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April 13.

Special Appeal No. 231 *of* 1862.

DAGDU' bin DA'UD TELI' PARDESHI'..... *Appellant.*
SHEKH SA'HEB valad BADRUDDI'N KA'MBLE. *Respondent.*

Judgments in rem *and* inter partes—*Sale by Guardians of property of Hindú Minor—Reg. II. of* 1827, *Sec.* 1., *Cl.* 3—*Reg. IV. of* 1827, *Sec.* XXV.—*Act VIII. of* 1859, *Sec.* 2.

K. sued to establish his title to a house purchased by him from D. D's guardians during his minority: alleging that the greater part of the purchase-money was employed in paying off a mortgage claim upon the house; that, after he had obtained possession under his deed, one D. S., the holder of a decree against D. D.'s guardians, attached the house; and that he brought a suit to raise the attachment, in which having failed, he paid into court the amount of D. S.'s claim.

Held that K. was not estopped from bringing this suit against D. D. by the decree in his former suit to raise the attachment, which declared that the deed of sale now relied upon was fraudulent and void as against D. S.

Held, also, that the *onus* of proving that the sale, by his guardians, of a minor's property was necessary, and for his benefit, lies upon the purchaser; and that adequacy of price is an important point to be considered in determining this question.

THE facts, as well as the proceedings, in this case are fully stated in the judgment of the Court (FORBES, ERSKINE, and WESTROPP, JJ.,) which was delivered this day by

WESTROPP, J.:—This was a hearing on review of a decree of the Ṣadr Adálat, pronounced on the 10th of June 1861, in this cause. The plaint was filed by Shekh Sáheb, the plaintiff and present respondent, against the appellant, Dagdú, his mother, Lallú, and paternal grandmother Kimí, which two last-named persons had been the guardians of Dagdú during his minority.

It prayed that Shekh Sáheb, the plaintiff, might be declared absolutely entitled to a dwelling-house, purchased by him for the sum of Rs. 375, while Dagdú was a minor, from his guardians, Lallú and Kimí, and conveyed by those guardians, by a deed of the 10th of August A.D. 1852 (exhibit No. 18), to the plaintiff, Shekh Sáheb. He mentioned also in his plaint, that Rs. 365, part of the purchase-money paid

by him for the house, was employed in paying off the claim of one Badruddín, to whom the guardians had previously mortgaged it, and the remaining Rs. 10 had been paid to the guardians on their own private account; and that possession of the house had been given to him under his deed; but that Dádá valad Sádúlá Muhammad had, under a decree obtained by him against Lallú and Kimí, in their character as guardians of Dagdú, attached the house, subsequently to the purchase thereof by the plaintiff; and that he, the plaintiff, had filed a suit against Dádá to raise the attachment, which suit had been decided against him (the plaintiff) in the court of original jurisdiction, also in the appellate court, and finally, on special appeal, in the Sadr Adálat; and that he thereupon paid into court Rs. 203-4-6, the amount of Dádá's claim, and thereby removed the attachment.

Neither Lallú nor Kimí has taken defence to the present suit. Kimí has died since it commenced.

Dagdú, in his answer, denied all knowledge of, or participation in, the dealings of his guardians with the plaintiff Shekh Sáheb, and also denied the authority of his guardians to sell or convey the house to the plaintiff; and alleged that the deed of conveyance was fraudulent, and had been so declared by the decrees in the suit in which Shekh Sáheb (the present plaintiff) was plaintiff, and Dádá valad Sádúlá Muhammad was defendant, which latter decrees, Dagdú contended, estopped Shekh Sáheb from now relying on the same deed. Dagdú also denied that the payment of the sum, Rs. 203-4-6, into court, in satisfaction of the claim of Dádá, was made at his request.

The Munsif, Purushottam Siddheshvar, on the 28th of June A.D. 1860, decreed in favour of the plaintiff, Shekh Sáheb. In the earlier part of the Munsif's judgment it is not quite clear whether he concludes positively that the consideration-money of the plaintiff's deed of purchase was expended by the guardians for the benefit of the defendant, Dagdú, in payment of ancestral debts; or merely that it probably was so expended. The Munsif then proceeds

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thus:—"And supposing that the money was borrowed, not for paying off ancestral debts, but for some other purpose; yet it is proved that at the time when the deed was executed by the guardians, the defendant, Dagdú, was a minor, and was living with them, and his marriage was performed by them. This is proved by plaintiff's witnesses. Dagdú does not deny that he was taken care of and married by his guardians. He does not show that they are ill-behaved persons, or that the sum obtained in respect of the house was expended in an improper manner. Inasmuch, therefore, as he does not show this, it is necessary to consider that this sum was expended for his use. Therefore, according to Hindú law, the deed was binding on him. As to the objection which the defendant, Dagdú, makes, that during his minority his guardians did not dispose of his property in a proper manner, and that he was not willing to abide by their disposition, this is only a pretence to defraud his creditors: because it is not proper for him to object to this, as he did not object to what was done by his guardians to his advantage. Thirdly, at the time when the plaintiff bought the house, the money due to the mortgagees of the guardians was paid, and the minor was living under the protection of the guardians. The plaintiff did not advance the money, knowing that the guardians were using the money in an improper manner. The plaintiff has, therefore, done all that he was bound to do in purchasing this property. If, therefore, the defendant, Dagdú, wished that he should not be burdened with this debt (? transaction), he ought to have shown that the guardians made an improper use of the money; but he has not done this. His defence, therefore, is ungrounded and improper."

Upon these passages we must observe that whether the minor, Dagdú, resided with his guardians, and whether his marriage was performed by them, are questions immaterial to the main question, viz., the validity of the plaintiff's deed of purchase, unless it be shown that the sale to the plaintiff was made for the purpose of realising funds absolutely requisite for the maintenance of Dagdú, and for the payment

of his marriage expenses. Upon the same passages we must further remark, that the Munsif seems to have cast the onus of disproving the proper application of the purchase-money, and the propriety of the sale of the house to the plaintiff by the guardians, upon Dagdú.

The Munsif appears to have held that the decrees in the plaintiff Shekh Sáheb's suit against Dádá were not a bar to Shekh Sáheb in the present suit. To this and the preceding point we shall revert presently.

The Munsif, lastly, seems to have held that the payment of Dádá's claim by the plaintiff, after the unsuccessful termination of his suit against Dádá, was made at the request of Dagdú's guardians; and that Dagdú was then of full age. It is not, perhaps, very clear whether the Munsif intended to find as a positive fact that Dagdu was a party to that request. He appears, however, to treat Dagdú as aware of the payment of Dádá's claim by Shekh Sáheb.

Against the Munsif's decree in favour of the plaintiff, Shekh Sáheb, Dagdú appealed to the Zillá Judge, Mr. Charles Forbes, who, on the 10th of January 1861, affirmed the decree of the Munsif.

The curial part of Mr. Forbes' decree was as follows:—

"The appellate court finds the questions for its consideration to be: Is the deed of sale of the 10th of August 1852 a genuine and trustworthy document; and had Lallú and Kimí, as guardians of the appellant, Dagdú, the right to dispose of the house, if they thought proper; and is of opinion that the deed of sale is a genuine and trustworthy document; and that Lallú and Kimí, as guardians of Dagdú, had authority to dispose of the house. There can be no doubt that the purchase-money was expended by the said guardians in paying off some of Dagdú's father's debt; and there is nothing whatever to show that they did anything, in so doing, to the detriment of their ward the appellant Dagdú's interest. If Dagdú had any objections to the possession of the respondent, Shekh Sáheb, he ought to have made them known when Shekh Sáheb paid the sum of Rs. 203-4-6 into court,

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to prevent the house being sold over his head, in pursuance of a decree obtained by Dádá against Lallú and Kimí, Dagdú himself being at that time of age. The Munsif's decree is, on these grounds, affirmed; and respondent Shekh Sáheb's title to the house affirmed: all costs, Rs. 207-7-1, on the appellant, Dagdú."

Dagdú having appealed to the Ṣadr Adálat against the decree of the Zillá Judge; the Ṣadr Adálat (*a*), on the 10th of June 1861, affirmed the decree of the Zillá Judge with costs.

On the 11th of September 1861, Dagdú presented a petition of review, the statements in which were not very intelligible; but seem to have been intended to present the following points:— (1) That the decrees in the plaintiff's suit against Dádá estopped the plaintiff from maintaining this suit, albeit that Dagdú had not been a party to the suit against Dádá; (2) That, notwithstanding the conclusions of fact adverse to Dagdú, at which the Zillá Judge arrived on the evidence, it was competent to the Ṣadr Adálat to have reversed his decree, on the ground set forth in point No. 1; (3) That the guardians had no power to sell the house; and that the purchase-money was not expended on Dagdú; (4) That the Judge's finding, that Dagdú, though of age, did not object to the payment of Dádá's claim by plaintiff, was not sufficient to confer any right on the plaintiff to the house, as against Dagdú; and that the payment was made by the plaintiff in his own wrong, and without consent of Dagdú; (5) That the plaintiff's remedy, if any, in respect of exhibit No. 18, was a personal one against the guardians only.

After due notice of the presentation of the petition of review had been given to the respondent, Shekh Sáheb, the Ṣadr Adálat (*b*), on the 10th of March 1862, ordered that petition to be registered.

On the 16th of November 1863, the cause was argued, on review before this court (*c*), by Mr. *White* for the

(*a*) Present: Keays and Newton, Puisne Judges.
(*b*) Present: Kinloch Forbes and Newton, Puisne Judges.
(*c*) Present: Forbes, Erskine, and Westropp, JJ.

appellant, and by Mr. *Anstey* for the respondent. Judgment was reserved.

Although the defendants (Dagdú, Lallú, and Kimí) were not parties to the plaintiff's suit against Dádá, the decrees in it appear to have been admitted in evidence in this suit, *without objection on either side*. We find them referred to by the plaintiff in his plaint, as furnishing the reason for his eventually paying off the claim of Dádá, the execution creditor; and, on the other hand, the defendant Dagdú relies on them, as estopping the plaintiff from maintaining the present suit upon the deed of purchase (exhibit No. 18). The decrees, therefore, are in evidence. It remains to be considered whether they are conclusive.

Upon that question of estoppel, we see no good reason for differing from the ruling of the Ṣadr Adálat, and of the courts below; and we arrive at that conclusion, whether we look to the old Regulations (*d*), or the new Civil Procedure Code (Act VIII. of 1859, Sec. 2), or at the law as administered in England.

The "matter in dispute," that is to say, the question *properly* at issue in the plaintiff's suit against Dádá, was, whether the plaintiff's deed of purchase (exhibit No. 18) was valid against Dádá, an execution creditor.

It is true that the Munsif appears to have founded his original decree in that suit upon the ground that the proper expenditure of the money raised on the house had not been proved; and that the whole of the transactions of the guardians with respect to it were illegal. He also seemed to think that a suit to raise Dádá's attachment would lie only for Dagdú, and not for Shekh Sáheb. He, therefore, non-suited Shekh Sáheb; but reserved permission for the guardians, if they thought proper, to bring a suit on behalf of Dagdú to raise the attachment. On appeal, the Judge of the Konkaṇ (Mr. Keays), on the 17th of March 1854, re-

(*d*) Reg. II. of 1827, Sec. I., Cl. 3, and Reg. IV. of 1827, Sec. XXV.

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versed the Munsif's decision; and ordered further inquiry, especially into the question of the proper *expenditure* of the purchase-money, mentioned in the deed (No. 18 in this suit, No. 15 in that), and that the plaintiff should be at liberty to produce further evidence on that point. He also directed that the Shástri should be consulted; and that the age of Dagdú should be carefully ascertained. Neither the Munsif nor the Judge laid down the real issue in the case. Clearly they both wandered from the point. The Munsif, on the new trial, considered the deed to be proved; but decreed against the plaintiff, because it "had been obtained in a fraudulent manner, for the purpose of preventing Dádá from recovering his dues, which had been awarded him in a decree." On appeal, the Assistant Judge, Mr. Cameron, on the 4th of February 1858, affirmed the Munsif's decree, adverting to the dates of Dádá's decree (6th of August 1852) against the guardians, his petition for execution (11th of August 1852), attachment (13th of August 1852), and to the fact that the date of the plaintiff's deed was the 10th of August 1852, that is, four days after Dádá's decree, and one day before his application for execution, Mr. Cameron held distinctly that the plaintiff's deed of purchase was "manifestly obtained to evade the sale of the property on a decree lawfully obtained," that is to say, that the deed was fraudulent and void as against Dádá, the execution creditor. The Ṣadr Adálat affirmed Mr. Cameron's decree.

The question properly at issue in the present suit is, whether the same deed is valid against Dagdú. It was perfectly possible that a sale of the house might have been made, which would have been fraudulent and void against Dádá and other creditors in respect of debts, either of the father of Dagdú, or of Dagdú himself, incurred properly on his behalf by his guardians, and yet that the same sale might have been highly beneficial to Dagdú, the minor, if made at a very remunerative price, or under other circumstances of advantage to him. It would have been extra-judicial on the part of the courts, which disposed of Shekh Sáheb's suit against Dádá, to have made any declaration as to the validity

or invalidity of the deed as regarded Dagdú, who was not a party to that suit.

The matter in dispute in this suit, *i.e.*, the validity of the deed as against Dagdú, being wholly different from the matter in dispute in the suit against Dádá, viz., the validity of the deed as against Dádá, the case clearly does not fall within Reg. II. of 1827, Sec. 1., Cl. 3. That section and Reg. IV. of 1827, Sec. xxv., must, we think, be read together, as being *in pari materiâ*. It is reasonable to suppose that they were both intended to apply only to suits between the same parties, or persons deriving directly under them. The words "grounds of action," which occur in the latter enactment, seem to have been used synonymously with the phrase "matter in dispute" in the former, and, in all probability, were not intended to go beyond the scope of that phrase. Even, however, if this were not so, this case does not fall within Sec. xxv. of Reg. IV. of 1827: inasmuch as Shekh Sáheb's ground of action against Dádá was the alleged wrongful attachment by Dádá of the house. It is true that the deed of purchase (exhibit No. 18) was the reason, or one of the reasons, assigned by Shekh Sáheb, as showing the wrongful character of the attachment; but it was not itself the ground or cause of action, although *incidentally* resorted to in that action. Moreover, in the present suit, the plaintiff, Shekh Sáheb, relies not only upon the deed, but also upon the subsequent acquiescence of Dagdú, and upon his, the plaintiff's, having relieved the house from Dádá's attachment. These latter points made by the plaintiff may, or may not, be strong. The alleged grounds of action, however, in the present suit cannot be said to be identical with the ground of action in the suit against Dádá. The arguments already used with respect to the phrases "matter in dispute" and "grounds of action," employed in the Regulations of 1827, are likewise applicable to Sec. 2 of the Code of Civil Procedure. There is, however, another reason why this case does not come within that section, namely, that its operation is expressly confined to suits between the same parties, or between parties under whom they claim. It is scarcely

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necessary to say that Dagdú cannot be considered as claiming either under Shekh Sáheb, or under Dádá, who were the parties in the former suit.

In England, in like manner, a judgment *inter partes* binds only (*e*) parties and privies thereto (*f*); and, even as against them, it will be evidence only, and not conclusive, unless specially pleaded by way of estoppel. (*g*) And, moreover, such a judgment is not receivable, in favour of a stranger to the legal proceeding in which it was pronounced, even as against a party to that proceeding; because, says Lord Coke, "every estoppel ought to be reciprocal, that is, to bind both parties:"—Co. Lit. 352 *a*; and see per *Parke*, B., 2 Cr. M. and R. 139, and per *Tindal*, C.J., 3 Bing. N. C. 70, 6 Bing. N. C. 83; Taylor on Ev., para. 1495. These authorities show not only that the decrees in the plaintiff's suit against Dádá do not operate as an estoppel in the plaintiff's present suit, but also might have been successfully objected to by the plaintiff as not properly receivable in evidence at all in the latter suit as against him.

A judgment *in rem* will bind all persons whomsoever, whether they were, or were not, parties or privies to it. (*h*) Mr. Smith defines a judgment *in rem* to be "an adjudication pronounced upon the *status* of some particular subject-matter by a tribunal having competent authority for that purpose." He adds: "Such an adjudication, being a most solemn declaration, from the proper and accredited quarter, that the *status* of the thing adjudicated upon is as declared, concludes all persons from saying that the *status* of the thing adjudicated upon was not such as declared by the adjudication," "which very declaration operates accordingly upon the *status* of the thing adjudicated upon, and *ipso facto* renders

(*e*) NOTE.—An exception to this rule is allowed in favour of adjudications upon subjects of a public nature, such as tolls, boundaries between parishes, counties, or manors, rights of ferry, liabilities to repair roads or sea walls, and the like. See 2 Taylor on Evidence, para. 1496, 4th Edn., and the cases there collected.

(*f*) 2 Smith's Leading Cases, 439, 441, 3rd Edn.

(*g*) *Ibid.*; 2 Taylor on Evidence, para. 1497, 4th Edn.

(*h*) *Ibid.*; and *Scott* v. *Shearman*, 2 W. Blackstone 977; Roscoe's N. P. 139, 5th Edn.

it such as it is thereby declared to be." The principal examples of the effect of judgments *in rem* occur in the Spiritual, Admiralty, and Revenue Courts. Mr. Taylor (*i*) shows that Mr. Smith's definition of a judgment *in rem* is not perfect, but alleges the difficulty, if not impossibility, of giving one which would be open to fewer objections; and, accordingly, in lieu of a definition, supplies a list of those adjudications which are unquestionably regarded as judgments *in rem*.

It probably would be difficult, but we are not prepared to say that it would be impossible, to furnish a more satisfactory explanation of the nature of judgments *in rem* even than that contained in the definition given by that very learned and profound lawyer Mr. Smith. The doctrine as to their conclusiveness seems in a great measure to depend upon presumed notice to the world at large of the legal proceedings in which they are pronounced. See per *Blackstone*, J., in *Scott* v. *Shearman*, 2 Wm. Blackstone 979 to 981; per Lord *Mansfield* in *Bernardi* v. *Motteux*; 2 Douglas by Frere 581: and per Lord *Denman* in *Bailey* v. *Harris*, 12 Q. B. 905. The late Mr. John Austin (Vol. III., pp. 189 to 191) explains how the phrase *in rem* became applicable to judgments.

But as the judgment in the suit of Shekh Sáheb against Dádá has no pretensions to the character of a judgment *in rem*, it is unnecessary for us further to discuss the nature of such judgments. It is a settled rule of English law that neither a judgment *in rem*, nor a judgment *inter partes*, is evidence of any matter which may, or may not, have been controverted, or which came *collaterally in question*, or which was *incidentally* cognisable, or which can only be inferred by argument from the judgment. (*k*) Even to bind parties and privies, the judgment must have directly decided the point which is *in issue* in the *second suit*. (*l*)

(*i*) Vol. II., 4th Edn., pp. 1100 and 1101, paras. 1487 and 1488.

(*k*) *Duchess of Kingston's Case*, 20 Howell's State Trials 538; S. C. 2 Smith's L. C. 424, 425; Ibid. 438; *Blackham's Case*, 1 Salk. 290; Roscoe's N. P., 5th Edn., 136; *Carter* and *James*, 13 M. and W. 137.

(*l*) *Ricardo* v. *Garcias*, 12 Clark and F. 368, per Lord *Campbell*, 401; *Attorney General* v. *King*, 5 Price 195.

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In Shekh Sáheb's suit against Dádá, the real issue being, whether the deed of purchase (No. 18) was fraudulent and void against Dádá, facts may have been proved in support of the affirmative of that issue, which would perhaps have also gone far to establish that the same deed was also fraudulent and void as against Dagdú. But, as already stated, that is a further and other proposition, which was not, and could not properly have been, at issue in that suit. The position of Dádá with regard to that deed was one thing; and the position of Dagdú with regard to the same deed is a totally different thing. Though, *incidentally*, facts may have been (we give no opinion as to whether they were so or not) elicited, in the suit against Dádá, which may have been sufficient to show that the deed was fraudulent and void, not only against him, but also against Dagdú, this court cannot hold that the decrees in that suit are conclusive upon the plaintiff in the present suit, in which he seeks a declaration of the validity of the deed (No. 18) against Dagdú and his guardians.

The foregoing remarks dispose of the first and second points of the petition of review.

As to the third and fifth points, it is desirable to refer to some of the authorities relating to transactions with infants and their guardians. Sir Thomas Strange (*m*) inculcates in the most forcible terms the necessity of caution and inquiry on the part of persons dealing with minors, "who (he says), in general, will be bound but by necessary acts, or such as are evidently for their benefit; the jealousy, in their favour, of the Hindú, corresponding with that of the English Law." Sir W. H. Macnaghten (*n*) remarks: "As to the power of guardians over the property of their wards, I apprehend that much misapprehension exists." Quoting Colebrooke (*o*), he adds: "As I understand the provisions on the subject, minors are under the protection of law: favoured in all things which are for their benefit; and not prejudiced by anything to their disadvantage." He further

(*m*) 1 H. L. 203. (*n*) Princ. H. L., ch. vii., p. 119, Wilson's Edn.
(*o*) Obligations, ch. x., para. 585.

observes (p. 120) : "Where the heir is a minor, the creditor must wait until the minority expires, before he can come upon the assets for the liquidation of his debts. Subject to this condition, the son must pay his father's debts, as well as all *necessary* debts contracted on his account during his minority;" and again (p. 125) : "A guardian may indeed dispose of a portion (of the property) to meet a necessity arising for the minor's subsistence ; but no necessity can by possibility arise for disposing of any portion to pay the minor's father's debts, for he must cease to be a minor before he can be liable." See also Borrodaile's Reports, Vol. I., p. 176 ; and a Madras case referred to by Sir W. H. Macnaghten, p. 127 ; and Colebrooke, 1 Digest, p. 291, para. clxxxvii.

We are not by any means to be understood as asserting that, either in the Mofussil of this Presidency, or within the local jurisdiction of this court, the doctrine laid down by Sir W. H. Macnaghten, that the creditor of a deceased Hindú must wait for payment out of the estate of the deceased until the heir attains his majority, prevails. In the Supreme Court the minority of the only son, or of any of the children, of a deceased Hindú, was not, nor at the Original side of the High Court is it, considered any objection to a suit for the administration of his estate. It is easy to conceive cases in which it would be far more beneficial to the heir, if he have no money or other personal estate out of which the debts may be paid, to sell a portion of the immoveable estate in order to pay the debts of his ancestor, or his own properly incurred debts for necessaries, rather than to allow a heavy rate of interest on those debts to consume the whole of the estate. Such a partial sale might be the only means of preserving any portion of his patrimony. (*p*)

In England, however, no prudent guardian would attempt to act in such cases, without the sanction of the Court of Chancery. Nor, in my opinion, ought he to do so in the

(*p*) NOTE.—See, as to Infants now, Act XX. of 1864, Sec. 18, and Bombay Act VII. of 1866, both passed since the above judgment was delivered. See also Act XXVII. of 1860, as to administration.—ED.

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island of Bombay, without the sanction of the Original side of this court, unless he be specially empowered by will or deed to sell the immoveable estate. He, moreover, could not, in England, convey to a purchaser a good title. The guardian's power there over real estate is of a very limited character. He cannot (except under special statutes) grant even a lease for any longer term than the infant's minority. In England, in the case of an estate being devised, or descending or coming, to an infant, subject to a mortgage, the mortgagee is not bound to wait until the infant attains his majority: but he is entitled, on a bill filed in equity, to foreclose the infant on non-payment, giving him a day, after coming of age, to show cause against the decree, which permission to show cause does not entitle him, except in cases of fraud or collusion, to unravel the account or to redeem, but merely to show error in the decree. (*q*)

Assuming that, in the Mofussil of this Presidency, the guardians of a Hindú infant have the power of selling his immoveable estate, we have no hesitation in saying that it behoves the purchaser to ascertain at his peril that the sale is necessary, and for the benefit of the infant; and that, therefore, the *onus* lay upon the plaintiff to establish those facts to the satisfaction of the court; and no presumption could properly have been made against Dagdú, because he may not have taken the initiative in attempting to disprove the necessity for, and propriety of, the sale.

The Zillá Judge (Mr. Forbes), in his decree, finds that the deed of the 10th of August 1852 (exhibit No. 18) is a genuine and trustworthy document; and that the guardians had authority to dispose of the house, and that the purchase-money was expended in paying off some of Dagdú's father's debts, and that there was no detriment occasioned thereby to Dagdú. But there is no finding that the sale was absolutely necessary, and for the benefit of Dagdú.

In ascertaining whether the sale is for the benefit of the

(*q*) The authorities are collected in *Chambers on Infants*, p. 572, 526, 527, *et seq*, and 533, Edn. of 1842.

infant, full adequacy of price is a most important question. It has not escaped our notice that Mr. Cameron, in his decree in the suit against Dádá, incidentally observes that the house, which the plaintiff admits he has purchased for Rs. 375, was then worth Rs. 700.

In the present case, the Munsif erroneously cast upon Dagdú the burden of disproving the propriety of the sale; the tendency of the Judge (Mr. C. Forbes), though not so clearly indicated, is in the same direction. Neither he nor the Munsif laid down any clear or distinct issue, as to the necessity for the sale, as well as its propriety, or as to the adequacy of the price—a point which they seem to have wholly ignored. We feel bound, therefore, on these grounds, to reverse their decrees; as well as the decree of the Sadr Adálat of the 10th of June 1861, which affirmed them. There must, therefore, be a new trial on the merits.

On such new trial, the exhibits, No. 22, dated 16th January 1850; No. 21, dated 25th January 1850; and No. 20, dated 12th February 1852; will require the careful attention of the trying court. By exhibit No. 22 the guardians obtained the house now in dispute, in exchange for a house belonging to the infant—an act which *per se* was a great stretch of the authority of the guardians. However, Shekh Sáheb, who claims under those guardians, cannot dispute the validity of that exchange, and that the house now in dispute thereby became the property of the infant Dagdú, for whom the guardians were acting. It may be well to ascertain what became of the sum of Rs. 350 paid on that occasion by Dádá by way of owelty of exchange.

Exhibits Nos. 21 and 20 are both mortgages of the newly acquired house, by the guardians of Dagdú, to Badruddin.

If the purchase-money paid by Shekh Sáheb, under exhibit No. 18, were applied in payment of the amount due on those mortgages, *primâ facie* it would appear to have been an application of the purchase-money, not in payment of the debts of Dagdú's father, but of the guardians. It may, however, on investigation, appear that the debts to

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Badruddin were incurred necessarily, and for the benefit of the minor, or to procure the means of paying his father's debts.

As to the fourth point, the effect of the payment of Dádá's claim by the plaintiff, there cannot be any doubt that, in order to render the appellant, Dagdú, or his property, in any respect liable, the plaintiff would be bound to show, that he made the payment at the instance, either express or implied, of the defendant, or that the act was subsequently recognised by him. For it is a clearly established principle, that no *assumpsit* will be raised by the mere voluntary payment of the debt of another person, inasmuch as one man cannot thus become the creditor of another without his knowledge or consent. (*r*) Here we have no clear or satisfactory finding that the consent of Dagdú, either express or implied, has been given to the payment.

In the event of the court below coming to the conclusion that the plaintiff's purchase-deed cannot be upheld, it will not be necessary for it to consider in this suit whether, even supposing that the payment of Rs. 203-4-6 was made with the knowledge of Dagdú, that payment creates a lien on the house in favour of the plaintiff, as a salvage creditor to that extent, or only gives to the plaintiff a right to proceed against Dagdú personally for the amount. Shekh Sáheb has not framed his present suit so as to charge either the house or Dagdú with a debt. The prayer of his plaint seeks nought save a declaration of title in the plaintiff as absolute owner of the house.

PER CURIAM :— The Court reverse the decree of the Ṣadr Adálat dated the 10th of June 1861, and the decrees of the Judge (Mr. C. Forbes) of the Konkaṇ, dated the 10th of January 1861, and of the Munsif of Kalyán, dated the 28th of June 1860 ; and direct that this cause be tried again upon the merits, and that the costs of this review and of this suit abide the result of such new trial.

Decrees reversed and suit remanded.

(*r*) *Stokes* v. *Lewis*, 1 T. R. 20 ; and the cases collected in *Chitty on Contracts*, 5th Edn., 515, 516.