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 CARR, J.

offence to which the accused was required to plead. All the convictions are therefore bad.

I set aside the convictions and sentences in all three cases and direct that each of the accused persons be acquitted and that the fine paid by him be refunded to him.

PRIVY COUNCIL.

J.C.*
 1928
 Nov. 30.

MA NGWE NAING (*Plaintiff*)
 v.
 MAUNG THA MAUNG (*Defendant*).

(On appeal from the High Court at Rangoon.)

Limitation—Conveyance by Burman to daughter—Purported partition on re-marriage—Suit by daughter for possession—Plea of fraud on creditors rejected on facts—Possession of father on behalf of daughter.

In 1904 a Burman executed on his remarriage a deed of partition by which he purported to convey to his daughter, the only child of his first marriage and then eight years of age, immovable property as her one-quarter share of the joint property of that marriage, and he appointed his own mother to take care of it. He remained in possession, but contributed to the support of his daughter, who resided with her maternal grandmother. At the time of the conveyance the father was considerably indebted, and his creditors finding that they could not attach the property settled with him upon easy terms. In 1915 the father promised his daughter and her maternal uncle that the property would be restored to her. In 1925 the daughter sued for possession. The father pleaded that the conveyance was in fraud of his creditors, and that the suit was barred by limitation.

Held, that upon the whole facts the father had failed to discharge the burden, which was heavily upon him, of proving that the conveyance was in fraud of his creditors, and not a genuine conveyance of his daughter's share, possibly liberally calculated; and that consequently his possession was not adverse to his daughter, but on her behalf. Having regard to this finding of fact it was not necessary to consider whether it was fictitious and fraudulent, upon which question decisions in India appeared to be in conflict.

Judgment of the High Court reversed.

Appeal (No. 153 of 1927) from a decree of the High Court (June 1, 1926) reversing a decree of the District Judge of Tharrawaddy (July 2, 1925).

* PRESENT :—LORD PHILLIMORE, LORD ATKIN AND SIR LANCELOT SANDERSON.

The appellant brought a suit in 1925 against the respondent, her father, for possession of immoveable property which he had conveyed to her in 1904. The respondent pleaded in defence, (1) that the conveyance was in fraud of his creditors and fictitious, and (2) that the suit was barred by limitation.

The facts appear from the judgment of the Judicial Committee.

The District Judge rejected both defences upon the facts, and made a decree.

On Appeal in the High Court the decree was reversed. The learned Judges (Heald and Chari, JJ.) upon an examination of the respondent's financial position in 1904, and considering the appellant's liability in respect of the debts incurred, held that the conveyance was a fictitious transaction by the defendant for the purpose of defeating his creditors. They held on the authority of *Maung Tin v. Ma Mai Myint* (1), that the defendant was not precluded from setting up his own fraud as a defence; in any case he could show that no title was intended to pass for the purpose of establishing adverse possession, and accordingly that the suit was barred by limitation.

1928 Oct. 28, 29, 30, Nov. 1. *De Gruyther, K.C.* and *Pennell* for the appellant.

Dunne, K.C., E. B. Raikes, and *McNair* for the respondent.

The arguments were mainly upon the facts. On the question whether the defendant could set up his own fraud reference was made to:—*Ram Surun Singh v. Pran Peary* (2), *Eugene Pogose v. Delhi and London Banking Company* (3), *Babaji v. Krishna* (4), *Preo Nath Koer v. Kazi Mahomed Shazid* (5),

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(1) (1921) 11 L.B.R. 83.

(2) (1870) 13 Moo. I.A. 551.

(4) (1893) 18 Bom. 372.

(3) (1884) 10 Cal. 951.

(5) (1903) 8 C.W.N. 620.

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Sidlingappa v. Hirasa (6), *Jadu Nath Poddar v. Ruplal Poddar* (7), *Girdharlal v. Manickamma* (8), *Maung Tin v. Ma Mai Myint* (9).

November 30. The judgment of their Lordships was delivered by :—

LORD ATKIN.—This is an appeal from the High Court at Rangoon allowing an appeal from a decree of the District Judge of Tharrawaddy, made in favour of the plaintiff the present appellant. The suit was brought by the plaintiff, Ma Ngwe Naing, against her father, the defendant, Maung Tha Maung, claiming possession of certain lands, of which she was the registered owner. It is not disputed that the father, by deed dated January 15th, 1904, purported to have made a partition of property and to have conveyed the property in question to his daughter. He alleges, however, that the transaction was a fictitious transaction intended merely to defeat his creditors. The High Court reversing the District Judge have so held ; the daughter has appealed.

Maung Tha Maung married as his first wife Ma Pu ; the plaintiff is the only issue of the marriage. In February, 1903, Ma Pu died ; the plaintiff was then 8 or 9 years old. Later, in 1903, the defendant married Ngwe Hlaing. On the remarriage the plaintiff undoubtedly became entitled to a share of the joint marital property of her father and deceased mother. Three or four months after the marriage the father took all the steps necessary to carry out a legal partition and to vest the appropriate share in the daughter. The family were consulted. Luyis were summoned to authenticate the partition, and a formal document was executed by the father on January 15th, 1904, which is Exhibit I. It recites that the father divides and

(6) (1907) 31 Bom. 405.
 (7) (1906) 33 Cal. 567.

(8) (1913) 38 Bom. 10.
 (9) (1921) 11 L.B.R. 83.

gives outright possession by way of inheritance of one-fourth of the whole estate to his daughter for the mother's share, and that Ma Shwe Hnit, the grandmother of the daughter, undertook to take charge of the daughter's share until the daughter's majority. It then defines the share, which consisted of 78 acres of paddy land, estimated in the deed as worth 3,500 rupees, and a house and compound worth 500 rupees, and concludes with formal words of conveyance. The document was duly registered. In due course the grandmother petitioned the Court of the District Judge for a grant of letters of administration to the deceased Ma Pu, alleging that the father had made over the guardianship and one-fourth share due to his deceased wife in trust for the daughter. On February 20th letters of administration of the estate of Ma Pu in general form were granted to Ma Shwe Hnit. In 1908 the father's creditors who had obtained decrees against him by way of execution attached the property in question. The grandmother, acting on behalf of the daughter, with the approval and assistance of the father, took proceedings to have the attachment set aside and succeeded. The father subsequently made a composition with his creditors. About the time of the deed of partition the plaintiff went to live with her maternal grandmother, Shwe Pai, with whom apparently she continued to live until her marriage in 1924. She attained her majority in 1911. During the whole of this period the father, as found by the trial Judge, continued in possession of the property, receiving the rents and produce. He however, contributed to the daughter's support. The trial Judge finds that about 1915 the daughter went with her maternal uncle and another witness to her father to demand possession of the lands, and received an assurance from the father that the property was safe and would be restored to

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her. Representations had been made in 1924 and preceding years by the father to various revenue officers that the lands in question were the daughter's and that he was leasing them on her behalf. The father gave evidence to the effect that at the time of the alleged partition he owed 30,000 rupees, that he executed the document to save the property from his creditors, and that under it he transferred all his property to his daughter's name. He says that after the partition he absconded for a time to avoid his creditors. On return he was sued and was imprisoned for debt. He made an unsuccessful application to be declared an insolvent. After the creditors had failed in their attachment of the lands in suit he says he compounded his debts of Rs. 30,000 for Rs. 3,000. He says he always remained in possession, and was supported by several witnesses, who spoke to acts of ownership at all material times by the defendant. The learned trial Judge found that the defendant had not discharged the onus of proof that the transaction was fictitious. The High Court, on the contrary, find that the transaction was wholly fictitious. They rely upon the circumstances that, as they find, the defendant was heavily indebted at the date of the deed; that the property assigned amounted to nearly the whole of the defendant's assets; that the guardian appointed was not the daughter's maternal grandmother with whom she lived, but the father's mother, and that the defendant continued in possession of the land throughout. They further came to the conclusion that the defendant's possession was throughout adverse to his daughter and that he had acquired a title by limitation. While appreciating the grounds of suspicion which the above circumstances afford, their Lordships are of opinion upon consideration of the whole case that the defendant

failed to discharge the onus which lay heavily upon him in the circumstances to show that the transaction was fictitious. The defendant's case is that the partition was intended to defraud his creditors. He has to admit that this fraud, if it was one, was successful; that he repelled the creditors' attempt to attach the property, procuring his daughter's title to be set up, and that thereupon the frustrated creditors accepted a small composition.

Their Lordships listened to a forcible argument that in such circumstances, where a grantor alleges that a transaction apparently real was actually fictitious, and was for the purpose of effecting a fraud, and the fraud was completed, he cannot be heard in a Court of Law to say that the transaction was other than what it appears to be. There have been various decisions on this point in India which appear to conflict. Their Lordships find it unnecessary to decide the point. But they have no doubt that facts that can be relied on in support of such a plea make it the duty of the Court adjudicating on the allegation of such a grantor to see that he proves by cogent evidence the averment that he makes. The present case differs from the usual form of alleged benami transactions in that there was an undoubted legal right of the transferee existing independently of the impugned transaction to receive a transfer of some property. Their Lordships think it probable that the father was at the date in question in debt, though not to the extent suggested of 30,000 rupees. Such a condition of affairs would be as likely to lead to the father making a real partition as a fictitious one. In these circumstances again it may well be that intending the property really to vest in the daughter, and so be removed from the creditors, he may have made in the partition a generous estimate of a fourth.

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It was contended in argument that in any case the share of an only daughter would be one-half. Their Lordships consider that for the purposes of estimating the good faith of the parties the expressed intention of giving one-fourth should alone be looked at. But it is obvious from the evidence that the defendant is inaccurate when he says that the transfer was of all his property, and the excessive share given to the daughter does not in the circumstances appear to be inconsistent with a genuine transaction.

Similarly, the retaining of the possession and management by the father in the circumstances of the daughter being an infant, and the guardian of the property being the paternal grandmother, appears entirely consistent with the possession and management being conducted in accordance with the legal title that is for and on account of the daughter. In this respect it would appear unfortunate that the learned Judges of the High Court have not referred to the admission in 1915 by the father to his daughter and her uncle found by the trial Judge on evidence which their Lordships find no reason to doubt. If as the trial Judge found in their Lordships' opinion correctly, the possession of the father is in accordance with the legal purport of the deed, no title would be acquired by the father under the law of limitation. For these reasons their Lordships agree with the learned trial Judge in thinking that the defendant failed to establish his defence. Their Lordships therefore are of opinion that the appeal should be allowed and the decree of the learned trial Judge restored, and will humbly advise His Majesty accordingly. The appellant should have her costs here and in the High Court.

Solicitor for appellant : *J. E. Lambert.*

Solicitors for respondent : *Bramall & Bramall.*