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on Clause 85 of Schedule II. of Act IX. of 1871. The Third Judge of the Court of Small Causes, who tried the case, found a verdict for the plaintiffs for the amount claimed. The defendant then moved for a new trial before the First, Third, and Fourth Judges, who, having differed in opinion, ordered the verdict for the plaintiffs to stand, subject to the opinion of the High Court on the question, "Was the claim of the plaintiffs barred by the law of limitation?"

At the hearing of the reference by WESTROPP, C.J., and SARGENT, J., on the 15th December 1876, *Macpherson* (for *Marriott*, Acting Advocate-General), on behalf of the plaintiffs:—Clause 85 of Schedule II. of Act IX. of 1871 is no bar to the present suit, for there has been here no discontinuance by the attorneys of the business which they were conducting for the defendant, nor has that business terminated. The compromise between the defendant and her judgment-debtor cannot be recognized by the Court (Act VIII. of 1859, Section 206), and therefore the Court cannot hold that that compromise was the "termination of the suit or business" in respect of which these costs became due. *Whitehead* v. *Lord*[1] governs the case.

There was no appearance on behalf of the defendant.

PER CURIAM:—Let the decree for the plaintiffs by the Court of Small Causes stand. The costs of this reference must be paid by the defendant.

[ORIGINAL CIVIL JURISDICTION.]

Suit No. 470 of 1874.

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January 27.

MANCHERJI KAWASJI DAVUR AND ANOTHER (PLAINTIFFS) *v.* MITHIBAI (DEFENDANT).

Parsi succession—Act XXI. of 1865—Childless widow of predeceased son of a Parsi intestate.

It is not a condition precedent to the application of Section 5 of Act XXI. of 1865 that the predeceased son of an intestate Parsi shall have left a widow *and* issue.

(1) 7 Exch. 691; S. C. 21 L. J. Exch. 239.

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Where an intestate Parsi left him surviving a widow, sons, daughters, children of a predeceased son, and the widow of another predeceased son, who had died without issue, and a posthumous daughter was afterwards born to the intestate,

Held that such last-mentioned widow was entitled to one moiety of the share in the intestate's estate which her husband would have taken had he survived the intestate, and that the other moiety of such share devolved on the surviving issue of the intestate, including the posthumous daughter, and the children of his other predeceased son.

KAWASJI NANABHAI DAVUR died intestate at Bombay on 22nd December 1873, leaving him surviving his widow, the defendant; two sons, the plaintiffs; Dinbai the widow, Rastamji the son, and Mithibhái, the daughter of a predeceased son, Kharsedji, who died on 8th June 1872; Awabai, the widow of a predeceased son, Naserwanji, who died without issue on 28th May 1872; and three daughters, Serinbai, Dhunbai, and Jerbai. A posthumous daughter was afterwards born to the intestate. Letters of administration were granted to the plaintiffs and defendant; and in 1874 the plaintiffs filed against the defendant this administration suit praying, amongst other things, for an enquiry as to who were the persons entitled to share in the estate of the intestate. At the hearing of the suit Awabai appeared by counsel and applied to be made a party. On 25th June 1875 an order was made in the suit referring it to the Commissioner to take the usual accounts, and directing "an enquiry as to who were the persons entitled according to the Acts of the Legislative Council of India for the distribution of Parsi Intestates' Estates living or *in gremio parentis* at the time of the death of the said intestate, Kawasji Nanabhai Davur, and whether any of them are since dead, and if so, who are their legal representatives." The order also directed that Awabai should be allowed to appear on the enquiry before the Commissioner, and on further directions on his report. The Assistant Commissioner accordingly proceeded to take the accounts and make the enquiries directed by the order of 25th June 1875, and being of opinion that under the provisions of the Parsi Succession Act (XXI. of 1865), Awabai took no interest in the estate of the intestate, made his special report to that effect on 12th December 1876, and thereby also defined the shares to which the other representatives of the intestate were respectively entitled on the supposition that Awabai was not entitled to any share. To this

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special report Awabai filed objections on 23rd December 1876, in which she contended that she was entitled either to the whole or one-half of the share which her husband, Naserwanji, would have taken, had he survived the intestate.

The cause was called on before GREEN, J., on 27th June 1877, for further directions on the special report of the Assistant Commissioner, and argument of the question raised by Awabai's objections thereto.

Marriott, Advocate-General (Acting), and *Farran*, for Awabai abandoned the claim to the whole of the share which Naserwanji would have taken had he survived the intestate, but contended that to a moiety of that share she was entitled. On a true construction of Section 5 of Act XXI. of 1865, if there is no issue of the child of the intestate, but a widow, such widow will take the share provided for a widow by Section 6. The omission from Section 5 of the word "leaving," which occurs in the preceding sections, is significant. Section 7, on which the Assistant Commissioner appears to have relied in arriving at his decision, has no application to the present case, as the intestate here has left lineal descendants. Before the passing of this Act, Parsis, in the town and island of Bombay, were, as to succession, governed by the English law as modified by Act IX. of 1837 : 2 Williams on Executors, 1496. It is only under Section 5 of Act XXI. of 1865 that the children of a predeceased child can take at all. The word "children" cannot include grand-children. Section 7 shows that it was considered by the Legislature that lineal descendants, however remote, had been provided for by the earlier sections of the Act. Under the 5th section the issue of a deceased child take though there is no widow. That section cannot be construed in one way as regards the issue and in another way as regards the widow. The reasonable construction is that, where there is no issue of the predeceased child, his widow's share is cut down, by the 7th section, to one-half of the share which the predeceased child would have taken, had he survived the intestate. The first six sections of the Act are intended to embrace all cases of a Parsi leaving lineal descendants or a widow. It is unreasonable that a widow who has no children, and is therefore in greater need of support, should be deprived of all benefit; but the Act is rendered consistent by reading Section

7 as an exception. Section 5 places the widow and issue in the same position as if the property had been that of the deceased child. To read "widow *or* issue," instead of "widow *and* issue," would make nonsense of the section.

Latham for the plaintiffs:—The 5th section only applies in the case of the predeceased child having left a widow and children, which is not the case here. Prior to the passing of this Act, the daughter-in-law of a Parsi intestate would have got nothing; and, therefore, if she is to take anything now, it ought to be explicitly given by the Act. The only section of the Act which does explicitly give the daughter-in-law anything is the 5th, and under this she is only to take, in the event of there also being issue of her marriage. By the 7th section and the 2nd schedule of the Act, the widow of a son, dying without leaving lineal descendants, succeeds in the 10th degree; whereas if the 5th section applied to such widow, she would take at least one-half before any of those mentioned in the first 9 clauses of the 2nd schedule as having a prior title to the whole. According to the construction sought to be put upon the 5th section on behalf of Awabai, if a man died leaving a father and a son's widow only, and no lineal descendants, the widow would be entitled to one-half, but by the distinct wording of the 7th section and the 2nd schedule the father is entitled to the whole.

Mayhew for the defendant:—It is Section 5, not Section 7, which is the rider to the Act, for Section 5 is the only section which refers to substitution. If it had been one of the express objects of the Act to deal with the succession in the case of a child of the intestate dying in the life-time of the latter, we should have expected much more elaborate provisions. If the Legislature has used language which can only bear one meaning, and contemplating only one event, it is not for the Court to alter that language to meet a supposed hardship. The 2nd schedule shows that the intention could not have been to make the substituting clause give the widow one-half of the share of a predeceased child. Succession under a substituting clause is not a natural succession; therefore the hardship is not so great as alleged. If the construction contended for by Awabai be adopted, we shall have this amazing result, that the widow of a predeceased son will get from the estate of the intes-

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tate a share equal to that of the intestate's widow, and twice as great as that of one of his own daughters.

Marriott in reply :—That amazing result would have followed as a matter of course if the predeceased son had survived his father by a single hour. The only reasonable construction is to read the 5th section distributively. The condition of "leaving issue" has been intentionally omitted from this section.

GREEN, J. :—The question for decision here is as to the correctness of the report of the Assistant Commissioner of this Court, dated the 12th December 1876, that Awabai, the widow of one Naserwanji Kawasji Davur (one of the sons of Kawasji Nanabhai Davur, the intestate in the cause), is not entitled to any share in the property of the said intestate. The intestate died on the 22nd December 1873, leaving, as appears by the report, a widow Mithibai, two sons, Mancherji and Dorabji, the widow (Dinbai) and son [Rastamji] and daughter [Mithibai] of a son Kharsedji, who predeceased his father Nanabhai on the 8th June 1872, and three daughters, Serinbai, Dhunbai, and Jerbai. The said Mancherji, Dorabji, Kharsedji and Naserwanji were the sons, and the said Serinbai was the daughter of the intestate by his second wife, Motlibai ; and the said Dhunbai and Jerbai were his daughters by his surviving wife and widow, the said Mithibai. The son Naserwanji died in the life-time of his father on the 28th May 1872, leaving a widow, the said Awabai, but no issue. The question depends on the construction to be put on Act XXI. of 1865, "an Act to define and amend the law relating to intestate succession amongst Parsis," and in particular on Section 5, which is as follows :—"If any child of a Parsi intestate shall have died in his or her life-time, the widow or widower and issue of such child shall take the share which such child would have taken if living at the intestate's death in such manner as if such deceased child had died immediately after the intestate's death." Now, it is not a condition precedent of the application of Section 5 that the child of an intestate Parsi shall have died leaving a widow *and* issue. The section merely provides that if such child shall have died in his parents' life-time, the widow or widower and issue of such child shall take, &c.,—*i. e.*, the widow or widower (if any) and the issue (if any) shall take in such manner as if such deceased

child had died immediately after its parent. This seems to me the natural grammatical sense of the words of the section. In my opinion, it is not necessary, so far as the natural and grammatical sense of the words of the section are concerned, that in order for the widow or widower to take, and for the issue to take, there should be in existence at the time of the death of the intestate, both widow or widower *and* issue; otherwise we should have this consequence, which it is impossible to suppose could have been the intention of the Legislature—viz., that the issue of a predeceased son or daughter of an intestate Parsi would take nothing if the widow or widower of such predeceased son or daughter happened also to be dead at the time of the intestate's death; in other words, that such issue should take if they had one parent surviving, but should take nothing if wholly orphans. Whichever way Section 5 may be construed, the position of the widow or widower of a predeceased son or daughter has been changed by the Act as compared with the previous law. Under that law such widow or widower would have taken nothing, whether there were issue or not; but it is evident that under Section 5, if there be both widow or widower and issue, the widow takes something. So that there was in any event on the part of the Legislature an intention to change, in some respects at least, the position of the widow or widower of a predeceased son or daughter of an intestate Parsi. It is not necessary, in my opinion, to consider on the present occasion the position of the widow or widower of a predeceased son or daughter in the cases to which Sections 6 and 7 apply—to cases, namely, of a Parsi dying, leaving a widow or widower, but without leaving any lineal descendants, and of a Parsi dying, leaving neither lineal descendants nor a widow or widower. The fact that in Schedule 2 to the Act the widows of sons and widowers of daughters have a place in the succession in the case to which Section 7 applies, inferior to those of father and mother, brothers, grandfather and grandmothers, cousins and nephews and nieces of the intestate, seems to throw great difficulty in reading Section 5 merely as a proviso to, and overruling Sections 6 and 7, which otherwise might be a reasonable way of construing the Act. A curious result, however, would appear to flow from these Sections 6 and 7 taken together, with reference to the widow or widower of a predeceased

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son or daughter (unless it be held that she or he is provided for at all events under Section 5) which is that in the case to which Section 6 applies—viz., the intestate leaving a widow but no lineal descendants, a son or daughter's widow or widower would take nothing (as such widow or widower is not mentioned in Schedule 1 to the Act,) but in the case to which Section 7 applies—viz., the intestate dying, leaving neither lineal descendants nor a widow or widower, a son or daughter's widow or widower will take a share in the order provided in the 2nd schedule. I am unable to see any relevance, where an intestate leaves no lineal descendants, of the circumstance that he or she left a widow or widower, to the question whether the widow or widower of a predeceased son or daughter is to take or not. To make the Act harmonious, amendments are, in my opinion, necessary in several respects; but I am of opinion that, in the present case, the difficulties in the way of the construction contended for on behalf of Awabai are much less than those in the way of the construction adverse to her claim. The report of the Commissioner must be amended by certifying that Awabai, widow of Naserwanji Kavasji, is entitled to a share in the estate of the intestate, such share being one moiety of the share which her deceased husband Naserwanji would have taken had he died immediately after the intestate, and that the other moiety of the share of the said Naserwanji has devolved, under Section 6, on his brothers and sisters [1], viz., Mancherji, Dorabji, and Serinbai, Dhunbai, Jerbai, and the posthumous daughter of the intestate by Mithibai, and on the children of his brother Kharsedji. I am of opinion that the costs of arguing the objection should come out of the estate.

[1] *Note.*—This question was not argued.