ORIGINAL CIVIL.

Before Sir Charles Sargent, Knight, Chief Justice, and Mr. Justice Nánábhái Haridás.

RUSTOMJI BURJORJI (ORIGINAL PLAINTIFF), APPELLANT, *v.* KESSOWJI NA'IK AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

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April 18.

Practice—Appeal—Right to begin where respondent denies right to appeal—Order confirming report of Commissioner for taking accounts, no appeal from—Civil Procedure Code Act XIV of 1882, *Secs.* 3, 244—*Proceedings after decree, what are—Decree, execution of—Questions relating to execution, what are—Civil Procedure Code, Act VIII of* 1859—*Act XXIII of* 1861, *Sec.* 11—*Equity Rules Nos.* 371 *and* 456.

Where, an appeal having been filed, the respondent objected that no appeal lay, and by agreement of the parties the case was set down for the argument of this preliminary point, *held* that the appellant had the right to begin.

Clause 3 of section 3 of the Civil Procedure Code (XIV of 1882) provides that nothing in that Code shall apply to any proceedings after decree that had been commenced and were still pending on the 1st June, 1882. In case of any question connected with proceedings commenced prior to that date the applicability of the Code of 1882 depends on whether the new proceeding subsequent to that date, out of which the question has immediately arisen, is so intimately connected with the proceedings prior to that date as to be regarded as part of them.

A decree was passed in 1870 by which the suit was referred to the Commissioner to take accounts. On the 21st June, 1882, the Commissioner, in the course of taking the said accounts, issued a warrant ordering the defendants to show cause why they should not give inspection of certain books. *Held* that the question as to inspection was so intimately connected with the taking of the accounts that it should be regarded as part of the same proceedings, and as these had commenced and were still pending on the 1st June, 1882, the question whether the order refusing inspection was appealable or not, was (under section 3 of Act XIV of 1882) to be determined by the Civil Procedure Code (Act VIII) of 1859, and not by the Code of 1882.

Section 11 of Act XXIII of 1861 must be read as an amendment to the Civil Procedure Code (Act VIII) of 1859. That section is, in terms, confined to questions arising in the execution of decrees, which expression as used in the said Code means the enforcement of the decree on the application of one or other of the parties to it. *Held* that an order of a Judge confirming the report of the Commissioner for taking accounts, by which he refused to require the defendants to give inspection of certain books, was not an order within the contemplation of that section, and was, therefore, not appealable.

APPEAL by plaintiff against an order made by Scott, J., on 21st September, 1883, confirming the special report of the Commissioner for taking accounts.

*Suit No. 461 of 1869.

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The suit was brought by the plaintiff against the defendants' firm of Nursey Kessowji & Co. for an account in respect of certain purchases of tea alleged to have been made in China by the defendants' firm on account of the plaintiff, and the consignment of the same to England and its sale there. The defendants admitted the alleged transactions, and by a decree or order of reference dated 19th March, 1870, the suit was referred to the Commissioner's office in order that the account should be taken.

On the 21st June, 1882, the Commissioner at the plaintiff's instance issued a warrant ordering the defendants to show cause why they should not "produce and give full and general inspection of all books and papers in their possession, power and control, including the books and papers relating to the late firm of Peerbhoy Khaluckdina and Company in Bombay, and including all books and papers deposited in the office of the Commissioner, and why the seals placed on the books deposited in the office of the Commissioner should not be removed, so that the plaintiff may have full and general inspection of such books."

The Commissioner dismissed this warrant after hearing the parties.

Under Rule No. 456 of the Equity Rules the Commissioner at the plaintiff's request then made a special report to the Court, in order that the opinion of the Court might be taken upon the point. The plaintiff applied to vary the said report; but, after argument, Scott, J., on the 21st September, 1883, dismissed the plaintiff's application, and confirmed the Commissioner's report. The plaintiff appealed.

The defendants objected that no appeal lay from the decision of a Judge upon a report made by the Commissioner for taking accounts. It was agreed between the parties that this question should be decided before the appeal was heard.

The case now came on for argument on this preliminary point.

Hon. *F. L. Latham* (Advocate General) with *Inverarity* for appellant.

Jardine (with *Farran*) for respondents.

The point having arisen upon the respondents' objection that the appellant had no right of appeal, it was suggested that counsel for the respondents should begin.

Latham objected.—An appeal does not lie except it is specially given: so it rests upon the appellant to establish his right. The point does not appear to have been discussed, but the practice has been in these cases that appellant should begin—*Sonbái* v. *Ahmedbhái Habibhái*[1]; *Hirji Jina* v. *Náran Mulji*[2]; *Mithibái* v. *Limji Nowroji Banáji*[3].

SARGENT, C. J.—There seems to be an established practice that the counsel for appellant should begin.

Hon. *F. L. Latham* (Advocate General) for appellant.—The appellant has filed an appeal against the decision of Scott, J., confirming the Commissioner's special report made under Rule 456 of the Equity Rules. The only point now for argument is whether in such cases an appeal lies. We are met at the outset by the question, whether the present Civil Procedure Code (Act XIV of 1882) applies to this case. That question depends on the interpretation given to the word "proceedings" in clause 3 of section 3 of the Code (Act XIV of 1882). Does the word mean everything in the aggregate that takes place in the suit after the decree, or does it mean each separate step or incident in the subsequent proceedings? The decree in this suit was made in 1870, when the old Code (Act VIII of 1859) was in force; but the first step in the particular proceeding in which the present question arises, was the issue of the warrant on the 21st June, 1882, after the present Code came into operation. The High Court of Calcutta appears to have thought the word 'proceedings' should be taken in the latter sense distributively: see *per* Jackson, J., in *Runjit Singh* v. *Meherbán Koer*[4].

[SARGENT, C. J.—Each case must be taken by itself. No doubt there may be a new proceeding after decree, but is this one?]

I think it is, but I have cited the only authority I can find on the point. In the present case the question is not important, as the provisions of the present Code (Act XIV of 1882) are similar to

(1) 9 Bom. H. C. Rep., 398.
(2) 12 Bom. H. C. Rep., 129.
(3) I. L. R., 5 Bom., 45.
(4) I. L. R., 3 Calc., at p. 679.

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those of the Code of 1859 and section 11 of Act XXIII of 1861. Under the Code of 1859 it was held that the order to take accounts was a decree—*Hirji Jina* v. *Nárran Mulji*[1]. Whichever Code applies, the question is the same, *viz.*, is this a matter relating to the execution of the decree, and does it arise between the parties? See section 244 of Act XIV of 1882 and section 11 of Act XXIII of 1861. Section 3 of Act XIV of 1882 defines decree. What is execution? The word has a twofold meaning in the Code. First, it is applied to every step taken in carrying out a decree: see sections 259, 260, 261. Secondly, it is applied, in a narrower sense, merely to the arrest of person or the attachment of property under a decree. The wider meaning is the one to be adopted here. This liberal interpretation was given to the word in *Mithibái* v. *Limji Nowroji Banáji*[2]. The principle of that decision directly applies. This is a question whether inspection is to be full or limited. If this Court holds it cannot interfere at this stage, the case will go on to decree: there will be an appeal, and then the Court will consider the question of inspection, and may hold that the Court below was wrong in its decision upon the point, and the result will be that the whole case will have to begin again.

Equity Rules No. 371 and No. 456 both provide for matters being referred by the Commissioner to the Court—under the latter rule by a certificate and under the former by a special report. Possibly the difference between the two is that the latter is for the purpose of getting instructions as to how to proceed with the inquiry, while the former is a final report on some one branch of the inquiry. Counsel referred to the following cases in which appeals from the Commissioner had been actually heard and decided:—*Hirji Jina* v. *Nárran Mulji*[1]; *Rustomji Burjorji* v. *Kessowji Náik*[3]; *Mithibái* v. *Limji Nowroji Banáji*[2]; *Mithibái* v. *Limji Nowroji Banáji*[4]. In *Aben Sha* v. *Cássiráv Bába*[5] there is no report of the appeal, but in the statement of facts given in the report it is stated that there had been an appeal—

(1) 12 Bom. H. C. Rep., 129.
(2) I. L. R., 5 Bom., 45.
(3) I. L. R., 3 Bom., 161.
(4) I. L. R., 6 Bom., 151.
(5) I. L. R., 6 Bom., 260.

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Hanoomán Pershad v. *Ajoodhia Pershad*(1). There is one Calcutta case against me—*Sreenáth Roy* v. *Radhánáth Mookerjee*(2). In that case, however, the Judges appear in their observations to have overlooked the alteration in section 244 of the Code of 1877 which was effected by Act XII of 1879 and Act XIV of 1882.

Jardine, contra.—An appeal in this case does not lie. The warrant, out of which this question has arisen, simply asked for a general inspection of books and papers. That inspection was refused without prejudice to any application that might be made for a particular and limited inspection. This decision was affirmed by Scott, J. No doubt the non-admission of an appeal at this stage may cause inconvenience, but the same might be said of the refusal to permit an appeal against many other interlocutory orders in a suit. The question simply is, does the Code permit such an appeal?

As to the Code applicable to this case, I submit that this is merely an incident in proceedings that were begun before the new Code came into force, and, therefore, (see section 3) the old Code (Act VIII of 1859) applies. The principal case under that Code is *Hirji Jina* v. *Náran Mulji*(3). It is in our favour: for, although there an appeal was admitted, yet the judgments show that, if it had been merely upon a question of inspection, it would not have been allowed. See also *Sonbái* v. *Ahmedbhái Habibhái*(4). This last case is referred to in *Hirji Jina* v. *Náran Mulji*(3). Westropp, C. J., says of it: "the order sought to be appealed against, was one made in chamber for the *production of books—a mere matter of procedure, not a question as to the rights of the parties.*" That is precisely the present case.

But are the proceedings in the Commissioner's office proceedings in execution of the decree? Is the present question a "question relating to execution"? If so, there is an appeal both under Act XXIII of 1861 and Act XIV of 1882. I submit not. The cases I have cited are authorities to that effect; for, if in those cases the Judges had considered the question before them to have related to execution, they would at once have admitted

(1) 10 W. R. (F.B.) 5.
(2) I. L. R., 9 Calc., 773.
(3) 12 Bom. H. C. Rep., 129.
(4) 9 Bom. H. C. Rep., 398.

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the appeals on that ground, and would not have discussed the points considered in their judgments. It is *assumed* in those cases that taking accounts in the Commissioner's office is not "a proceeding in execution". In this case of *Rustomji Burjorji* v. *Kessowji Náik*[1] also the point was pertinent, but it was not discussed. The only authority in favour of an appeal is *Mithibái* v. *Limji Nowroji Banáji*[2]. There, however, the receiver had been appointed by the decree itself: so the matter clearly "related to the execution of" the decree. Here the decree does not direct inspection. There is no complaint that the Commissioner was not doing as he was ordered by the decree. It is his refusal to do something outside the decree altogether that is complained of. In the Civil Procedure Code the heading to Chapter XIX is "Execution of Decrees". But the reference to the Commissioner is made under section 394, which is not comprised in that chapter, but in Chapter XXV and in Part II, which is headed "Of Incidental Proceedings". It is clear the Legislature did not regard the taking of accounts as a proceeding in execution.

Again, section 540 of the Code gives the right to appeal from a decree. Section 2 defines decree. An order determining *any question referred to in section 244* is a decree within that definition, and there is an appeal from it. But section 2 does not say that an order upon *any question arising in execution* is a decree. It must be an order on a question referred to in section 244. But here the question arises under section 394, under which the case was sent to the Commissioner. Section 244 refers only to final decrees, and not to decrees directing accounts. If so, then this decree does not come within section 2, and is not appealable. Section 244 is comprised in Chapter XIX of the Code, and in all the sections in that chapter the execution referred to is the final process of execution. Garth, C. J., takes this view in *Sreenáth Roy* v. *Radhánáth Mookerjee*[3]. The words "discharge or satisfaction" in clause 3 of section 244 were added to the Code of 1877 by Act XII of 1879. These words could only refer to a final decree. Section 649 by its reference to Chapter XIX seems to

(1) I. L. R., 3 Bom., 161. (2) I. L. R., 5 Bom., 45.
(3) I. L. R., 9 Calc., 773.

indicate that execution is to be taken in its limited sense. If this be a question arising in execution, all the decisions of the Commissioner would be decrees under section 2.

Again, section 588 of the Code does not give an appeal against an order relating to inspection made under section 130. The Legislature, therefore, did not consider that orders on such matters should be appealable. The proceedings in the Commissioner's office are simply a continuation of the suit. It would be anomalous if an order, by the Commissioner, refusing inspection at a later stage of the suit should be appealable, while a similar refusal made at an earlier stage should not be appealable.

SARGENT, C. J.—In this case a decree was made referring it to the Commissioner to take an acccunt of certain dealings in tea between the parties. In the course of taking that account, which had commenced before the Civil Procedure Code of 1877 came into force, the Commissioner, at the instance of the plaintiff, issued a warrant, dated the 21st June, 1882, ordering the defendants to show cause why they should not produce and give full and general inspection of all books and papers in their possession. The Commissioner dismissed this warrant after hearing the parties without prejudice to the plaintiff's right to apply, under section 130 of the Civil Procedure Code, for the production of such particular accounts as they might show to be relevant to the matters in dispute. At the request of the plaintiff the Commissioner made a special report under section 456 of the Equity Rules of this Court which was confirmed by Mr. Justice Scott on 21st September, 1883.

The question we have to determine is, whether an appeal lies from that order, and here at the outset it becomes necessary to decide whether its solution is to be sought in the provisions of the Code of 1859 as amended by Act XXIII of 1861, or of the present Code. This, by section 3 of the latter Code, is made to depend on whether the order sought to be appealed from, was made in a proceeding which was pending on 1st June, 1882. The general question as to the proper construction of similar language in section 6 of Act I of 1868 is discussed by Mr. Justice West with much philosophical acumen in *Chinto Joshi* v. *Krishnáji*

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Náráyan[1], and he concludes by applying a test, which commends itself to us as the only practical one, *viz.*, whether the new proceeding subsequent to the date in question is so intimately connected with the proceedings prior to that date as to be regarded as part of them. In the present case the taking of the accounts, which was a proceeding after the decree referring the suit to the Commissioner, commenced when the Code of 1859 was still in force, and has continued up to the present time. The question as to the production of documents has arisen in the course of taking those accounts, and has given rise, according to the practice in the Commissioner's office, to the reference of the point in dispute to the Court upon which the order now under consideration in question was made. The proceedings in the reference are, therefore, intimately connected with the taking of the accounts which, in our opinion, must be regarded as one continuous proceeding, and the question, whether this order is appealable, must, therefore, we think, be determined by the procedure laid down by the Code of 1859.

In *Hirji Jina* v. *Narran Mulji*[2], which was a case governed by the Act of 1859, an order, which had been made on a certificate given under Rule 371 of the Equity Rules in the course of taking accounts by the Commissioner, was held to be appealable on the ground that such an order was a decree. The question raised by the reference was as to the power of the plaintiff to show that the defendant's payments had been made in respect of the matters other than those included in the account intended to be taken. Such an order was regarded as affecting the rights of the parties, and equivalent to a decree. Such, however, could not, we think, be deemed to be the character of the present order, which determines a mere question of procedure, however important it may be in its results.

But it was said that if the order was not a decree, it was, at any rate, an order made on a question relating to the execution of the decree referring it to the Commissioner to take the accounts, and appealable under section 11 of Act XXIII of 1861. It appears from the judgment of Westropp, C. J., in

(1) I. L. R., 3 Bom., 214. (2) 12 Bom. H. C. Rep., 129.

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Hirji Jina v. *Náran Mulji*[1] to have been almost assumed—although upon what ground it is not stated—that the above section had no application to an order made under the Equity Rules in the course of taking accounts. That section—read, as it must be, as an amendment to the Civil Procedure Code of 1859—is, in terms, confined to questions arising on the execution of decrees, *i. e.*—as that expression is used in the above Code—to questions arising in the enforcement of the decree on the application of one or other of the parties to it. The present order made on the application of the Commissioner under the old equity practice of the Supreme Court, introduced into the procedure of this Court by virtue of its power of making rules not inconsistent with the Civil Procedure Code, and asking for the instructions of the Court in carrying out its orders, cannot, in our opinion, be regarded as an order within the contemplation of that section. We must, therefore, hold that no appeal lies from the order in question. Appellant must pay respondent his costs.

Attorneys for the appellant.—Messrs. *Ardesir and Hormasji.*

Attorneys for respondent.—Messrs. *Hore, Conroy and Brown.*

(1) 12 Bom. H. C. Rep., 129.

REVISIONAL CRIMINAL.

Before Mr. Justice West and Mr. Justice Nánábhái Haridás.

QUEEN EMPRESS *v.* GOVINDA PUNJA.* *January* 31.

Mischief—Destruction of carcass—Right to skin of animals—Village Máhárs—Custom.

The owner of an animal who buries it after its death is not guilty of mischief or any other offence, although he does so with the express object of preventing the Máhárs of his village from taking its skin according to the custom of the country.

THIS was an application for the exercise of the High Court's revisional jurisdiction and for the reversal of the sentence passed on the accused by C. E. Frost, Magistrate (First Class) at Násik.

*Criminal Application, No. 285 of 1883.