1886

IN THE MATTER OF R. BROWN.

Mrs. Vardon, who is the appellant's real opponent, must pay her costs in both Courts. The costs of the Official Assignee will come out of the estate.

Appeal allowed.

Attorney for the appellant: Messrs. *Ghose & Ghose.*

Attorney for the Official Assignee: Messrs. *Dignam & Robinson.*

Attorney for Mrs. Vardon: Messrs. *Swinhoe & Chundra.*

T. A. P.

APPEAL FROM ORIGINAL CIVIL.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Wilson.

1886
March 19.

THE ORIENTAL BANK CORPORATION (PLAINTIFFS) *v.* J. A. CHARRIOL AND OTHERS (DEFENDANTS.)*

Limitation—Civil Procedure Code (Act XIV of 1882), *ss.* 32, 363, 364—*Adding defendant.*

No question of limitation can arise with respect to the Court's power to make an order adding a party defendant to a suit.

THIS was an appeal against an order made by Mr. Justice Pigot, directing upon the petition of the Banque de la Reunion that that Bank should be added as a defendant to the suit.

The suit was brought by the plaintiff Bank on the 18th January 1882. The original defendants were the members of a Calcutta firm, Robert and Charriol; the Official Assignee as assignee of the estate of two members of that firm who were insolvent; Lucian Lebeaud of Paris, described as trading in Paris under the name of Lebeaud, and at St. Denis in Reunion under the style of Lebeaud *père et fils*, and also trading in rice at Calcutta and Chittagong in partnership with Robert and Charriol, and L. de St. Hilaire of Chittagong.

The nature of the case made in the plaint was as follows: That a joint venture had been undertaken by Lebeaud, under both his firms, and Robert and Charriol, under which a cargo of rice was to be shipped by the ship "National," on joint account from Chittagong to Reunion, and there consigned to Lebeaud *père et fils* for sale; that, to provide funds for this venture, an arrangement was entered into between Lebeaud on behalf of all those interested in the venture, and the plaintiff

* Appeal No. 1 of 1886 against the order of Mr. Justice Pigot, dated the 25th January 1886, made in suit No. 29 of 1882.

Bank by which a credit was to be opened with the plaintiff Bank in Calcutta to the amount of £7,000; that Robert and Charriol were to draw upon Lebeaud at Paris bills payable in London, which the bank in Calcutta were to discount against the credit of £ 7,000; and that all such bills were to be drawn against, and specifically charged upon the rice so to be shipped; that Robert and Charriol availed themselves of this credit and drew two bills amounting together to £7,000, which the plaintiff Bank discounted; and that Robert and Charriol remitted most of the amount to the defendant St. Hilaire at Chittagong for the purchase of rice; that Robert and Charriol had stopped payment, as had also Lebeaud, but that St. Hilaire was nevertheless loading the "National" at Chittagong with rice purchased with the funds advanced by the plaintiff Bank.

The plaintiff Bank asked for a declaration that the rice so in course of shipment had been specifically appropriated to meet the bills discounted by it, and for an injunction, and the appointment of a receiver.

At the time of presenting the plaint the plaintiff Bank applied for and obtained an order, by which, upon the Bank undertaking to be responsible for any damages arising to the defendants by reason of the injunction, the defendants were called upon to show cause why an injunction should not issue or a receiver be appointed.

On the 8th February 1882, with the consent of all the parties to the suit then in India, the order was made absolute, without prejudice to the rights and interests of all parties interested, and a gentleman, a Calcutta merchant, was appointed receiver to take charge of the rice, and sell it and pay the proceeds into Court, and the defendants were restrained from dealing with it in any way.

The rice was accordingly sold, and the net proceeds, amounting to Rs. 54,186, paid into Court, where they still remain.

On the 14th April 1882 the Official Assignee filed his written statement, putting the plaintiff Bank to proof of its case. On the 15th January 1883 Lebeaud filed his written statement. He denied the specific appropriation, and stated, further, that the joint venture was not between himself and Robert and Charriol,

1886

THE ORIENTAL BANK CORPORATION v. CHARRIOL.

but between Lebeaud *père et fils* and Robert and Charriol, and that in the firm of Lebeaud *père et fils* besides himself, his son Alphonse Lebeaud and one Buroleau were partners.

In the meantime, on the 26th June 1882, the Banque de la Reunion filed a suit in the High Court against the plaintiff Bank, in which it alleged that before the institution of the present suit, bills of lading had been signed in respect of the rice shipped, and had been transmitted to Lebeaud *père et fils* at Reunion; and that on the 9th February 1882 those bills had been indorsed to the Banque de la Reunion for value without notice of any equity in favor of the plaintiff Bank; and claimed damages from the plaintiff Bank in respect of the sale of the rice, treating it as a conversion. On the 1st of December 1882, that suit was dismissed by Mr. Justice Cunningham; and on the 9th March 1883 the decree dismissing it was affirmed on appeal, on the ground that upon the facts alleged the plaintiff Bank was not liable in tort, but without deciding anything as to the respective titles of the parties.

On the 7th May 1883 the plaintiff Bank amended this suit, by adding as defendants Alphonse Lebeaud and Buroleau, who with the elder Lebeaud were partners in Lebeaud *père et fils*. On the 1st May 1885 Buroleau filed his written statement, in which he alleged that he had indorsed the bills of lading to the Banque de la Reunion; and that he had done this without notice of any claim on behalf of the plaintiff Bank in respect of the rice, and he set up their title against that of the plaintiff Bank.

In the meantime Lebeaud *père et fils*, as well as Lebeaud, had become insolvent, and the plaintiff Bank had gone into liquidation. The suit languished, the steps taken were few and far between, but in all that was done it was sufficiently plain that Buroleau supported the title of the Banque de la Reunion and defended in its interest.

In September 1885 a commission was issued at the instance of the plaintiff Bank for the examination of witnesses in England. During the execution of that commission, on the 29th October 1885, an agreement was entered into between the three liquidators, of Lebeaud, of Lebeaud *père et fils*, and of the plaintiff Bank, by which, in consideration of certain terms, all opposition

1886

THE ORIENTAL BANK CORPORATION v. CHARRIOL.

to the plaintiff Bank's claim was to be withdrawn, and the plaintiff Bank was to be allowed to take the money, the proceeds of the rice, out of Court.

Under these circumstances the Banque de la Reunion applied to be made a defendant to the suit, on the ground that its presence before the Court was necessary, in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit.

Preliminary to the question as to the propriety of making the Banque a party, it was contended by the plaintiff Bank that s. 32 of the Code did not expressly provide that persons not parties to the suit might apply for the purpose, and the case of *Mohindrobhoosun Biswas* v. *Shosheebhoosun Biswas* (1) was cited as an authority on this point.

Mr. Justice Pigot was of opinion that it was not in that case laid down that such an application could not be made; remarking that in the case of *Vavasseur* v. *Krupp* (2), Sir George Jessel, M.R., had, upon the application of the Mikado of Japan, made that Sovereign a party to the suit under the English rule which corresponded to s. 32, and that in the cases of *Khadar Saheb* v. *Chotibibi* (3), and *Vydianadayyan* v. *Sitaramayyan* (4), orders had been made making persons defendants on their own application, and that in *Ahmedbhoy Hubibhoy* v. *Vulleebhoy Cassumbhoy* (5), a similar order had been made by Bayley, J., in which he referred to *Campbell* v. *Holyland* (6), where, after decree in a foreclosure suit, Jessel, M.R., had made the purchasers after decree of the mortgagor's interest parties defendants upon their application made *ex parte*, and also upon the same application made a purchaser of the mortgagee's interest also a party defendant.

On the other point, the learned Judge considered that the order applied for by the Banque was a proper one, and directed that the Banque should be made a party defendant upon the terms that, if the Court should see fit at the hearing, the onus of proving in the first instance the validity of its title as assignee

(1) I. L. R., 5 Calc., 882.
(2) L. R., 9 Ch. D., 351.
(3) I. L. R., 8 Bom., 616.
(4) I. L. R., 5 Mad., 52.
(5) I. L. R., 8 Bom., 323.
(6) L. R., 7 Ch. D., 166.

1886

THE ORIENTAL BANK CORPORATION v. CHARRIOL.

or pledgee of the bills of lading, should be thrown upon the Banque as between itself and the plaintiff Bank and the Official Assignee; and that if the plaintiff Bank should desire to appeal against such order, the Banque should afford them every facility for the appeal being heard by the Appeal Court which was then sitting.

Against this order the plaintiff Bank appealed.

Mr. *Bonnerjee*, for the appellants.—I contend that the application was one under s. 32 of the Code, and that it is barred by limitation. [WILSON, J.—The Court has acted on its own motion on certain information brought to the notice of the Court by a third party; there is no provision of limitation against a Court acting on its own motion.] Section 32 must be read with ss. 26 to 32. [WILSON, J.—In the *Honduras Inter-Oceanic Railway Co.* v. *Lefevre* (1), the whole discussion was as to the propriety of making Tucker a party in the first instance, although the matter turned on the rule of the Judicature Act answering to s. 32 of our Code.] The principle is not applicable to cases of this description. Here what is asked for would change the entire nature of the suit. The Banque de la Reunion raised all sorts of claims inconsistent with our suit. [GARTH, C.J.—Has the Banque any right to hang back for five years, and then come in and unrip the whole suit in order to open up the question which it might have raised in 1882; and if it could do so would it not be barred?] The case of *Mohindrobhoosun Biswas* v. *Shosheebhoosun Biswas* (2), decides that s. 32 does not contemplate any application to the Court by the person proposed to be added. [WILSON, J.—I did not intend to lay down that a third party could not come in and apply, but I intended to say that the Court could act on the information of a third party.] I say that the Court ought only to act on the information of a porson a party to the suit; persons claiming adversely to both sides have never been allowed to come in. [WILSON, J.—How do you deal with cases in which tenants have applied to have their landlords made parties? The only section under which that could be done is s. 32.] Yes, but the Courts discourage third parties coming in; it is in the discretion of the Court, and there must be some limit

(1) L. R., 2 Ex. D., 301. (2) I. L. R., 5 Calc., 882.

to such discretion. Assuming the Banque de la Reunion to be able to make the application, it is barred: the Banque ought to have come in within three years from the time when its right to apply accrued; and that was when it obtained a right to sell the rice, when its case was dismissed by Cunningham, J., in 1882. Art 178 of the Limitation applies and bars the application.

[WILSON, J.—The effect of your construction of s. 32 is to limit the words "at any time."] Under s. 32 is the Court to give to a person not expressly named a larger right than is to be given to a person who is named? To an application such as this no special article applies. The general Art. 178 is applicable; that article has been applied in the cases of *Bhoyrub Dass Johurry* v. *Doman Thakoor* (1), and in *Benode Mohini Chowdhrain* v. *Sharat Chunder Dey Chowdhry* (2), and in *Fulvahu* v. *Goculdas Valabdas* (3). There would have been no necessity to follow the form laid down in this latter case had the Court power *at any time* to add parties.

[WILSON, J.—Section 32 relates to the case of persons who might have been made parties *ab initio*, and, if so, it does not apply to the case: the case might possibly fall under s. 372.] In that case the three years limitation applies. The Banque says in its petition that it was not aware of the proceedings mentioned in the suit until April 1882.

The case of *Naraini Kuar* v. *Durjan Kuar* (4) lays down the rule as to the addition of parties under s. 32. *Norris* v. *Beazley* (5) is also in point.

The *Advocate-General* (Mr. *Paul*) on the same side.—The question is, has a sound and proper discretion been exercised by the Judge in the Court below? The question as to the title of the goods under the bill of lading was not raised. We are clear of the bill of lading, and do not require any adjudication as to the bill of lading. Now was it necessary for the purposes and questions of the suit to add the Banque de la Reunion as a party? [WILSON, J.—The Banque took a title after the suit was filed.] *Lis pendens* does not apply to moveable property;

(1) I. L. R., 5 Calc., 139.
(2) I. L. R., 8 Calc., 837.
(3) I. L. R., 9 Bom., 275.
(4) I. L. R., 2 All., 738.
(5) I. L. R., 2 C. P. D., 80.

1886

THE ORIENTAL BANK CORPORATION v. CHARRIOL.

there are no cases showing that it is applicable; and moreover would it apply to a person outside the jurisdiction? *Srimati Anand Mayi Dasi* v. *Dharandrà Chandra Mookerjee* (1).

We have the goods; we do not want the bill of lading; the suit could have been decided without endangering the right of the Banque de la Reunion, and there was no need therefore to add it as a party. It took no proceedings for five years and then starts up and wishes to appear in the case. The bills of lading are not produced, but only copies of them, and there is nothing to show that they are not parted with. The admission to the suit of the Banque de la Reunion will put great difficulties in the way of the suit; the Banque filed no proper written statement and can delay the suit, nor have we any hold on it for costs. I submit (1) that if the Banque made the application it is barred: (2) if the Court made it a party, it is not a necessary party; (3) that in the way it has intervened there is not sufficient before the Court to adjudicate on; it says nothing about the bills of lading, and does not show that it is the party entitled to claim, as it may have assigned the bills of lading.

Mr. *Evans* for the Banque de la Reunion.—Buroleau has been defending the suit and setting up the title of the Banque. He filed his written statement on the 1st May 1885. The suit as first constituted did not contain Lebeaud *père et fils*. Lebeaud alone was a party. The plaint was amended on 13th May 1885 by adding Lebeaud *père et fils*; this was immediately after the dismissal of the Banque's suit. The Banque having advanced money on the bills of lading is a necessary party. The Banque produces the original bills of lading. [The bills of lading were here for the first time produced in Court.] The plaintiff Bank after clearest notice of the Banque's claim agrees with the defendant to take the money out of Court. Has not the Banque a right to come in and object to this? The case is somewhat similar to that of a beneficiary applying to be added as well as his trustee. Under s. 437 of the Code a beneficiary has no *right* to apply to be added, but can ask the Court to use its discretion in so doing. If the application be held to be one within the Limitation Act, the Court would not hold

(1) 8 B. L. R., 122.

that the Banque's right was barred, inasmuch as it says that it has only just discovered about the agreement. I submit the application is not one under s. 437 or 32; it is merely an application calling the attention of the Court to the terms of the agreement which is detrimental to the Banque.

If it is to be treated as an application, when does the right to apply accrue? As long as Lebeaud *père et fils* were defending the suit for the Banque was it necessary that the Banque should be added as a party? Now it is necessary, as the Banque's money is about to be taken out of Court. It cannot be an application under s. 32 in the first suit to which Lebeaud *père et fils* were no parties; it may be in the suit after they were made so. [GARTH, C.J.—Does it make any difference that Lebeaud *pere et fils* were not parties; the suit is one to recover a claim against goods or for a declaration that the goods are charged.] There has been here no assignment pending the suit under s. 372 *by a party to the suit.*

Mr. *Pugh* on the same side.—Article 178 is limited to applications under the Code. The Banque has a *locus standi*; as soon as it discovered the agreement it brought the matter to the attention of the Court. *Hossein Ali Khan* v. *Syud Burkut Ali* (1); there the application was treated as one by Burkat Ali. *Penney* v. *Todd* (2) is also in point.

The judgment of the Court (GARTH, C.J., and WILSON, J.) was delivered by

WILSON, J., who, after stating the facts, continued as follows: In the Court below it was contended on behalf of the plaintiff Bank that there is no power under any circumstances to add a party defendant on his own application. This contention was not pressed before us, and we entertain no doubt that the view taken by the learned Judge on this point is correct.

And, the Court having this power, the present case is one in which it is especially desirable to exercise it. The fund is in Court, and by the act of the Court in its order of the 8th February 1882. There is some reason to suspect that at the time when the order of the 8th February 1882 was obtained those who were in charge of the plaintiff Bank knew that bills of lading had been, or were likely to have been, issued in respect

(1) 10 W. R., 372. (2) . W. N. 1878, 502.

1886

THE ORIENTAL BANK CORPORATION v. CHARRIOL.

of the rice. If so, the suppression of the fact was a very grave matter indeed, and the plaintiff Bank which is trying to get the money out of Court is in liquidation.

But it was contended before us that the Limitation Act precludes the making of this order at the present stage. This point was not taken before the learned Judge of the Court below, but it was strenuously pressed upon us. It was said that the application of the Banque de la Reunion to be made a party was an application within the meaning of the Limitation Act, and an application not expressly provided for in the Act; and that therefore under Art. 178 of the second schedule it must be made within three years of the time when the right to make the application accrued.

It was said further that the right to make this application accrued when the Banque de la Reunion acquired title by endorsement of the bills of lading; or, at latest, when by the dismissal of its own suit the true state of the case became known to it. But assuming that the article referred to applies to such a case, still we think this application was not barred. We think that the right of an outsider to claim to be made a party to a suit accrues when the necessity for his so claiming arises. In the present case we think that, however it may have been before, a right to make this application accrued to the Banque de la Reunion in October last, when the person who had up to that time represented its interest and defended for its benefit ceased to have any voice in the suit, and the other parties proceeded to dispose by arrangement of the funds in Court behind its back.

Speaking for myself, I must say further, that in my opinion there can arise no question of limitation with respect to the Court's power to make such an order as that in question. There are two classes of provisions in the Procedure Code with regard to parties. One class of provisions confers rights upon plaintiffs and others, chiefly as to the original selection of parties—by chap. III, as to the addition or substitution of parties by reason of subsequent events in chap. XXI. For applications to be made to the Court in exercise of such rights, periods of limitation are frequently provided. In most of such cases if the

rights given are not exercised within the time limited the ordinary consequence is that the suit comes to an untimely end. Thus, if a sole plaintiff or defendant die, and the representatives are not brought in within the time limited, the suit fails, and the Court has nothing more to with do it unless it can be and is revived. The second class of provisions does not give rights to parties, but confers powers and imposes duties upon the Court. The object of these provisions is not so much to prevent the abatement of suits, as to secure that if a suit does proceed and is adjudicated upon, that shall only be done in the presence of the proper parties, lest the Court should be made an instrument of injustice or fraud by determining rights, and even, as here, handing over property, without hearing the persons interested. The difference between these two classes of provisions is well illustrated by ss. 363 and 364. By s. 363 if one of several plaintiffs dies, and the cause of action survives to his representatives, together with the surviving plaintiffs, the representatives may come in and get themselves joined as plaintiffs; and a time is limited for their doing so. If they do not apply within that time their right is gone. It may be that in such an event the suit will not proceed, in which case the Court has nothing to do with the matter. But by s. 364 the suit may proceed at the instance of the surviving plaintiffs; and if it does, the Court has power to do, and is bound to do the thing which the representatives have lost the right to claim; "the legal representative of the deceased plaintiff shall be made a party." The second paragraph of s. 32 belongs to this class of provisions. It says: "The Court may at any time, either upon or without such application, (that is the application of either party), and on such terms as the Court thinks just, order that any plaintiff be made a defendant, or that any defendant be made a plaintiff, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit be added."

For the exercise of these powers and those conferred by other sections upon Courts no period of limitation is provided; and

1886

THE ORIENTAL BANK CORPORATION v. CHARRIOL.

they are to be exercised in my opinion whenever the necessity for doing so is made apparent, so long as the case is *sub judice*. Any other view would, I think, lead to disastrous consequences. It was suggested in the present case that, though the Court might act at any time of its own motion, it could not act on the application of any person if the right of that person to claim relief were barred. I do not think that is so. I do not see how the fact of any person's making an application, whether in time or out of time, can take away from the Court a power given to it to act at any time, either upon or without application.

Lastly, it was argued, that the Banque de la Reunion had been guilty of such laches that its petition ought to be rejected. But we see no laches. The practical necessity for its intervention arose when it became aware of the agreement of last October.

The appeal is dismissed with costs.

Appeal dismissed.

Attorney for appellants: Messrs. *Barrow and Orr.*

Attorney for the second defendant: Messrs. *Sanderson & Co.*

T. A. P.

ORIGINAL CIVIL.

Before Sir W. Comer Petheram, Knight, Chief Justice.

1886
April 1.

SECRETARY OF STATE FOR INDIA IN COUNCIL (EXECUTION-CREDITOR) v. JUDAH (JUDGMENT-DEBTOR.)*

Arrest—Escape—Release on recognizance—Surrender under recognizance—Recognizance, Expiry of—Arrest, Fresh application for—Civil Procedure Code (Act XIV of 1882), ss. 239, 241, 341, 349, 357—Writ of attachment—Criminal Procedure Code (Act X of 1882), s. 491.

A judgment-debtor once arrested and imprisoned in execution of a decree cannot under the Civil Procedure Code be again arrested under a fresh writ of attachment on the same decree.

THIS was an application for a second warrant of arrest against A. N. E. Judah, the previous warrant being taken for the purposes of this application as expired.

The facts were as follows:—

In execution of a decree obtained by the Secretary of State for India in Council against A. N. E. Judah, a writ of attachment was