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was right in rejecting the application, though this was not the proper ground given for its rejection.

At all events, we think that this is not a case in which we ought to interfere under s. 622 of the Code. We must, therefore, discharge the rule with costs.

Rule discharged.

ORIGINAL CIVIL.

Before Mr. Justice Wilson.

PEPIN v. CHUNDER SEEKUR MOOKERJEE AND ANOTHER.

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April 1.

Contract of Indemnity—Limitation Act (XV of 1877), sched. ii, art. 83—Costs.

In 1864 a lease of a house was granted to *A* for a term of ten years. The lease contained a covenant to repair. *A* died, and *B*, his administrator, assigned the lease to another, and it ultimately became vested in the plaintiff. In 1872 the plaintiff assigned the lease to the defendants, "under and subject to the covenants" therein contained. The defendants failed to repair, and after the term had expired, *C*, the representative of the lessor, sued *B* for arrears of rent and damages for non-repair. *B* defended the suit, but *C* obtained a decree against him for Rs. 6,167-3 and costs, amounting in all to Rs. 8,328-3. His own costs amounted to Rs. 1,491-1. In 1876 *B* paid *C* the Rs. 8,328-3. In 1877 *B* sued the plaintiff for the amount which he had been compelled to pay *C*, and for the amount of his own costs. The plaintiff gave notice to the defendants to intervene and defend if they desired; but they did not reply, and the plaintiff consented to a decree for Rs. 6,932-12-11 with costs. Thereupon the plaintiff instituted the present suit to recover from the defendants the sum recovered from him by *B*, together with his own costs of defence.

Held, that the suit was not barred under Act XV of 1877, sched. ii, art. 83—which provides a period of three years' limitation for a suit upon any contract of indemnity other than those specifically provided for, from the time "when the plaintiff is actually damnified"—as the time when the plaintiff was actually damnified was when *B* recovered against him.

In the case of contracts of indemnity, the liability of the party indemnified to a third person, is not only contemplated at the time of the indemnity, but is the very moving cause of that contract; and in cases of such a nature costs reasonably incurred in resisting, or reducing, or ascertaining the claim may be recovered.

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Held, therefore, that the costs incurred by *B*, in the suit instituted against him by *C*, and those incurred by the plaintiff in the suit by *B* against him, were reasonably and properly incurred, and that he was entitled to recover them from the defendants (1).

IN June 1864 Kissen Kissore Ghose granted to one Archer a lease of premises No. 125, Bow Bazar, for a term of ten years, at a rent reserved. The lease contained a covenant to repair thoroughly in every fourth year during the term. Archer died, and the Administrator-General administered his estate. The Administrator-General having repaired the premises, assigned them to the firm of Lepage, of which firm the plaintiff was a member; and the lease subsequently became vested in the plaintiff alone.

On the 3rd February 1872 the plaintiff assigned the lease, together with the business of Lepage and Co., to the defendants Chunder Seekur Mookerjee and Poorno Chunder Mookerjee in the name of the defendant Poorno Chunder alone. The assignment was expressed to be "under and subject to the conditions and covenants" of the lease.

When the fourth year for making repairs came, the defendants failed to make any, and the term expired with the premises unrepaired.

The original lessor being dead, his widow and representative Burno Moye Dassee brought a suit against the defendant Poorno Chunder in this Court. In this suit she claimed arrears of rent and rates and damages for breach of covenant to repair.

On the 2nd February 1875 a decree was made in that suit, which showed that the rent and rates had been paid after suit brought, and awarded Rs. 6,000 as damages for non-repair, with costs. The same person brought a second suit against the same defendant. In this suit she claimed possession of the premises and arrears of rent and rates and mesne profits. The decree in this suit, dated the 7th April 1875, showed that, after suit, possession had been given; and awarded Rs. 1,917-3 in respect of arrears, with costs. Under these two decrees Burno

(1) See the Indian Contract Act, 1872, s. 126

Moye attached certain property of the defendant Poorno Chunder, but failed at that time to obtain any satisfaction. Burno Moye then brought a suit against the Administrator-General as administrator of Archer, in which she claimed Rs. 1,167-3 for arrears of rent and rates, and Rs. 6,000 as damages for non-repair. The Administrator-General defended the suit, and a decree was made for Rs. 6,167-3, with costs. The Administrator-General had also his own costs to bear. The decree and the plaintiff's costs amounted to Rs. 8,328-3. The Administrator-General's own costs amounted to Rs. 1,491-1. On the 13th September 1876, the Administrator-General paid to Burno Moye the Rs. 8,328-3, the amount of her decree and costs.

In the meantime, the property of the defendant Poorno Chunder remained under Burno Moye's attachment. The first decree against that defendant was for Rs. 6,000. The taxed costs of Burno Moye in that suit, including those of an unsuccessful appeal, were Rs. 3,261. The second decree was for Rs. 1,917-3, and the taxed costs of Burno Moye amounted to Rs. 491. Early in April 1877, representatives of Burno Moye and of the defendant Poorno Chunder met at the office of Burno Moye's attorney; the accounts in respect of the two decrees were gone into; and soon after, on the 8th April, Poorno Chunder paid to Burno Moye Rs. 5,500, which was accepted in full satisfaction of the two decrees, and the attachment was withdrawn. This sum was considerably less than the difference between the sum paid as damages by the Administrator-General and the sums due to Burno Moye under the two decrees for debt and costs, and that without any allowance for interest to which she was entitled.

In 1877 the Administrator-General brought a suit against the present plaintiff to recover from him the amount which he had been compelled to pay to Burno Moye. He claimed Rs. 10,110-13, which included the amount of the decree against him with Burno Moye's taxed costs and his own costs of defence.

The present plaintiff gave notice of this suit to the present defendants, and called upon them to intervene and defend, if

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they desired to do so. They made no reply. The present plaintiff filed his written statement in that suit, but subsequently consented to a decree for Rs. 6,932-12-11, with costs. The costs amounted to Rs. 997-7-6, and the plaintiff had paid, or was liable to pay, the whole. The plaintiff now sued to recover from the defendants the sum which the Administrator-General had recovered from him, together with his costs of defence.

Mr. *Jackson*, Mr. *Bonnerjee*, and Mr. *Trevelyan* for the plaintiff.

Mr. *Kennedy* and Mr. *Allen* for the defendants.

Mr. *Bonnerjee*.—Upon the settlement of issues, Mr. Justice Pontifex, on the authority of *Moule* v. *Garrett* (1), held, that the plaint disclosed a good cause of action. That case decides that an assignee of a lease by mesne assignments is under an obligation to indemnify the original lessee against breaches of covenants in the lease, committed during the continuance of his own tenancy; and that that obligation is not affected by the covenants which the assignee may have made with his immediate assignor. The question of limitation was not argued on the settlement of issues. I submit that the onus of the issue as to whether the defendants, or either of them, by any payments to the original lessors, have absolved themselves or himself to any, and what, extent from liability to the plaintiff, is on the defendants.

Mr. *Kennedy*.—The precise question in this case has never been decided. *Moule* v. *Garrett* (1) decides that when the assignment contains none of the usual and proper covenants to indemnify, there is an implied covenant on the part of the ultimate assignee of the lease to indemnify the assignor. In *Burnett* v. *Lynch* (2) the lessee by deed poll assigned his interest in the demised premises, subject to the payment of the rent and performance of the covenants contained in the lease. There was no express covenant on the part of the assignee, but it was held that he was liable for damages recovered against the

(1) L. R., 7 Ex., 101. (2) 5 B. & C., 589.

lessee by the lessor. Abbott, C. J., says (p. 601):—"He accepted the assignment subject to the performance of the covenants; and we are first to consider whether any action will lie against him. If we should hold that no action will lie, this consequence will follow, that a man having taken an estate from another, subject to the payment of rent, and the performance of the covenants, and having thereby induced an understanding in that other, that he would pay the rent and perform the covenants, will be allowed to cast that burden upon the other person." The principle is, that there is an implied promise or duty cast on the assignee to perform the covenants and pay the rent. There is a duty which the assignor may, for the purpose of protecting himself, proceed at once to enforce. The implied obligation only rested on us pending the time of our possession; it ceased when we went out of possession. How can there be a double series of undertakings on our part? The cause of action arose the instant the covenants were broken—*Moule* v. *Garrett* (1)—and the suit is barred. [WILSON, J.—If the suit had been brought in England under the old law, it might have been for money paid.] We would not have been ultimately liable to pay. The money which the plaintiff has paid is not money which he was compellable to pay. *Sanders* v. *Benson* (2) expressly determines the time when the cause of action arose. There a suit was instituted against the equitable assignee of a lease eight years after the expiration of the lease, and it was held that the right to damages accrued on the expiration of the lease, and that the suit was barred. The entire amount of the decree against the Administrator-General was Rs. 6,000. We are asked to pay nearly Rs. 10,000. That is certainly not recoverable. In the Administrator-General's suit the amount was absolutely determined. The authorities are clear that if a person who is responsible chooses not to submit to his responsibility, but to contest the claim, he is not entitled to add to the liability of other persons who are liable if he does not pay—*Baxendale* v. *London, Chatham, and Dover Railway Co.* (3), *Fisher* v. *Val de Travers Co.* (4).

(1) L. R., 7 Ex., 101.
(2) 4 Beav., 350.
(3) L. R., 10 Ex., 35.
(4) L. R., 1 C. P. Div., 511.

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Mr. *Trevelyan* in reply referred to *Howard* v. *Lovegrove* (1).

WILSON, J.—This is a suit by the assignor against the assignees of a lease, in which the plaintiff seeks to be indemnified in respect of money which he has been compelled to pay by reason of the defendants' failure to perform the covenants in the lease. (His Lordship then stated the facts of the case, and continued.) Therefore the present suit was brought by the plaintiff to recover from the defendants the sum recovered from him by the Administrator-General, together with his own costs of defence, amounting to Rs. 1,028-9. The case came before Mr. Justice Pontifex for settlement of issues. That learned Judge held, that the plaint disclosed a good cause of action, on the authority of *Moule* v. *Garrett* (2), and the following issues were settled:—

1*st*.—Does limitation apply?

2*nd*.—Have the defendants, or either of them, by any and what payments to the original lessors, absolved themselves or himself to any and what extent from liability to the plaintiff?

3*rd*.—Are the defendants, or either of them, liable to any and what damages?

These issues came on for trial on the 23rd and 24th of March.

As to the first issue, that as to limitation, the defendants' case was put thus. It was said the implied obligation of the assignee of a lease is to perform the covenants of the lease. On the failure to perform such covenants by the assignee a right of action accrues to the assignor, and therefore limitation runs from that date. For this *Burnett* v. *Lynch* (3) was cited.

I do not think *Burnett* v. *Lynch* (3) is an authority for such a proposition. What was decided is thus stated by Bayley, J.: "An action upon the case founded upon the *tort* will lie, on this ground, that from the facts stated in this declaration the law raises a duty on the defendants to perform the covenants, that there has been a breach of the duty, and that damage has accrued to the plaintiff in consequence of that breach of duty."

But even were the obligation such as that contended for, it does not follow that no other obligation lies upon the assignee.

(1) L. R., 6 Ex., 43. (2) L. R., 7 Ex., 101. (3) 5 B. & C., 589.

An assignment of a lease commonly contains a covenant by the assignee to pay the rent and perform the covenants, and also a covenant to indemnify the assignor. *Moule* v. *Garrett* (1) is in my judgment a clear authority to the effect that, in the absence of express covenant, such an obligation to indemnify is to be implied. Then by art. 83 of the first division of the second schedule of the Limitation Act (XV of 1877), limitation in the case of a contract of indemnity runs from the date when the plaintiff is actually damnified. In the present case, therefore, limitation began to run when the Administrator-General recovered against the plaintiff, and the suit is not barred.

With regard to the second issue the defendants have failed to show any defence under it. The first defendant has never paid anything to the original lessor. The second defendant has paid Rs. 5,500; but he paid it after the Administrator General had paid the amount of the decree against him, and from the amount for which that defendant settled the claims against him, it is plain that he was allowed the benefit of the Administrator-General's payment.

As to the third issue it was contended for the defendants that the plaintiff cannot recover the whole of his claim. It was pointed out that the Administrator-General claimed against the present plaintiff, not only the damages recovered against him, but also the costs he had to pay to Burno Moye, and his own costs of defence; and that the present plaintiff has further added to this claim the costs he had to pay the Administrator-General, and his own costs of defence. These costs, it was contended, cannot be recovered, and for this were cited *Baxendale* v. *London, Chatham, and Dover Railway Co.* (2) and *Fisher* v. *Val de Travers Co.* (3). In *Baxendale* v. *London, Chatham, and Dover Railway Co.* (2), the plaintiffs contracted with Harding to carry pictures from London to Paris. They afterwards contracted with the defendants, that the latter should carry the pictures. By the defendants' negligence, the pictures were damaged. Harding sued the plaintiffs, who defended the action, and had to pay the

(1) L. R., 7 Ex., 101. (2) L. R., 10 Ex., 35.
(3) L. R., 1 C. P. Div., 611.

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value of the pictures and Harding's costs; they also incurred costs in defending. The plaintiffs then sued the defendants, and claimed to recover the value of the pictures, and also the costs paid and incurred. The defendants accepted the assessment of value in the former suit by paying the amount into Court, but denied their liability for costs. The Exchequer Chamber decided in favour of the defendants, on the ground that the two contracts being separate and independent, costs incurred in defending an action upon the one were not the natural and proximate result of a breach of the other. That case seems to me, I must say, a very plain case. To have allowed the costs, would have been to take into consideration a matter (the other contract) not necessarily or naturally connected with the contract in question or its breach, and not in the contemplation of the parties at the time of contracting. The case was followed as to costs—*Fisher* v. *Val de Travers Co.* (1).

The distinction between such cases and the present is clearly pointed out by Quain, J., in *Baxendale* v. *London, Chatham, and Dover Railway Co.* (2):—"If this were a contract of indemnity, where although there may be two contracts in form there is only one in substance, our decision might be in favor of the plaintiff. In such a case a surety, who is called upon to pay the debt due or duty owing from the principal, may well be justified in defending an action at the principal's expense." In the case of contracts of indemnity, the liability of the party indemnified to a third person is not only contemplated at the time of the indemnity, but is the very moving cause of that contract; and in cases of such a nature there is a series of authorities to the effect, that costs reasonably incurred in resisting or reducing or ascertaining the claim may be recovered. Thus, where one person has warranted to another that he had authority to make a contract on behalf of a third person, and on the faith of the warranty legal proceedings are taken to enforce the contract against such third persons, and it turns out that the guarantor had no such authority, the costs are recoverable against him: *Collen* v.

(1) L. R., 1 C. P. Div., 511. (2) L. R., 10 Ex., 35.

Wright (1), *Godwin* v. *Francis* (2). In cases of indemnity it has been so held in many cases: *Duffield* v. *Scott* (3), *Penley* v. *Watts* (4), *Smith* v. *Compton* (5), *Howard* v. *Lovegrove* (6).

In the present case I think the costs incurred by the Administrator-General in the suit by Burnomoye, and those incurred by the present plaintiff in the suit by the Administrator-General against him, were reasonably and properly incurred, I therefore find as to the third issue, that the plaintiff is entitled to recover from the defendant the sums of Rs. 6,932-12-11, Rs. 997-7-6, and Rs. 1,028-9, with costs on scale No. 2.

Judgment for plaintiff.

Attorney for the plaintiff: Baboo *Nobin Chunder Burral.*

Attorney for the defendants: Baboo *Gunesh Chunder Chunder.*

Before Mr. Justice Wilson.

DOORGA CHURN DOSS *v.* NITTOKALLY DOSSEE AND OTHERS.

1880 *March* 11, 15.

Practice—Defence in Formâ Pauperis—Civil Procedure Code (Act X of 1877), chap. xxvi.

Although chap. xxvi of the Civil Procedure Code only provides for suits to be brought by a pauper, the Court has power to allow a defendant to defend *in formâ pauperis.*

THIS was a suit for the restitution of conjugal rights. The father of the defendant Nitokally Dossee presented a petition asking for leave to defend the suit *in formâ pauperis.* Notice of the intended application was served upon the Government.

Mr. *Souttar* for the plaintiff contended, that, as there is no provision in the Code which enables the Court to allow a defendant to defend *in formâ pauperis,* chap. xxvi of the Code applying only to suits by paupers, it was evidently not the

(1) 7 E. & B., 301; S. C. on appeal, 8 E. & B., 647.
(2) L. R., 5 C. P., 295.
(3) 3 T. R., 374.
(4) 7 M. and W., 601, *per* Parke, B., at p. 609.
(5) 3 B. and Ad., 407.
(6) L. R., 6 Ex., 43.