APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Birdwood.

1887. *March* 23 *and April* 13.

CHENVIRÁPPA' BIN VIRBHADRA'PPA', (ORIGINAL DEFENDANT), APPELLANT, *v.* PUTTA'PPA' BIN SHIVBASA'PPA', (ORIGINAL PLAINTIFF), RESPONDENT.*

Benámi transaction for purpose of defrauding creditors—Deed of conveyance not in real purchaser's name—Collusive suit by nominee against real owner—Decree obtained by fraud—Subsequent suit by real owner against nominee for possession—Right of party to fraud to set fraudulent decree aside—Collusive transaction when held binding, and when set aside.

In 1874, the plaintiff Puttáppá bought a house from G., but caused the conveyance to be executed by G. in the defendant Chenvirappá's name. This was done with the object of protecting the property against the claims of the plaintiff's creditors. The plaintiff occupied the house, ostensibly as tenant to the defendant, for a nominal rent. In 1880, the defendant brought a suit against the plaintiff to recover possession of the house, and obtained an *ex-parte* decree. He applied for execution of the decree, but allowed the execution-proceedings to drop. In 1883 he made a fresh application for execution. Thereupon the plaintiff filed the present suit for a declaration of his title to the house in question, and of his right to retain possession, alleging that the defendant was a mere *benámidár*; that the sale deed and the *ex-parte* decree were sham and collusive transactions in fraud of the plaintiff's creditors, and that the defendant was merely a trustee for him.

Held, that the plaintiff was bound by the decree passed in 1880 in the defendant's favour, though it was a collusive decree. The plaintiff could not get the judgment set aside which the defendant had obtained against him by his own contrivance. The plaintiff alleged that the defendant held in trust for him; the object of that trust being to protect the plaintiff's property in fraud of his creditors. Even if such a trust enforceable by the Courts could arise out of such a *turpis causa*, the question was whether this continued to subsist and would be enforced when the original relations of the parties had become merged in the decree obtained by the defendant against the plaintiff. The general principle is that where a defendant has suffered a judgment to pass against him, the matter is then placed beyond his control.

Held, also, upon the general principle of *res judicata*, that the plaintiff was estopped from raising the question of fraud in the present suit, which he might and ought to have urged in the former litigation.

Held, further, that the suit, if regarded as one for setting aside a decree obtained by fraud, was barred by limitation, such fraud as there was being a well known to the plaintiff in 1880 as in 1883, when the present suit was filed.

* Second Appeal, No. 107 of 1886.

(1) I. L. R., 6 Bom., 703.

A party to a collusive decree is bound by it, except possibly when some other interest is concerned that can be made good only through his.

Ahmedbhoy Hubibhoy v. *Vulleebhoy Cassumbhoy*(1) and *Venkatramanna* v. *Virámma*(1) followed.

Param Sing v. *Lálji Mal*(2) dissented from.

A decree fraudulently obtained may be challenged by a third party who stands to suffer by it either in the same or in any other Court; but, as between the parties themselves to a collusive decree, neither of them can escape its consequences.

Where an illegal purpose has been effected by a transfer of property, the transferee is not to be treated as a trustee holding it for the benefit of the transferor.

Where a collusive transaction has merely proceeded to the length of sham deeds passed between the parties, or even if false declarations made by them in litigation for their common benefit, the Courts may displace the apparent by the real ownership.

In cases in which the transaction was still inchoate, or the grantor still retained a *locus pœnitentiæ*, the formal act has been relieved against by reference to the real intention of the parties. The violation or infringement of the law had not in such cases been completed, and a suspensive condition was annexed to the initial acts of which Courts of Equity could take advantage; but, apart from this, a man cannot confine the operation of his deed within the limits of an intended fraud. The purpose having been once answered especially by defeat of a third person's rights asserted in Court, a claim for reconveyance would be properly dismissed.

SECOND appeal from the decree of J. L. Johnstone, Acting Judge of Dhárwár, confirming the decree of Ráv Sáheb Rághvendra Rámchandra, Second Class Subordinate Judge at Hubli.

The plaintiff Puttáppá purchased the house in dispute from one Gurshidáppá for Rs. 240 on the 10th January, 1874. With a view to protect the property against the claims of his creditors, the plaintiff got the sale-deed to be executed by the vendor in favour of the defendant, Chenviráppá, who was his son-in-law. The plaintiff took possession of the house, ostensibly as a tenant of the defendant, for a nominal rent of Rs. 5 *per annum*. But, as a matter of fact, he did not pay any rent.

In March, 1880, the defendant, Chenviráppá, filed a suit against the plaintiff and his wife for possession of the house, alleging that he had purchased it from Gurshidáppá: that he had been

(1) I. L. R., 10 Mad., 17. (2) I. L. R., 1 All., 403.

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in possession thereof till the 29th January, 1880, and that on that day the plaintiff and his wife had taken wrongful possession of it. In this suit an *ex-parte* decree was passed on the 8th June, 1880, awarding possession of the house to Chenviráppá. He applied for execution of this decree, but did not proceed in the matter. The application was, therefore, struck off the file on the 26th August, 1880, on the ground of his default.

On the 17th July, 1883, Chenviráppá presented a second *darkhást* for execution of the decree. The plaintiff thereupon filed the present suit, in which he prayed for a declaration of his title to the house in question, and of his right to retain possession. He alleged that the defendant was a mere *benámidár*; that the sale-deed of the 10th January, 1874, as well as the *ex-parte* decree of the 8th June, 1880, obtained by the defendant against him were sham and collusive transactions in fraud of the plaintiff's creditors; and that, as he had paid for the house, the defendant was nothing more than a trustee for him.

The defendant contended that the suit was barred under section 13 of the Civil Procedure Code (Act XIV of 1882); that it was also barred by limitation; that he was the real purchaser, and had paid the purchase-money; and that the decree obtained by him in 1880 was not a fraudulent or collusive decree.

Both the lower Courts found that the sale-deed executed in favour of the defendant was a *benámi* transaction, intended only to defeat the execution of a decree outstanding against the plaintiff and other persons; that the purchase-money was really paid by the plaintiff, and not by the defendant; that the plaintiff was in possession of the house as owner ever since the date of his purchase; and that the *ex-parte* decree obtained by the defendant in 1880 was a collusive decree, which was never intended to be operative between the parties. The lower Courts, therefore, decreed the plaintiff's claim.

Against this decision the defendant appealed to the High Court.

G. R. Kirloskar for the appellant:—There is no evidence to show that the *ex-parte* decree passed in June, 1880, is a collusive decree. In that suit the plaintiff did not set up a proprietary

title to the house in dispute. He cannot get a fresh decision on a point already decided against him. The matter is *res judicata*. Assuming that the decree is collusive, it is nevertheless binding on both parties. A party to a collusive decree cannot escape its consequences—*Prudham* v. *Phillips*[1]; *Ahmedbhoy Hubibhoy* v. *Vulleebhoy Cassumbhoy*[2]; *Venkatramanna* v. *Virámma*[3]; *Patch* v. *Ward*[4]. If there was fraud, the plaintiff ought to have sued within three years from the date of the decree. The suit is barred by limitation.

Mánekshán Jahángirshán for the respondent:—This is a suit to prevent the consummation of a fraud. The Court will not aid the defendant in defrauding the plaintiff. It is open to the plaintiff to reveal the true nature of the transaction, and recover on the real agreement between the parties. Refers to *Param Sing* v. *Láljí*[5], *Gopi Vásudev Bhat* v. *Markande Náráyan Bhat*[6], and *Symes* v. *Hughes*[7]. Where a fraud has been committed, the Court can interfere—Kerr on Fraud, 399. The plaintiff did not defend the suit brought against him by the defendant in 1880, because he was assured by the defendant that he would not execute the decree. As to limitation, the fraud was only known when execution was sought. Time should be computed from the date of the second *darkhást*, by which the defendant sought more than a nominal execution of the decree. *Param Sing's case*[8] is in point.

G. R. Kirloskar, in reply:—In *Param Sing's case*[8] there was an express agreement that the decree, when obtained, should not be executed. This circumstance distinguishes that case from the present. A plaintiff who obtains a decree by fraud cannot afterwards repudiate it when he finds it prejudicial to his interests—Kerr on Fraud, 327. An arrangement in fraud of creditors is binding between the parties—*Bessey* v. *Windham*[9]; *Bowes* v. *Foster*[10].

Cur. adv. vult.

(1) 2 Amb. Rep., 763.
(2) I. L. R., 6 Bom., 703.
(3) I. L. R., 10 Mad., 17.
(4) L. R., 3 Ch. App., 203.
(5) I. L. R., 1 All., 403.
(6) I. L. R., 3 Bom., 30.
(7) L. R., 9 Eq. Ca., 475.
(8) I. L. R., 1 All., 403.
(9) 14 L. J. Q. B., p. 7.
(10) 2 H. & N., 779.

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WEST, J.:—According to the facts found by the Courts below, Puttáppá bought a house, but caused the conveyance, exhibit 63, to be executed by the vendor Gurshidáppá in favour of Chenviráppá on the 10th January, 1874. Chenviráppá was brother-in-law and also son-in-law of Puttáppá, and the object of taking the conveyance in Chenviráppá's name was to protect the property against Puttáppá's creditors. As Puttáppá paid for the house, Chenviráppá's ownership was attended with a resulting trust in Puttáppá's favour. Puttáppá entered on possession, though nominally at least, as tenant of Chenviráppá at a small rent, and so held the property for several years.

In 1880, Chenviráppá sued Puttáppá for possession of the house, on the ground of possession wrongfully taken by Puttáppa on the 29th January, 1880. On the 8th June, 1880, possession was awarded to Chenviráppá by an *ex-parte* decree. An application made by Chenviráppá for execution was allowed to drop on the 26th August, 1880; but on the 17th July, 1883, a second application was made, and then for the first time, as Puttáppá says, he found that Chenviráppá was playing him false. Why the ceremony of the sham litigation had been gone through, not only with respect to the house now in question, but also with respect to another ostensibly purchased by Chenviráppá from Puttáppá himself, does not clearly appear. The original conveyance in 1874 had been taken in Chenviráppá's name, in order, as Puttáppá says, to guard the purchased property against execution of a decree of 1872 then outstanding against Puttáppá jointly with some other persons. That decree was satisfied by a surety, one Revanáppá, who, Puttáppá says, was paid off about a year before the institution of the present suit. Revanáppá, it is suggested, could have sued Puttáppá, and hence a continued need for guarding the property by the intervention of Chenviráppá.

When Chenviráppá at length sought to obtain possession under his decree of 1880, Puttáppá instituted the present suit for a declaration of his title and of his right to retain possession of the house in question, and the Courts below have decreed according to his claim, notwithstanding the existence of the prior decree awarding possession to Chenviráppá and of the order for execu-

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tion of that decree. The litigation having, as they say, been merely collusive, Chenvirápá has derived no right from it, and Puttáppá being actually in possession, must be retained in possession, rather than turned out in favour of his partner in deception.

It is laid down generally that a man cannot set up an illegal or fraudulent act of his own, in order to avoid his own deed[1] If A, in order to defraud C, allows B to acquire the legal ownership of his property, A will not generally be aided by equity in undoing his own act or avoiding his own submission. See *In re Mapleback*; *Ex parte Caldecott*[2]. Where, in order to defeat an execution by a judgment-creditor, a judgment-debtor invited his landlord to distrain and sell for rent not really due, the tenant, it was held, could not be assisted by the Court in recovering the money realized by the sale—*Sims* v. *Tuffs*[3]. The *particeps criminis* stands on quite a different footing from an innocent third party, and if he has really parted with the direct ownership of his property, he cannot at the same time have annexed to the ownership a trust in his own favour the necessary effect of which is to give success to a conspiracy for defeating the law.

In *Gopi Vásudev* v. *Markande Náráyan*[4] it was held that a pretended mortgage might be set aside at the suit of a real vendee, even though it had been successfully sued on as against the original owner. This was in accordance with the general principle, that a decree fraudulently obtained may be challenged by a third party—*Fermor* v. *Smith*[5]—who stands to suffer by it either in the same or in any other Court[6]. As to the parties themselves to a collusive decree, the general principle has been long received, that neither of them can escape its consequences. See *Ahmedbhoy Hubibhoy* v. *Vulleebhoy Cassumbhoy*[7]. The decision just referred to has recently been followed in *Venkatramanna* v. *Virámma*[8], which was a case very analogous to the present one. Where a collusive transaction has merely proceeded

(1) May on Fraudulent Conveyances, p. 432.
(2) L. R., 4 Ch. Div., 150.
(3) 6 Carr. & P., 207.
(4) I. L. R., 3 Bom., 30.
(5) 2 Co., p. 202; Co. R., Part III, 78a.
(6) See Story Eq. Plg., Secs. 794, 426, 428, at p. 424.
(7) I. L. R., 6 Bom., 703 at pp. 711, 712.
(8) I. L. R., 10 Mad., 17.

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to the length of sham deeds passed between the parties, or even of false declarations made by them in litigation for their common benefit, it has been held that the Courts may displace the apparent by the real ownership. In *Symes* v. *Hughes*(1) a fraudulent transfer was set aside, in order that effect might be given to a compromise arranged between the transferor and his creditors. Whether a similar decree would have been made in favour merely of the transferor himself, is not at all certain. In the Scotch case of *Tennent* v. *Tennent*(2), Lord Westbury expresses hypothetically an opinion that a deed by which a man resigned his share in a business to his father and brother might be set aside at his suit, if it appeared to have been made to protect them against his creditors. As that was not so, it was upheld, and if it had been set aside, it would perhaps have been set aside only in the interest of the creditors, not of the man who had tried to cheat them(3). However, in *Sreemutty Debia* v. *Bimola Soondaree*(4) Sir R. Couch says: "Parties are not precluded from showing what was the real nature of the transaction, although it might have been entered into for the purpose of setting up against creditors an apparent ownership different from the real ownership. In many of these cases the object of a *benami* transaction is to obtain what may be called a shield against a creditor; but, notwithstanding this, the parties are not precluded from showing that it was not intended that the property should pass by the instrument creating the *benámi*, and that in truth it still remained in the person who professed to part with it." And, again, "Although, no doubt, it is improper that transactions of this kind should be entered into for the purpose of defeating creditors, yet the real nature of the transaction is what is to be discovered, the real rights of the parties. If the Courts were to hold that persons were concluded under such circumstances, they would be assisting in a fraud, for they would be giving an estate to a person when it was never intended that he should have it." The inference from *Rám Surun Singh* v. *Mussamut Prán Peary*(5),

(1) L. R., 9 Eq., 475.
(2) 2 H. L. Sc. at p. 7.
(3) See May on Fraudulent Conveyances, p. 432.
(4) 21 Calc. W. R. Civ. Rul. at p. 424.
(5) 13 M. I. A., 551.

Mussamut Oodey Koowur v. *Mussamut Ladoo*[1] is drawn out in a still more pronounced form in *Bykunt Nath Sen* v. *Goboollah Sikdar*[2] by Markby, J., who there says: "An act done by a party with the view of defeating a claim made against him does not estop him from disputing afterwards the validity of that act. The Privy Council decision, no doubt, refers to a statement, but I cannot make any distinction between the making of a statement and the doing of an act."

These decisions go a long way towards enabling a party to a dishonest trick, by which his creditors may have been defrauded, to get himself reinstated when his purpose has been served. The person entrusted with the property, in order to shield it against just claims, acts dishonourably, no doubt, in refusing to restore it when called on, but the risk of this operates to check knavery if the Courts refuse their aid to the sham vendor. In the case, however, of *Mahádáji Gopál* v. *Vithal Ballál*[3] there was a false award of arbitrators, a pretended sale under it (not a Court sale), and then a sham transfer, in order to defeat creditors. The transferee was really a mortgagee, and, as he had received money in that character from the plaintiff as mortgagor, it was held that he could not resist a claim to redeem by setting up the fictitious transactions by which the plaintiff's judgment-creditor had been defeated. Still in the case just cited the ostensible sale was reduced to a mortgage by the acts of the parties, and their intention to mortgage under the form of a sale could be inferred from their conduct without resorting to a further explanation which involved the disclosure of a fraud.

Amongst the English cases, from which the principles stated in the Calcutta decisions have been drawn, it would not be easy to find any in which a plaintiff seeking to have his own solemn act set aside simply and solely in his own interest has succeeded in getting the formal act replaced by the real intention when that intention involved a fraud on third parties. The Courts refuse to aid a violation of the Common Law rule against fraud[4], as they refuse to aid the violation of a statute by giving effect to transac-

(1) 13 M. I. A., 588.
(2) 24 Calc. W. R. Civ. Rul., at p. 392.
(3) Printed Judgments for 1881, p. 182.
(4) See Kerr on Fraud, p. 307.

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tions that infringe or evade it[1]. In *Phillpotts* v. *Phillpotts*[2] the executors of a person deceased sought to escape payment of an annuity granted by the testator, on the plea that it had been granted for the purpose of multiplying votes. This purpose was opposed to the law only if the grantor retained an interest in what he ostensibly conferred, and the Court refused to deprive the formal act of its regular effect in favour of those who had to rely for an excuse on the illegal purpose of their own testator. In *Bessey* v. *Windham*[3], cited and relied on in the one just referred to, the Court gave effect to a deed transferring property, though it had been found, as a fact, that nothing was intended to pass by it. It operated between the parties, though it might be void as against creditors who were to be defrauded by it. Another case relied on was that of *Doe dem. Roberts* v. *Roberts*[4]. There a deed was sought to be avoided by the defendant, on the ground that it had been colourably executed merely to give an apparent qualification to kill game. The Judges would not deprive the formal conveyance of its effect; Bayley, J., said: "By the production of the deed, the plaintiff established a *primâ-facie* title; and we cannot allow the defendant to be heard in a Court of justice to say, that his own deed is to be avoided by his own fraud"[5]. In *Brackenbury* v. *Brackenbury*[6] a conveyance for the same purpose as in *Doe dem. Roberts* v. *Roberts*(was given effect to, in equity by the Court's refusing to interfere with the transferee's action of ejectment upon it. In *Cecil* v. *Butcher*[7] the father after executing a conveyance for the same purpose had kept it in his own possession, and never informed his son. Eventually he had destroyed it. In giving judgment, Sir T. Plumer, M.R., said that in a Court of Common Law the completion of the deed was the completion of the title under it, but as to Courts of Equity he added: "They have not depended singly upon the question, whether the party has made a voluntary deed; not merely upon whether, having made it, he keeps it in his own possession; not merely upon whether it is made for a particular purpose; but

(1) Story Eq. Juris, SS. 296, 298.
(2) 20 L. J., C. P., 11.
(3) 14 L. J., Q. B., 7.
(4) 2 B. & A., 367.
(5) 2 B. & A., 369.
(6) 2 Jac. & W., 391.
(7) 2 Jac. & W., 565 at pp. 573, 574, 578.

when all these circumstances are connected together, when it is voluntary, when it is made for a purpose that has never been completed, and when it has never been parted with, then the Courts of Equity have been in the habit of considering it as an imperfect instrument. If it was understood between the parties that it should only be kept in readiness to be used if wanted, or if it is made *ex parte*, and never intended to be divulged to the grantee, unless the particular purpose requires it; the question is, whether there is not then a *locus pœnitentiæ;* if, under such circumstances, the grantee furtively gets possession of the deed, though it is good at law, yet he has obtained it contrary to the intention of the grantor, who never meant him to have it; and will not a Court of Equity, at least, refuse him its assistance? This principle will be found to pervade all the cases. It may, perhaps, when the transaction is known to both parties, rest upon the supposition of a collateral agreement between them, that the deed should not be used,—should not be called forth into life unless wanted for the special purpose, and that the deed being executed on the faith of that agreement, it is contrary to good conscience and equity to call for it, and apply it beyond the purpose for which the grantee knew it to be intended." His Lordship then proceeds to a review of the cases, and from it deduces the result: "I think there is a great preponderance of authority in support of the proposition, that in a case where a voluntary deed is made without the knowledge of the grantee, when it is made for a special purpose for which it was never required to be made use of, when it has been kept in the hands of the grantor without ever being acted on, a Court of Equity will not relieve upon it." It will be seen that the principles thus deduced from the English cases fall short of the broad statements in the cases of *Sreemuty Debia* v. *Bimola Soonduree*[1] and *Bykunt Nath Sen* v. *Gobdoollah Sikdár*[2].

As to statements made in previous litigation with a third party, these rest on special principles. See *Boileau* v. *Rutlin* [3]. Lord Justice James says in *Rám Surun Singh* v. *Mussamut Prán Peary* [4]: "Then, with regard to the supposed estoppel by

(1) 21 Calc. W. R. Civ. Rul., 422.
(2) 21 Calc. W. R. Civ. Rul., 391.
(3) 2 Ex. R. 665 *per* Parke, B.
(4) 13 M. I. A., 559.

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pleading, it is equally clear that a pleading by two defendants against the suit of another plaintiff never can amount to an estoppel as between them." Of the petition presented in *Mussumut Oodey Koowur* v. *Mussumat Ladoo*[1] by one widow disclaiming her rights in order to enable another to carry on a mortgage suit, the Judicial Committee say (page 598): "If that is to prevent her recovering the property now in question, it must do so either because it operated as a conveyance or as a contract to convey the interest which she now claims, or because it operated by way of estoppel. There is no other way in which it can operate." If, therefore, there had been a conveyance or a contract, she presumably would have been bound.

In the cases in which the transaction was still inchoate, or the grantor still retained a *locus pœnitentiæ*, the formal act has been relieved against by reference to the real intention of the parties. The violation or infringement of the law had not in such cases been completed[2], and a suspensive condition was annexed to the initial acts of which the Courts of Equity could take advantage; but, apart from this, a man cannot confine the operation of his deed within the limits of his intended fraud. The purpose once answered especially by defeat of a third person's rights asserted in Court [3], a claim for relief by way of reconveyance would, as Lord Eldon agreed with Lord Kenyon (see *Curtis* v. *Perry*[4],) be properly dismissed. Story says: "Relief is not granted where both parties are truly *in pari delicto*, unless in cases where public policy would thereby be promoted"[5]. And again (section 697): "Where the party seeking relief is the sole guilty party, or where he has participated equally and deliberately in the fraud; or where the agreement, which he seeks to set aside, is founded in illegality, immorality, or base and unconscionable conduct on his own part; in such cases Courts of Equity will leave him to the consequences of his own iniquity; and will decline to assist him to escape from the toils which he had studiously prepared to entangle others." In the case of

(1) 13 M. I. A., 585.

(2) Comp. at Com. Law; *Bowes* v. *Foster*, 27 L. J., Ex., 262.

(3) See *per* Channel, B., in *Bowes* v. *Foster*, 27 L. J. Ex., p. 268.

(4) 6 Ves. Ju., p. 747.

(5) Story Eq. Juris., S. 298.

Barnard v. *Sutton* [1] the plaintiff alleged a conveyance and assignment in trust for creditors. The defendant set up no interest except as himself a creditor, and the deed was decreed to stand as a security for this sum only. There had probably been an intention to defraud the plaintiff's creditors, but on the pleadings the case could be disposed of apart from that question. The plaintiff did not allege an essentially fraudulent purpose in order to deprive his conveyance of its ordinary effect. Had he done so, *Haigh* v. *Kaye* [2] shows that he would probably have failed.

In that case a person engaged in litigation conveyed to a friend on trust to pay him the rents and profits. Afterwards he demanded a reconveyance, and the Court decreed it, saying that the mere allegation of a fear on the plaintiff's part of an adverse decision was not enough to deprive the plaintiff of his equitable right to a reconveyance. Where a conveyance has been made without real delinquency under a misconception of the law, the Courts do not set themselves to guard a law which was merely imagined, not really existent, and in such a case they decree a reconveyance—*Davies* v. *Otty* [3]; *Manning* v. *Gill* [4]. Such cases obviously differ from those in which there was a definitely illegal purpose and intention on which a plaintiff has to rely in seeking to get rid of the regular effects of his own solemn act. Section 84 of the Indian Trusts Act, II of 1882, states compendiously the principles to be deduced from the cases. It implies that when an illegal purpose has been effected by a transfer of property, the transferee is not to be treated as holding it for the benefit of the transferor.

Such being the law as to the rights arising under mere conveyances and other instruments between parties, we have here to consider further the case of one party's having obtained a decree for possession against the other on a title, which, the latter says, is a mere trust for his benefit. Supposing a trust enforceable by the Courts could arise out of the *turpis causa* alleged by the plaintiff, who says the object was to protect his property against

(1) 12 L. J. (N. S.) Ch. 312; S. C., 7 Jur., 685.

(2) L. R., 7 Ch. Ap., 469.

(3) 34 L. J., Ch., 252.

(4) L. R., 13 Eq., 485.

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an actually existing decree in fraud of the judgment-creditor, the question is, whether this continued to subsist, and would be enforced, when the original relations of the parties had become merged in the decree obtained by the one against the other. The general principle is, that where a defendant has suffered a judgment to pass against him, the matter is then placed beyond his control. In *Bateman* v. *Ramsay* (1) it was held that a judgment entered even under a warrant of attorney executed by the owner of an estate in order to protect himself against creditors could be proceeded on, though this purpose had failed, and the Court refused to interfere in favour of the conusor. Similarly, in *Ahmedbhoy Hubibhoy* v. *Vulleebhoy Cassumbhoy* (2), Latham, J., quotes *Prudham* v. *Phillips* (3), that, "if both parties colluded, it was never known that one of them could vacate it" (4). It may be said, then, with confidence in the present case that Puttápá could not get the judgment set aside which Chenviráppá obtained against him by his own contrivance. As against a third party it could be refused recognition on the ground of fraud. See *West* v. *Skip* (5), but there was no fraud as against a colluding party. Equitable conditions cannot be annexed by a Court to its own decree against the terms of the decree itself. It can be construed, but not qualified in the further proceedings.

The law of limitation allows three years (6) within which to set aside a decree obtained by fraud (7). In the present case such fraud as there was was as well known to the plaintiff in 1880 as in 1883. There was, in fact, he says, no fraud until Chenviráppá began seriously to execute his decree. The decree then stands, and cannot be set aside at Puttáppá's instance, whether as being collusive or as guarded by limitation.

It would be opposed, it seems, to this final effect of a decree, and it would certainly afford a wide opening to fraud if a judgment-debtor in ejectment could come forward with a fresh

(1) Sau. & Sc. R., 459.
(2) I. L. R., 6 Bom., 711, 712.
(3) 2 Ambler., 763.
(4) See Hargrave's Law Tracts, p. 456.
(5) 1 Ves. Sen., 244. Notes to Twyne's case, 1 S. L. C., 1.
(6) Act XV of 1887, Sch. II, Art. 93.
(7) As to the mode to be pursued, see *Aushootoshchandra* v. *Tara Prasanna Roy* (I. L. R., 10 Calc., 612).

suit to establish his right on equitable grounds to the very property which by the decree he has been ordered to deliver to another. Even under the double system of Courts in England it was recognized that a decree of one superior Court could not be set aside by another. Nor could relief be given, in equity, against a judgment of a Common Law Court on a ground equally available as a defence in the latter (1). Here, however, the ground taken by Puttáppá was equally available to him as a defendant in Chenviráppá's suit. Supposing, therefore, that we could divide the Subordinate Judge's Court into two, the new suit by Puttáppá ought to have been rejected. There is, of course, no such division of the judicial powers in this country as would enable a Court to interfere by injunction with its own proceedings or with those of any Court not subordinate to it (2). In the same Court the existence of a judgment unreversed is enough on general principles(3), even without resort to section 13 of the Code of Civil Procedure, to prevent the same matter being litigated again. This appears plainly from *Huffer* v. *Allen* (4).

It has been said, indeed, that a decree obtained by fraud may be impeached in any collateral proceeding. See *per* Willes, J., in *The Queen* v. *The Saddlers' Company* (5). This must be understood, it seems, as "impeached by one not a party to the fraudulent decree." See *De Metton* v. *De Mello* (6). In the present case the parties are the same; the proceeding is not collateral; it is in direct contradiction to the decree, and proposes to avoid it by setting one judgment up against another. This incongruity the law will not tolerate. See *Castrique* v. *Behrens* (7). The present plaintiff as defendant in the previous case made wilful default; and in the judgment in *Trevivan* v. *Lawrence* (8) it was resolved: "If a *scire facias* be brought against the issue in tail upon a judgment in debt against the ancestor, and he being warned makes default, he shall not come afterwards and say that he is tenant in tail; so if he plead any other matter, and

(1) Story Eq. Plg., S. 481.
(2) Act I of 1877, sec. 56.
(3) See Ev. Poth., II, 352.
(4) L. R. 2 Ex., 15.
(5) 30 L. J., Q. B., 186, 199.
(6) 2 Camp., 420.
(7) 30 L. J., Q. B., 163.
(8) 2 Sm. L. Ca., (8th ed.) at p. 800.

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it is found against him. Also they held the judgment upon the *scire facias* is sufficient title in the ejectment, and the first judgment need not be given in evidence." A verdict negativing a right pleaded by a defendant estops him in a subsequent action from asserting that right as plaintiff against the same party (1). The point becomes one adjudicated, and so even in a judgment by default does the point whereon judgment is given for the plaintiff (2). It is *res judicata*, and the matter so determined cannot be withdrawn from the effect of the decree while the decree stands unreversed. See *per* Knight Bruce, V. C., in *Barrs* v. *Jackson* (3), where that learned Judge, after admitting that particular facts may be again controverted, adds "provided the immediate subject of the decision be not attempted to be withdrawn from the operation so as to defeat its direct object." If a defendant proceed by means of a new suit instead of getting a judgment set aside (4) when it is opposed to right, so, too, it seems can a plaintiff defeated in his suit. This would lead to infinite confusion, and would make the administration of the law impossible (5).

No English case has been cited for the respondent Puttáppá. The principle laid down by Lord Campbell in the *Bank of Australasia* v. *Nias* (6) is distinctly opposed to his departure from the prescribed course for getting a decree reversed or set aside; and but one Indian case, it seems, can be found to support the decrees made in his favour. In *Param Sing* v. *Lálji Mal* (7) the Court relieved the plaintiff against a conveyance on which he had submitted, as in the present case, to an *ex-parte* decree against him. The object of the transaction had been, the plaintiff alleged, to shield the property against a claim by the plaintiff's son. There was this difference between that case and the present, that the defendant had expressly engaged after the conveyance to him that the plaintiff's possession should not be disturbed, but this undertaking ought, according to the general view, to have

(1) See *Doe* v. *Oliver*, 2 Sm. L. Ca., p. 696, 5th ed.

(2) See *Philpott* v. *Aslett*, &c. Notes to *Marriot* v. *Hampton* (2 Sm. L. Ca., p. 373); *De Medina* v. *Grove* (10 Q. B., 172).

(3) 1 Y. & C. C. C., 597.

(4) See Ev. Poth., Vol. II, p. 357.

(5) See Ferrer's case, 3 Cok. R., by Thomas and Fraser, p. 271, and notes.

(6) 20 L. J., Q. B., p. 284. See also 2 Sm. L. Ca., p. 373, notes to *Marriot* v. *Hampton*.

(7) I. L. R., 1 All., 403.

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been pleaded against the defendant's claim, and could not be made the basis or support of a separate subsequent suit by the defendant in that earlier case. The Allahabad Court considered that as the agreement bound the plaintiff in the first suit not to execute his decree, and had not been brought forward by the defendant in that suit, the question of whether it barred execution could not have been determined in that former suit, and, therefore, the then defendant dispossessed under the decree was not estopped by the decree, or, if estopped, could nevertheless insist on the agreement, and recover possession. This decision is not supported by any corresponding judgment, nor are we aware of any that supports it. It seems opposed to section 13 of the Code of Civil Procedure and to the general principles partly embodied in that enactment. In *Newington* v. *Levy* (1), Blackburn, J., says: "I incline to think that the doctrine of *res judicata* applies to all matters which existed at the time of the giving of the judgment, and which the party had an opportunity of bringing before the Court. But, if there be matter subsequent the party is not estopped from raising it." The same doctrine may be gathered from 2 Evans's Pothier—332, *Greathead* v. *Bromley* (2), *Schumann* v. *Weatherhead* (3) and also from the judgment of the Court in *Baldeo Sahai* v. *Bateshar Singh* (4) quoting the judgments of the Judicial Committee in *Srimut Rajah Moottoo Vijaya* v. *Katama Natchiar* (5) and in *Woomotara Debia* v. *Unnopoorna Dassee* (6). The uniform concurrence of the authorities, as indeed of the positive law of procedure, also in the doctrine that as between the parties *res judicata pro veritate accipitur* forces us to decline to yield to the particular precedent that we have last discussed.

We follow this Court and the High Court of Madras in saying that a party to a collusive decree is bound by it, unless possibly when some other interest is concerned that can be made good only through his. No such interest is at stake in the present case, and we must reverse the decrees of the Courts below, and dismiss the suit.

The parties severally are to pay their own costs throughout.

Decree reversed.

(1) L. R., 6 C. P., at p. 193.
(2) 7 T. R., 455.
(3) 1 Ea. R., 537.
(4) I. L. R., 1 All., 75.
(5) 11 M. I. A., p. 73.
(6) 11 Beng. L.R., p. 158, Privy Council.