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property is liable. The appellant is also we think entitled to recover the costs of this suit in both Courts.

The decree of the lower Court will be reversed, and in lieu thereof we direct that an account be taken of what is now due to the plaintiff, for principal and interest on the mortgage bond dated the 28th Magh 1281, and for his costs of both Courts, and that the defendants be directed to pay to the plaintiff, or into Court, the amount that may be found due on the taking of the said account, together with interest thereon, at the rate of 6 per cent. per annum from the date of the decree to the date of payment, within six months from the date of the decree. And we further direct that if defendants make default in paying the amount due within the time mentioned above, the mortgaged property be sold, and that the proceeds of the sale (after defraying thereout the expenses of the sale), be paid into Court and applied in payment of what is found due to the plaintiff, and that the balance, if any, be paid to the defendants, or other persons entitled to receive the same.

H. T. H.

Appeal allowed and decree modified.

Before Mr. Justice Field and Mr. Justice O'Kinealy.

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 July 3.

RADHA PERSHAD SINGH AND ANOTHER (DECREE-HOLDERS) v. PHULJURI
 KOER AND ANOTHER (JUDGMENT-DEBTORS).²

Appeal to Privy Council—Security for costs of respondent—Execution of decree against surety—Civil Procedure Code (Act XIV of 1882), ss. 253, 602, 603, 610.

A plaintiff, having preferred an appeal to Her Majesty in Council, was called upon to furnish security. Thereupon A, on behalf of the appellant, executed a security bond for the costs of the respondent. The appeal was dismissed with costs by Her Majesty in Council. On an application (by the respondent in the appeal) for execution to issue against the estate of A, the surety (who had died in the meantime)—

Held, that the liability of the surety under the security bond could not be enforced in execution of the decree of Her Majesty in Council.

Bans Bahadur Singh v. Mughla Begum (1) dissented from.

THIS was an application by the defendant for execution of a decree of the Privy Council, dated the 28th of May 1872, dis-

² Appeal from Order No. 116 of 1885, against the order of H. W. Gordon, Esq., Judge of Sarun, dated the 5th of March 1885.

(1) I. L. R., 2 All., 604.

missing the plaintiff's suit with costs. Execution was sought against the legal representative of a person who had entered into a security bond for the costs of the respondent in the appeal to the Privy Council (see ss. 602 and 603 of the Code of Civil Procedure, Act XIV of 1882.)

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The material portions of the judgment appealed from are as follows :—

“The second prayer in the decree-holder's application is, that it may be declared in the certificate that the decree may be executed against the estate of the surety Baboo Radha Kissen, deceased. With regard to this prayer several objections are taken by the daughter and heiress of the deceased surety. Of these, the principal are that the decree is barred by limitation ; that it cannot be enforced against the surety in the execution department ; and that she has no knowledge of the alleged surety bond, and that the decree-holder is, therefore, bound to prove it.

“It seems to me that the decree, so far as the surety is concerned, is barred under Art. 180, Sch. II of the Limitation Act. The decree sought to enforced against the surety's estate is a decree for costs, for which the surety went security, passed by the Privy Council on the 28th May 1872. The first application to execute the decree against the surety was made on July 22nd, 1884, *i.e.*, more than 12 years after the date of the decree. The preceding application, dated May 26th, 1882, was for execution against the original judgment-debtor, *i.e.*, the plaintiffs in the original suit alone, and not against the surety. This application did not, I think, keep the decree alive against the surety, and it is accordingly barred under Art. 180. Section 230 of the Civil Procedure Code does not, I think, bar the application, because the application of 26th May 1882 which was granted was filed before the present Civil Procedure Code, Act XIV of 1882, (1st June 1882) and was, therefore, made under Act X of 1877, as amended by Act XII of 1879, and not under s. 230 of the Civil Procedure Code. The application of July 22nd, 1884, is the first application for execution made under the present law. However, the decree-holders cannot benefit by this, their application being barred under Art. 180, Sch. II of the Limitation Act. The second objection raises the difficult question as to whether the decree can be executed against the surety at all in the execution department, or whether the decree-holder should bring a separate suit to enforce the obligation. There is, as far as I am aware, no ruling of the High Court as to the interpretation of ss. 253 and 610 of the present Code. The Allahabad High Court, however, in a Full Bench ruling—*Bans Bahadur Singh v. Mughla Begum* (1)—have held that a decree for costs of the Privy Council can be executed against the surety, the words “decree in an original suit,” in s. 253 of the Civil Procedure Code, including the decree of the Appellate Courts also. I follow this

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ruling with some hesitation, because it seems to me that much may be said in favour of the view taken by the two Hon'ble Judges Mr. Justice Spinkie and Mr. Justice Straight, who dissented from the opinion of the majority of the Full Bench. However, I think I must accept this ruling, as correct law in the absence of any authoritative decision on the same point by the Calcutta High Court. Certainly as the heiress of the surety denies all knowledge of the surety bond, it seems reasonable that the decree-holder should satisfy the Court that the deceased Radha Kissen actually executed it. The mere filing of a certified copy of the bond is not sufficient, and did I not hold that the decree-holder's application is barred, I should require them to produce more evidence before acceding to the application. There are some other objections taken by the lady objector, but in the above view of the case, I think it unnecessary to consider them. The application to be allowed to take out execution against the estate of the surety is refused with costs."

The judgment-creditors appealed to the High Court.

Baboo *Mohesh Chunder Chowdhry*, and Baboo *Rughu Nundon Prosad*, for the appellants.

Mr. *C. Gregory*, for the respondents.

The judgment of the Court (FIELD and O'KINEALY, JJ.) was delivered by

FIELD, J.—This was an application to recover by execution the amount of security given for the costs of an appeal to the Privy Council, under the provisions of ss. 602 and 603 of the Code of Civil Procedure. The Court below has held that the execution is barred as against the sureties. The view taken by the Court below, we think, confounds two things that are wholly distinct, that is, the decree of the Privy Council, and the security bond. We think, however, that it is not necessary for us to determine whether the recovery of the money secured by the bond is or is not barred, so far as that recovery depends upon the execution proceedings sought to be had in the Court below, because the order appealed against can be supported upon a ground which has been taken by the respondent for the purpose of supporting that order refusing execution. The respondent contends that the proper remedy of the decree-holder is by a separate suit, and that he is not entitled to recover the amount secured by the bond in the execution department of the Court which has charge of the execution of the Privy Council decree. We are not

aware that the question thus raised has ever been decided by this Court. It has been decided by a Full Bench of the Allahabad High Court in the case of *Bans Bahadur Singh v. Mughla Begum* (1), and it was there decided by a majority of three Judges as against two, that execution could be had in order to recover the amount of the security bond. This view has been dissented from in a case, decided by the Madras High Court, of *Balaji v. Ramasami* (2).

Section 253 of the Civil Procedure Code provides as follows: Whenever a person has, before the passing of a decree in an original suit, become liable as surety for the performance of the same, or of any part thereof, the decree may be executed against him to the extent to which he has rendered himself liable, in the same manner as a decree may be executed against a defendant." Now in the present case it is clear that the persons against whom execution is sought did not become surety before the passing of the decree in the original suit; and, therefore, the express language of s. 253 is not applicable. But it is contended that s. 610 extends the provisions of s. 253 to the case of a surety bond like the present. That section provides as follows: "Whoever desires to enforce, or to obtain execution of any order of Her Majesty in Council, shall apply by petition, accompanied by a certified copy of the decree or order made in appeal and sought to be enforced or executed, to the Court from which the appeal to Her Majesty was preferred. Such Court shall transmit the order of Her Majesty to the Court which made the first decree appealed from, or to such other Court as Her Majesty by her said order may direct, and shall (upon the application of either party) give such directions as may be required for the enforcement or execution of the same; and the Court to which the said order is so transmitted shall enforce or execute it accordingly, *in the manner and according to the rules applicable to the execution of its original decrees.*" It is said that s. 253 contains a rule applicable to the execution of original decrees within the meaning of this provision. We do not think so. We agree with the observations of Mr. Justice Spankie, at page 615 of the Allahabad report, that this argument mixes

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(2) I. L. R., 7 Mad., 284.

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up liability and machinery, and treats them as one and the same. We think it confounds liability, which is created by a provision of substantive law which happens to have been inserted in the Code, and procedure, which is adjective law. We may further observe that what the section provides for is the execution of an order of Her Majesty in Council. This is the legal case for which the Legislature proceeds to lay down rules; and in s. 610 this is a different case from the enforcement of a surety bond which cannot be brought within the purview of an order of Her Majesty in Council. We think, therefore, with all deference to the majority of the Judges of the Allahabad Court, that s. 610 cannot be construed so as to extend the provisions of s. 253 to a case not expressly provided for by the Legislature.

We think, therefore, that a surety bond of this kind cannot be summarily enforced by execution.

The appeal fails and is dismissed but without costs.

P. O'K.

Appeal dismissed.

PRIVY COUNCIL.

P. O. *
 1885,
 July 8.

AKHOY CHUNDER BAGCHI AND OTHERS (PLAINTIFFS) v KALA-PAHAR HAJI AND ANOTHER (DEFENDANTS.)

[On appeal from the High Court at Fort William in Bengal.]

Hindu Law—Adoption—Construction of authority to adopt—Attempt by two widows to adopt each a son simultaneously.

Two widows of a Hindu each adopted a son to their deceased husband, under an authority from him, thus expressed. "You.....the elder widow, may adopt three sons successively, and you.....the younger widow may adopt three sons successively." *Held*, that, this might more reasonably be construed as giving the elder widow authority to adopt three sons successively, and then a similar power to the younger, than as authorizing simultaneous adoptions.

Held, also, that, supposing that the husband had intended to give such an authority, the law did not allow two simultaneous adoptions.

The opinion of W. H. Macnaghton (1) on the subject referred to and approved.

* *Present*: LORD MONESWELL, LORD HOBHOUSE, SIR B. PEACOCK, and SIR R. COUCH.

(1) Principles and Precedents of Hindu Law, Vol. II, Chap. VI of Adoption; note to case XIX.