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his property, or in lieu of appointing a receiver discharging the insolvent. This view is supported by the terms of s. 354, which says—"that every order under s. 351 shall be published in the local Official Gazette, and shall operate to vest in the Receiver all the insolvent's property (except the particulars specified in the first proviso to s. 266), whether set forth in his application or not." From the words it is clear that it was never intended that every order disallowing an application to be considered an insolvent should be published in the Gazette.

The appeal allowed under s. 588, cl. 17, so far as an order under s. 351 is concerned, appears to be on behalf of the judgment-creditor only. The amending Code, like the former Act VIII of 1859, allows no appeal to the judgment-debtor whose application to be considered an insolvent and to be discharged as such is disallowed.

The appeal is dismissed with costs.

Appeal dismissed.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Mitter.

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SUPUT SINGH AND OTHERS (DEFENDANTS) *v.* IMRIT TEWARI AND OTHERS (PLAINTIFFS).*

Joint Liability—Contribution—Joint Tort feasors.

The question as to whether as between persons against whom a joint decree has been passed there is any right of contribution at all, depends upon the question whether the defendants in the former suit were wrong-doers in the sense that they knew, or ought to have known, that they were doing an illegal or wrongful act. In that case no suit for contribution will lie. If the defendants in the former suit were not guilty of wrong in that sense, but acted under a *bonâ fide* claim of right, and had reason to suppose that they had a right to do what they did, then they may have a right of contribution *inter se;* and in such case the Court should enquire what share they each took in

* Appeal from Appellate Decree, No. 2438 of 1878, against the decree of Baboo Roy Matadin Bahadur, Subordinate Judge of Gya, dated the 31st August 1878, affirming the decree of Baboo Shee Sarun Lal, First Sudder Munsif of that district, dated the 22nd March 1878.

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the transaction; because, according to circumstances, one or more of them might be excused altogether, or in part, from contributing, as for instance, one of them might have acted as a servant, and by the command of the others; or the others might have been the only persons benefited by the wrongful act; in which case those who were benefited, or who ordered the servant to do the act, would not be entitled to contribution.

Section 22 of Act XV of 1877 does not apply to a case in which the person to whom a right of suit is assigned after the institution of the suit, obtains leave to carry on the suit.

ONE Umnat Russul, in 1873, brought a suit against the plaintiffs and defendants in the present suit, and one Gopal Tewari, to recover Rs. 610, the price of 122 palm trees, which had been cut down by them; and on the 5th March 1873, obtained a decree against them. The plaintiffs (in the present case) and Gopal Tewari, appealed, but the decision of the lower Court was upheld. The plaintiffs in the present case and Gopal Tewari thereupon paid to Umnat Russul, on the 17th July 1874, Rs. 200, and on the 15th December 1874, Rs. 677, the two amounts being the sum due, together with all costs. The present suit was brought on the 14th December 1877, by the plaintiffs, calling upon the defendants to contribute their quota of the sum paid under the decree of the 5th March 1873. On the 24th December 1877, before summonses had been served, but subsequent to the filing of the plaint, the plaintiffs assigned their right of suit to Syed Mukrum Hossain and Suput Singh, who, on the 5th January 1878, applied for leave to carry on the suit; and on the 10th January 1878 obtained an order of Court making them plaintiffs in the suit. This order was then served upon the defendants on the 22nd March. The names of the original plaintiffs were ordered to be struck out.

The defendants contended that the suit was barred by limitation, as the debt was paid by the plaintiffs on the 17th July 1874, and 15th December 1874, and the present suit was instituted, as indicated by the date on the copy of the plaint served on them, on the 10th January 1878. They further contended that the decree of 1874 was for the price of palm trees cut down, and that they had admitted in that suit that they had cut down three trees only, and that they were ready and willing still to pay the value of three trees, *viz.*, Rs. 15, and costs.

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The Munsif held that, under art. 99, sched. ii of Act XV of 1877, the period of three years ran from the date when the entire debt was paid off by the plaintiffs,—*viz.*, the 15th December 1874; and that as the suit was filed by the plaintiffs on the 14th December 1877, it was not barred; and that the contention that the suit should have been held to have been brought on the 10th January 1878, the date on which the new parties were made plaintiffs, was untenable, inasmuch as s. 22 of Act XV of 1877 should be read with s. 32 of Act X of 1877; and the latter section did not apply to representatives by purchase. That as regards the other point, the decree against all the defendants passed in the original suit being a joint one, they were all jointly liable in equal shares. He, therefore, ordered all the defendants to contribute equally to the debt paid by their co-debtors, the plaintiffs.

The defendants appealed to the Subordinate Judge of Gya, who, however, affirmed the decree of the Munsif.

The defendants appealed to the High Court.

Mr. *M. L. Sandel* for the appellants.—The last day the suit could be brought was the 15th December 1878. The lower Court ordered the name of the original plaintiffs to be struck out on the 22nd March 1878; and has held that s. 22 of Act XV of 1877 must be read with s. 32 of the Code of Civil Procedure. [GARTH, C.J.—The original plaintiffs, *however, not having* had their names struck out in accordance with the order, could sue in the capacity of trustees, as their suit was not barred.] Payment of the debt under the decree was made on two occasions; any claim under the first payment, which was made on 17th July 1874, is clearly barred under cl. 99, sched. ii of Act XV of 1877, and they cannot ask for contribution as to that. The second payment was made later and within three years from the time of instituting this suit; but whether the plaintiffs can call upon us to contribute, is doubtful. Where several persons commit a wrong, and that wrong is capable of being estimated, one of such wrong-doers can only insist on contribution from the others according to the amount of wrong done by such others. If this suit for contribution is rightly brought,

the rights of all the contributors must be tried and determined; see the cases of *Mohadeo Misser* v. *Lahoree Misser* (1), *Rash Munjoree Chowdhrain* v. *Rada Soonduree Dossee* (2), *Sreeputty Roy* v. *Loharam Roy* (3), and *Ganesh Singh* v. *Ram Raja* (4). [GARTH, C.J.—In Selwyn's *Nisi prius* it is pointed out that the right to contribution only arises where the person suing is unaware that the act for which damage has been given was a wrongful act—*Merryweather* v. *Nixon* (5) and *Farebrother* v. *Ansley* (6). In Addison on Torts, 4th Ed., p. 1,000, it is laid down that there is no contribution between joint wrong-doers. That being so, we ought to know something further as to the former decree, to enable us to determine the nature of the wrongful act complained of, and as the record is silent as to this, we ought to remand the case, to have the question tried in what sense, and under what circumstances, these persons are wrong-doers.]

Baboo *Joy Gopal Ghose* for the respondents took time to consider certain terms of compromise offered by the appellants.

The judgment of the Court was delivered by

GARTH, C.J. (MITTER, J., concurring).—The first point raised by Mr. Sandel on behalf of the appellants is, whether limitation does not apply to the whole of the plaintiffs' claim.

It appears that the suit was brought on the 14th of December 1877 by Imrit Tewari, Kolessur Tewari, Harihur Tewari, and Jhinga Tewari, who had paid the whole of the damages decreed against them and other defendants in a former suit for cutting down some trees growing upon land, of which they were the tenants.

After the plaint had been filed, and before the summons to the defendants had been issued, the plaintiffs assigned their interest in the present claim to certain other persons, named Syud Mukrum Hossain and Suput Singh; and it seems, that the summons to the defendants issued in the names of those

(1) 24 W. R., 260.
(2) 23 W. R., 283.
(3) 7 W. R., 384.
(4) 3 B. L. R., P. C., 44-45.
(5) 2 Sm. L. C., 546; S. C., 3 T. R., 186.
(6) 1 Campb., 342.

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persons (the assignees), and not of the original plaintiffs in the suit. It also appears that, at the time when the assignees' names were first introduced into the proceedings, the claim would have been barred by limitation.

It has been held by both the lower Courts, that the suit is not barred, because they consider that s. 22 of the Limitation Act ought to be read with s. 32 of the Code of Civil Procedure; and that, reading those sections together, this case does not fall within the meaning of s. 22 of the Limitation Act.

It has now been contended by Mr. Sandel, that although the original plaintiffs might have been the proper persons to sue in the first instance, and although they might have been the trustees for the persons to whom they afterwards assigned the claim, still, as the defendants were summoned to answer the suit of the assignees, limitation ought to be reckoned as from the time when those persons were first made parties to the proceedings.

We think that this is not so; and that the case is one to which s. 32 of the Code of Civil Procedure is not properly applicable.

In the first instance, the original plaintiffs were the only persons who could institute the suit; and when they afterwards assigned their interest, it was perhaps not necessary for the persons to whom they assigned it to become parties at all; but if they did so, they would only continue the suit, not in substitution, but in conjunction with, and as the representatives in interest of, the original plaintiffs; and that it was merely a mistake in form to have summoned the defendants at the suit of the assignees. We think, therefore, that, under the circumstances, the suit is in time.

Then another question of limitation has been raised, which appears to us entitled to more weight; and that is, that the payments made by the original plaintiffs in respect of which they now sue for contribution, were made at two different times.

A sum of Rs. 200 was first paid by them to the plaintiffs in the former suit on the 17th July 1874; and as to this it is contended, that the plaintiffs are not entitled to recover contribu-

tion, because they did not bring this suit within three years from that date.

Now the rateable proportion which the plaintiffs ought to have paid, assuming that each of the persons who were made liable under the former decree were bound to contribute equally to the amount awarded, would be about Rs. 76; and Mr. Sandel contends, that as regards the difference between Rs. 76 and the sum of Rs. 200 paid on the 17th July 1874, the plaintiffs, even assuming that they are entitled to sue at all, are barred from recovering contribution.

This would of course depend upon the further question, which has also been argued by Mr. Sandel, and which we shall deal with presently, *viz.*, whether the persons against whom the original decree was made are bound to contribute equally or to any or what extent, to the sum decreed in the former suit; and this is a point, which the Court below, when the case comes before it again, will have to take into consideration.

But the first and main question is, whether, as between the persons against whom jointly the decree in the former suit was pronounced, there is any right of contribution at all, and this depends [according to the rule laid down in the Full Bench case, to which we have been referred, *Sreeputty Roy* v. *Loharam Roy* (1)] upon the question, whether the defendants in the former suit were wrong-doers in the sense that they knew or ought to have known that they were doing an illegal or wrongful act. In that case no suit for contribution would lie (see also *Merryweather* v. *Nixon* (2) and *Farebrother* v. *Ainslie* (3).

But, on the other hand, if the defendants in the former suit were not guilty of a wrong in that sense, but acted under a *bonâ fide* claim of right, and had reason to suppose that they had a right to do what they did, then, no doubt, they might have a right of contribution *inter se*; and in such case the Judge in the Court below was bound to enquire what share they each took in the transaction, because, according to circumstances, one or more of them might be excused altogether or in part from

(1) 7 W. R., 384.

(2) 2 Sm. L. C., 546; S. C., 8 T. R., 186.

(3) 1 Campb., 342.

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contributing; as for instance (to use an illustration put by Sir Barnes Peacock) one of them might have acted as servant and by the command of the others, or the others might have been the only persons benefited by the wrongful act; in which case those who were alone benefited, or who ordered the servant to do the act, would not be entitled to contribution.

It is therefore necessary, that the case should go back to the Court of first instance, in order that it may be ascertained what were the circumstances of the former suit, and what was the nature of the wrongful act of which the defendants were found guilty; and if the wrong was of such a nature as to justify a suit for contribution, then it must be further ascertained, what part these defendants took in the matter, and whether they ought to contribute at all or in what proportion.

Mr. Sandel appears to have offered very fair terms of compromise to his opponents, which, it may be very wise for them to accept; but unless the matter is so settled within a fortnight from this date, the judgments of both the lower Courts will be reversed, and the case will be remanded to the first Court for retrial, having regard to the foregoing observations.

The costs will abide the ultimate result.

Case remanded.

ORIGINAL CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Pontifex.

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Feby. 5.

GOCOOL CHUNDER GOSSAMEE AND OTHERS (PLAINTIFFS) *v.* THE ADMINISTRATOR-GENERAL OF BENGAL (DEFENDANT).

Practice—Civil Procedure Code (Act X of 1877), s. 372—Revivor—Plaint taken as Petition to revive.

A suit was instituted by the trustee appointed under a will, against the executrix, for the purpose of having the trusts of the will carried into execution. A decree was made, and certain directions were given for the purpose of having a scheme settled, by which the trusts were to be carried out; but before the scheme was finally settled and approved, and while the proceedings were pending, the case was struck out of the board for want of prosecution. Subsequently, both the plaintiff and defendant died. The heirs of the plaintiff then instituted a suit against the Administrator-General as