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recover the balance of his debt from his judgment-debtors, who may, perhaps, have their remedy against the defaulting purchaser. We, therefore, reverse the order of the District Judge, and restore that of the Subordinate Judge, with costs on the respondents throughout.

Order accordingly.

[APPELLATE CRIMINAL.]

Before Sir M. R. Westropp, Knt., Chief Justice, Mr. Justice Melvill, and Mr. Justice Kemball.

April 29.

IMPERATRIX *v.* DONGA'JI ANDA'JI.*

The Code of Criminal Procedure (Act X. of 1872), Sections 280 and 297—Death of appellant—Abatement of appeal—Revision.

The Code of Criminal Procedure gives no right to the heir, devisee, executor, or any other representative of a deceased convict, to lodge an appeal, or continue and prosecute an appeal already lodged.

(Kemball, J., diss.)—The appeal lodged by a convict abates on his death.

The High Court, nevertheless, may call for and examine the record of the case with a view to revision and rectification, and may make such order thereon as it may consider just.

THE accused Dongáji was convicted by S. H. Phillpotts, Session Judge of Puna, of forgery by altering a copy of a summons from the civil Court at Vadgám. On the 19th of November 1877 he was sentenced to four years' rigorous imprisonment, and to pay a fine of Rs. 1,000. On the 14th of January following, an appeal was lodged in his behalf in the High Court by his vakil. The High Court on the 30th January decided to hear the appeal, and notified to the Magistrate and Public Prosecutor of the Puna District that the appeal would be heard on or after the 14th of February 1878. On the 19th of February the superintendent of the Puna Jail reported that the convict Dongáji had died on the morning of that day.

On the 8th April, *Máhádev Chimnáji Apte* and *Vináyak Pandit* claimed to be heard in support of the appeal.

Nánábhái Haridás (Government Pleader) objected, and urged that the appeal abated on the convict's death.

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MELVILL, J.:—The proceedings in this case have been called for, with the view of hearing an appeal preferred by the convict against the finding and sentence of the Session Court of Puna. In the meantime the convict has died in jail.

The sentence included a fine of one thousand rupees; and as, under section 70 of the Penal Code, the estate of the deceased convict is still liable for the discharge of this fine, Mr. Vináyak Pandit asks that he may be heard against the conviction.

Mr. Vináyak holds a power of attorney from the deceased convict, but this power was terminated by the death of the principal. He offers to produce a *vakalatnámá* signed by the convict's representative; but it is clear that such representative has no *locus standi* in the case. In criminal cases, in which the sentence involves a fine or forfeiture of property, the representative of a deceased convict is, no doubt, interested in procuring a reversal of such sentence, and the Legislature might, if it had seen fit, have given to such representative the right of prosecuting an appeal. But it has not seen fit to do so. That right is given to the convict only; and, when he dies, no one can be heard in support of the appeal.

The question remains,—whether, after the death of the appellant, we ought, as an Appellate Court, to consider the propriety of the conviction and sentence, notwithstanding that there is no longer any person in existence who can prosecute the appeal. I think that we ought not. Section 280 of the Criminal Procedure Code says that "the Appellate Court, after perusing the proceedings of the lower Court, and after hearing the appellant, his counsel, or agent, if they appear, * * * may alter or reverse the finding and sentence or order of such Court, and may, if it see reason to do so, enhance any punishment that has been awarded, or order the appellant to be re-tried." It is manifest that, when the appellant is dead, we are unable to exercise most of the functions assigned by this section to a Court of Appeal. We cannot hear the appellant. We cannot enhance any sentence of imprisonment. We might enhance a fine; but, by so doing, we should only be punishing an innocent person, who has had no op-

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portunity of being heard. We cannot order the appellant to be re-tried. It being, therefore, impossible for us to deal with the appeal thoroughly, I do not think that we ought to "peruse the proceedings" for the purpose of forming an opinion on the facts, and on the chance that we may thereupon find some ground for interfering on behalf of the convict, or rather of his representative.

In a recent case the Chief Justice and myself did consider the proceedings in a criminal case after the death of the convict. But the proceedings in that case had been called for under section 297, and we were sitting as a Court of Revision. No person has any right to be heard before the High Court in the exercise of its powers of revision. The Court is not supposed to be acting on the application of the convict, but in the exercise of its power of supervision over subordinate Courts, and with a view to correcting their errors. I think that we should have power to interfere in the present case, as a Court of Revision, if we saw any error, in law, invalidating the conviction, or if the sentence were too severe for the offence which has been held by the Session Court to be proved. But I can see no error in law, nor is the sentence excessive, if the facts be as the Session Court has found them. We cannot, therefore, exercise our powers of revision; and, considering the case before us solely as an appeal, I am of opinion that the appeal abated on the death of the appellant, and that our functions as an Appellate Court ceased.

KEMBALL, J.:—I agree in thinking that the representatives of the deceased convict cannot prosecute this appeal. But I am unable to concur in the view that the appeal abated, and our functions as an Appellate Court ceased upon the death of the appellant.

The question is not without its difficulties; but my opinion is that, as the hearing of the appellant, his counsel, or agent, is not an indispensable condition to considering an appeal, and as every thing that was necessary to be done to enable us to hear this appeal was done before the death of the appellant, we are bound, having the record and proceedings before us, to dispose of the case on its merits.

Assuming that the law imposes no obstacle, I do not think the question of our ability to proceed, ought to be affected by the consideration that we are unable to exercise some of the discretionary powers vested in us as a Court of Appeal, or able to exercise others to the detriment of an innocent man unheard. It may or may not be to the interest of the representative to clear the memory of the deceased appellant; but, irrespective of that question, I think the balance of advantages to such representative is in favour of the appeal being considered. Supposing the fine not to have been paid at the time of his death, the property of a deceased convict is, as we know, answerable in the hands of his legal representative for such fine, provided that the period limited for its levy has not expired. And there is this further to be considered, that the Appellate Court, in consenting to call for the papers, has so far pronounced in the convict's favour.

It is an undoubted fact that a great number of appeals are disposed of by this Court without the appellants being heard in person or by counsel; probably because the appellants are in jail, and are too poor or too ignorant to employ counsel. No doubt the proviso as to appearance in section 280 of the Criminal Procedure Code applies to such cases; but whatever may have been the intention of the Legislature, it would also literally apply to the case now under consideration. I have no doubt that, as a Court of Revision, we could dispose of this case, but I think we are bound to decide it as a Court of Appeal.

[The learned Judges, having differed in opinion, as appears from the above minutes, the case was laid before the Honourable the Chief Justice under the provisions of section 271 of the Code of Criminal Procedure.]

WESTROPP, C. J. :—It is true that the fine, which is leviable out of moveable property only of the convict (Criminal Procedure Code, section 307, *Reg.* v. *Lálla Kárwar* [1],) continues to be so leviable after his death (Penal Code, section 70 [2]), and, therefore, his repre-

(1) 5 Bom. H. C. Rep. 63 Cr. Ca.

(2) In England the executor or administrator of the offender is bound to pay such a fine out of the assets come to his hands—2 Williams on Exrs. 1740, 7th edn.)

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sentatives or legatees, as the case may be, are, if the fine have been wrongfully imposed, injuriously affected after his death by the sentence which so imposed the fine, and have an interest in continuing the appeal which he had instituted in his life-time. There is not, however, so far as I can perceive, any authority given, either expressly or by direct implication, to them to continue such an appeal, or to bring a new appeal. The Criminal Procedure Code has not made any provision for the continuance of the appeal either by the heir, or devisee, or executor of the deceased convict, or by any other person. The High Court cannot itself assume the position of the appellant and conduct the appeal, and has not power conferred upon it to depute any other person to do so. It has been frequently held in England that an appeal lies only where it is given by statute, expressly or by inevitable implication, and in this respect differs from a *certiorari*, which is a common law right, and always lies, unless it be expressly taken away. (The cases are collected in 1 Burns' Justice, Titles 'Appeal,' p. 219, and '*Certiorari*,' p. 617, 30th edn.) Section 286 of the Criminal Procedure Code prohibits appeals in any case except those provided for by the Code itself, or by any law for the time being in force. The power of revision in the High Court is not, indeed, a common law right like the writ of *certiorari*, but it is given by sections 294, 297 of the Criminal Procedure Code (1872) in the widest terms, and is even more extensive than the proceedings by *certiorari* to which the Court of Queen's Bench resorts upon application only, whereas the High Court may and frequently does exercise its power of revision *ex mero motu*. Section 297 shows that the case may be either called for by the Court itself, or may be reported for orders, or brought to the knowledge of the Court in any way, so that, even though there may be no right in the next of kin, legatee, or other representative of the deceased convict to appeal or continue an appeal already lodged by the convict, such representatives are not without the means of attaining justice. They may bring their grievances to the knowledge of the Court, which will, if a *primâ facie* case for interference be shown, call for the record with a view to revision and rectification. In the case of an appeal the appellant has the carriage of the proceedings, but in the exercise of its revising power the High Court conducts the proceeding.

It is an important branch of its duty of supervision of the Courts subordinate to it. So in England "it is the undoubted prerogative of the Crown to see that all inferior jurisdictions are kept within their proper bounds, and on that principle the whole doctrine of *certiorari* proceeds,"(1) and, therefore, the Court of Queen's Bench, the medium through which the Crown exercises that prerogative, having a general superintendency over all Courts of inferior jurisdiction, may award a writ of *certiorari* to remove the proceedings from any of them, unless some particular statute or charter invests them with absolute judicature.(2) The circumstance that the jurisdiction under that writ is one of supervision and not of appeal, may account for the decision in *Reg.* v. *Roberts* (3) which is shortly reported thus:—"The defendant, being a bricklayer, was convicted for not building party walls according to the statute, and having brought a *certiorari* died before argument, notwithstanding which the Court would go on and affirm the conviction."(4)

If I am right in supposing that the determination of the Court of King's Bench in that case proceeded upon the principle of supervision, it is an *à fortiori* precedent for the High Court, which, in the exercise of its duty of superintendence, may and, perhaps, most frequently does act *ex mero motu*. I have not been able to find any instance of the Court allowing an appeal from a conviction or a writ of error in a criminal case to proceed where the appellant or plaintiff in error had died. I infer from this that the Court of Queen's Bench would regard the proceedings in such cases as having finally abated, and would, in a manner, apply to such proceedings the maxim which Courts do apply to civil actions, and more especially to such actions when in form *ex delicto*—"*actio personalis moritur cum personâ.*" I do not, however, know any criminal case in which the English Courts have expressly resorted to that maxim.

(1) *Per* Foster, J., in the case of the *King* v. *Berkley*, 1 Kenyon 81 at p. 103.

(2) 1 Burns' Justice of the Peace, tit. '*Certiorari*,' pp. 616, 617.

(3) 2 Strange's Rep. 937.

(4) See also *Rex* v. *The Justices of Yorkshire*, 9 Dow. and Ry. 204, which, however, being an application by two defendants, is not so much in point as *Rex* v. *Roberts*.

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My opinion is, that the appeal in the present case has abated, and cannot be permitted to proceed farther. I think that the High Court has, however, the right to call for the record, and make such order thereon as it may deem to be due to justice. I do not understand that my opinion is required by my brothers Melvill and Kemball on the question whether such a case has been made as to render it desirable that the record should be brought up.

April 29. PER CURIAM:—The appeal abates.

Order accordingly.

[ORIGINAL CIVIL.]

Before Sir M. R. Westropp, Knt., Chief Justice, and Sir Charles Sargent, Knt., Justice.

March 23.

CASSUM JOOMA' BY HIS CONSTITUTED ATTORNEYS KHIMA' DOLLA' & Co., TRADING UNDER THE NAME OF KHIMA' DOLLA', (PLAINTIFF) *v.* THUCKER LILA'DHUR KISSOWJEE (DEFENDANT).*

Splitting cause of action—Tradesman's account—Act IX. of 1850, *Section* 34—*Small Cause Court jurisdiction.*

A tradesman cannot, by keeping separate accounts of his dealings with a customer, split his cause of action so as to bring his suit within the jurisdiction of a Small Cause Court in the Presidency towns.

THIS was a case referred for the opinion of the High Court, under section 7 of Act XXVI. of 1864, by J. O'Leary, First Judge of the Court of Small Causes at Bombay.

The plaintiff sued to recover from the defendant the amount due on an adjusted account for goods sold and delivered. The adjustment was admitted, and also the fact that the obligation to pay, arising under it, had never been discharged. The defendant was indebted to the plaintiff on six different accounts, each of which had been separately adjusted. The accounts extended over the period between the month of July 1874 and February 1877, and the aggregate amount due, at the date of the last adjustment, was Rs. 4,540-8-3. Each of the accounts was kept in a separate book, and it appeared that payments had been made in respect of some

* Suit No. 12,398 of 1877.