. (Notes), 49.

of the order allowing the application for execution must be deemed to be confined to the sum of money which was attached and which was in dispute in that case. The order did not adjudicate upon the merits of the objections, and as there was no adjudication the order did not operate as *res judicata*. If that order were an adjudication on the question of the liability of the respondents under the decree it would under the rulings, prevail against a former adjudication.

Babu *Pieri Lal Banerji*, in reply.—

The granting of the application for execution in spite of the objections was a sufficient adjudication. The objections raised were necessarily inconsistent with the application being granted, and must be deemed to have been disallowed.

CHAMIER, J.—One Sri Krishan Das obtained a decree for possession of property and for costs against several persons including the respondents. When execution was taken out in 1905 the respondents protested that they had never been anything but *pro formâ* defendants and that the decree should not be interpreted as making them jointly liable for costs along with other defendants who had contested the suit. A petition of compromise was filed on April 20th, 1906, in which the decree-holder admitted in express terms that he had no claim against the respondents under the decree, and this compromise was made the basis of an order of the court releasing the property of the respondents from attachment. Shortly after that the decree-holder sold the decree to the appellant who in 1907 took out execution against the respondents. They put in an objection and the court decided that the respondents were no longer liable under the decree. The appellant brought the case before this Court on appeal, and this Court held expressly that there had been a complete adjustment of the decree as between the original decree-holder and the respondents and that the appellant was bound thereby. Notwithstanding the decision of this Court the appellant in April, 1910 again took out execution against the respondents and attached a sum of Rs. 28-8-0, which happened to be in court to their credit, and at the same time he asked for the attachment of a much larger sum as against the other judgement-debtor. The respondents put in a petition of objection

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pleading that they had been discharged from liability under the decree, that property attached previously had consequently been released, and that the application for execution was contrary to previous orders passed by the court. But the respondents allowed their objections to go by default with the result that the application for execution was allowed and the money attached was paid out of court to the appellant. The present application for execution was presented in June, 1913. The respondents objected on the ground that it has been held more than once during the course of the execution proceedings that they are no longer liable under the decree. The appellant's contention was and is that the court's order dismissing the respondents' objection in 1910, coupled with its order allowing the decree to be executed against the money belonging to the respondents, has the effect of wiping out the previous decisions passed in favour of the respondents, and on the principle of *res judicata* debars the respondents from pleading that the decree has been adjusted, so far as they are concerned. It is conceded that the later of two inconsistent decisions in the course of execution proceedings must prevail against the earlier, *Mallu Mal* v. *Jhamman Lal* (1) and *Rai Sham Kishore* v. *Ugrah Narain Singh* (2). The question is whether the order passed against the respondents in 1910 should be regarded as a decision that the decree had not been adjusted so far as the respondents are concerned and that they were still liable for the balance of the costs decreed. The respondents' contention is that the order of the court decided no more than that the respondents were in 1910 liable for a sum of Rs. 28-8-0. I am unable to accept this contention. The respondents' petition of objection distinctly raised the question whether they were liable under the decree or had been discharged from liability by the orders previously passed. No question of the extent of the respondents' liability was before the court. The dismissal of their objections resulted no doubt in the sum of Rs. 28-8-0, only being paid out of court to them, but the court did not apply its mind to the question of the extent of the respondents' liability. It must in my opinion be taken to have decided that the decree had not been adjusted as alleged by the respondents, consequently

(1) (1904) 1 A. L. J., 416. (2) (1909) 6 A. L. J., Notes 49.

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execution might proceed as against them. It was also suggested that the appellant's application for execution, directed as it was against other persons than the respondents, was calculated to put them off their guard and to lead them to suppose that as only a small sum of money belonging to them had been attached and a much larger sum had been attached as against other persons, they had only to allow the small sum of Rs. 28-8-0 to be paid to the respondents in order to be rid of the whole business. The answer to this is that the respondents were in no way misled by the appellant's application. They came in at once with a petition of objections and their failure to press it is not explained.

I am reluctantly driven to the conclusion that the decision of 1910 neutralised the previous decisions and left the respondents liable for the balance, of the decree for costs. I would therefore allow this appeal set aside the order of the court below dismissing the application for execution, and direct that the application be restored to the pending file and disposed of according to law. Costs of this appeal should be costs in the cause.

PIGGOTT, J.—I concur.

BY THE COURT.—The order of the Court is that the appeal is allowed, the order of the court below is set aside with this direction that the application for execution be restored to the pending file and disposed of according to law.

Appeal decreed, cause remanded.

Before Justice Sir Pramada Charan Banerji and Mr. Justice Rafique.

JANKI KUAR (PLAINTIFF) *v.* LACHMI NARAIN AND OTHERS (DEFENDANTS). * 1915 *May*, 28.

Fraud—Decree—Decree based on perjured evidence—Suit to set aside—Onus of proof—Res judicata.

Held that a suit to set aside a decree on the ground that the decree had been obtained by perjured and false evidence is not maintainable. *Held* further, that where a decree was impeached on the ground of fraud, the fraud alleged must be actual positive fraud, a meditated and intentional contrivance to keep the parties and the court in ignorance of the real facts of the case, and the obtaining of the decree by that contrivance.

* Second Appeal No. 458 of 1914, from a decree of Austen Kendall, District Judge of Cawnpore, dated the 12th of January, 1914, confirming a decree of Murari Lal, Subordinate Judge of Cawnpore, dated the 26th of March, 1913.