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mises may put the one out as well as the other into possession without any actual physical departure or formal entry, and effect is to be given, as far as possible, to the purpose of an owner, whose intention to transfer has been unequivocally manifested.

On the subject of the alleged illness of the donor Sultán as affecting the validity of the donation, reference may be made to *Muhammad Gulshere* v. *Mariam Begam*(1). The appreciation of the evidence on this subject is a matter for the lower Courts, as is also the effect of the testimony as to Sultán's handing over the *sanad*, title-deed, and receipt book to Ibhrám when he gave or attempted to give him the house at Sátára and the other property in dispute.

We reverse the decree of the District Court, and remand the cause for re-trial and a fresh adjudication with reference to the foregoing observations. Costs to follow the final decision.

Decree reversed and case remanded.

(1) I. L. R., 3 All., 731.

APPELLATE CIVIL.

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

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September 15.

RA'JA'RA'M BHAGWAT, APPLICANT, *v.* JIBA'I, WIDOW OF KHA'N MAHOMED, DECEASED, OPPONENT.*

Practice—Procedure—Parties—Civil Procedure Code (Act XIV of 1882*), Secs.* 368, 369 *and* 372*—Death of a respondent pending appeal—Right of assignee of his interest to be substituted in his place.*

At an auction sale held in execution of a decree passed against one Ganpat Anandráv, certain property put up for sale was purchased by one Khán Mahomed, the husband of the opponent.

Subsequently Krishnaráv Anandráv, the brother of Ganpat Anandráv, brought a suit against the opponent to establish his right to the property purchased by the opponent's husband. On the 17th February, 1882, he obtained a decree declaring that he (Krishnaráv Anandráv) was entitled to a half share of the property in dispute, and an order was made that he should have joint possession with the opponent of one moiety of the property.

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On the termination of the above suit, which had been brought by Krishnaráv in *formâ pauperis*, he was required to pay the court-fees. For that purpose he procured an advance of Rs. 290 from the applicant on the security of the moiety of the property which was awarded to him by the decree. He passed a deed of sale to the applicant on the understanding that the property should be reconveyed to him by the applicant on the repayment of the advance with interest. In the meantime cross appeals were filed against the above-mentioned decree passed in favour of Krishnaráv, and at the hearing of the appeal the lower Appellate Court varied the decree of the Subordinate Judge, holding that Krishnaráv Anandráv was entitled to the possession of the property as sought for. From this decree the opponent preferred a second appeal to the High Court, which, at the time of this application, was still pending.

Before the hearing of the appeal, *Krishnaráv Anandráv died*, and the applicant thereupon applied to have his name placed on the record as respondent.

Held, that the applicant was entitled to be made a party. The analogy of section 368 is to be extended generally to appeals, and the party appealing may choose his own respondent as representative of deceased. The more specific rule prescribed in that section must prevail, in the cases to which it is exactly applicable, over the more general rule in section 372. But the rule in section 368 may well be intended for the case in which the death, and death only, of the defendant constitutes the change of circumstances for which it was thought necessary to provide; but where there has been, not only the death of the respondent, but an alleged prior conveyance to him of the property awarded by the decree appealed against, there is a fact in addition to the fact contemplated by section 368 and the rule in section 372, being alone sufficiently inclusive, must apply.

An appellant may determine who shall be respondent, but not that any particular person shall not be a respondent. The choice of respondents made by the appellant may be defective through ignorance or fraud, and the real representative of the decree-holder cannot justly be refused an opportunity of maintaining the decision which it is sought to upset.

AT an auction sale held in execution of a decree passed against one Ganpat Anandráv, certain property put up for sale was purchased by one Khán Mahomed, the husband of the opponent.

Subsequently Krishnaráv Anandráv, the brother of Ganpat Anandráv, brought a suit against the opponent to establish his right to the property purchased by the opponent's husband. On the 17th February, 1882, he obtained a decree declaring that he (Krishnaráv Anandráv) was entitled to a half share of the property in dispute, and an order was made that he should have joint possession with the opponent of one moiety of the property.

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court-fees, and for that purpose he obtained from the Subordinate Judge at Thána authority to sell or mortgage his moiety. He accordingly procured an advance of Rs. 81 from the applicant, and executed a deed of sale of the property to him on the 1st January, 1883, on the understanding that the applicant should reconvey the property on being repaid the advance with interest. Subsequently, the applicant advanced to Krishnaráv several further sums, making in the aggregate Rs. 290, on the security of the property.

In the meantime cross appeals were filed against the above-mentioned decree passed in favour of Krishnaráv, and at the hearing of the appeal the lower Appellate Court varied the decree of the Subordinate Judge, holding that Krishnaráv Anandráv was entitled to the possession of the property as sought for. From this decree the opponent preferred a second appeal to the High Court, which at the time of this application was still pending.

Krishnaráv Anandráv died suddenly in the month of April without making a will.

The applicant as transferee for valuable consideration, under the circumstances above stated, of the interest of Krishnaráv Anandráv now applied that his name might be placed on the record instead of the name of Krishnaráv Anandráv, deceased.

A notice to the opponent was issued under section 372 of the Civil Procedure Code, calling upon her to show cause why the name of the applicant should not be substituted in the place of Krishnaráv Anandráv as party to the pending appeal.

Shántárám Náráyan showed cause.—An assignee from a deceased plaintiff cannot insist in appeal, on being made a respondent—*Moreshwar Bápuji* v. *Kushába Shankroji*[1]. Sections 365, 369, 370 and 371 of the Civil Procedure Code refer to the cases of death, marriage, or insolvency of the parties to a suit. Section 368 makes a specific provision for the death of a defendant. No provision has been made for the case of the death of a respondent. Section 372 does not contemplate such a case as the present. The High Court has no power to deal

(1) I. L. R., 2 Bom., 248.

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with the present case, either under the Civil Procedure Code or the Probate Act. It is the right of the appellant to bring forward the representatives of a deceased respondent. No stranger can claim to come in as respondent. It is the free choice of the appellant to bring forward as respondent whomsoever he chooses—*Lakshmibái* v. *Bálkrishna*(1).

Pándurang Balibhadra for the applicant.—Under section 372 of the Code an assignee has a right to come in during the lifetime of the assignor, as well as after the death of the assignor. He can claim to come in even against the wish of the assignor. Section 372 does contemplate a case like the present one—*Benode Mohini* v. *Sharat Chunder Dey*(2). The circumstances in the cases cited by the opposite party were different from those in the present case, and therefore they do not apply.

WEST, J.—This is an application by Rájúrám Rámkrishna, praying that his name may be substituted for that of Krishnaráv Anandráv, deceased, as respondent in Second Appeal No. 445 of 1883.

Section 372 of the Code of Civil Procedure provides that "in other cases of assignment, creation and devolution of any interest pending the suit, the suit may" on terms be continued; but it has been contended that, where the respondent has died, the provision for the case of the death of a defendant in section 368 prevents the application of section 372 to the case. No doubt, as said in *Lakshmibái* v. *Bálkrishna*(1), the analogy of section 368 is to be extended generally to appeals, and the party appealing may choose his own respondent as representative of one deceased. The more specific rule prescribed in section 368 must, therefore, prevail in the cases to which it is exactly applicable over what from that point of view is the more general or residual rule in section 372. But then the rule in section 368 may well be intended for the case in which the death, and the death only, of the defendant constitutes the change of circumstances for which it was thought necessary to provide; while in the case before us there has not only been a death of the respondent, but an alleged prior con-

(1) I. L. R., 4 Bom., 654. (2) I. L. R., 8 Calc., 837.

veyance by him to the present applicant of the house and land awarded to the respondent by the decree now appealed against. The case being one of an assignment or creation of an interest pending the appeal *plus* the death of the assignor, is one embracing a fact more than that contemplated by section 368. The rule in section 372, on the other hand, must be admitted to apply to it; and being alone sufficiently inclusive, if not the more specific, as dealing with "other cases" than the ones previously provided for, must prevail over those rules. The double event of a transfer of the decree-holder's title and of his death was probably not distinctly conceived by the draftsman of the Code: but we can give effect to the apparent intention, not only in a literal application of the words to the cases exactly provided for, but also by a logical extension of them to the composite cases involving circumstances that fall separately under distinct rules, and yet must have been meant to be dealt with in a consistent and uniform manner.

Generally it is the plaintiff who is *dominus litis* in a suit. It is he who chooses his form of complaint, and the persons whom he desires to make responsible. Accordingly, sections 368, 369 are so worded as to show that the Legislature looked on the plaintiff as the person to take the requisite steps for continuing the suit against those who had newly become responsible. In an appeal the same reasons would apply, but not without some qualifications. An appellant may determine who shall be a respondent; but not that any particular person shall not be a respondent. The choice of respondents made by the appellant may be erroneous or defective through ignorance or fraud, and the real representative of the decree-holder cannot justly be refused an opportunity of maintaining the decision which it is sought to upset. It is true, no doubt, that the decree of the Appellate Court cannot directly affect this real representative who has not been made a respondent, but still he may be embarrassed and put to expense in asserting the right which he could easily and cheaply defend, in the appeal. A reversal of the judgment in favour of his assignor, through the connivance of the assignor's sons as respondents, will obviously in many cases put him into a much less advantageous position than if he were a respondent himself. It is

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reasonable to suppose that the person to whom a decree-holder's estate has come by assignment should not have been prevented from defending the decree notwithstanding the indifference or the hostility of the decree-holder himself, and if this is so, it seems equally reasonable that he should have the same opportunity after the decree-holder's death. He ought not, it seems, to be shut out from it by the defeated party as appellant choosing as respondents, persons, who, in consequence of the assignment, have no longer any substantial interest in the object of the litigation.

Under the Code of 1859 it was ruled that a defeated litigant could not transfer to a stranger a right to appeal which could be exercised notwithstanding the assignor's death, but the litigant to whom property has been awarded, stands on quite a different footing from one whose claim has been rejected. Ownership is generally transferable; while the right to sue a third party, or to challenge an adjudication in his favour, can become transferable only by express provisions of the law, growing naturally more liberal as the Courts grow more capable of preventing abuses. Thus the recognition of an accessory right to defend a property taken by transfer against attack might well consist with a denial of a transferable quality in the mere right to challenge an unfavourable judgment. The new Code of Civil Procedure, however, is plainly meant to be more indulgent—or at least more distinctly indulgent—to the passing of contentious capacities along with the ownership than was its predecessor of 1859. It seems that, subject to the control of the Court, the successors to litigated rights or acquirers of interests in them were intended in all ordinary cases to be at liberty to carry on an existing suit or appeal rather than to be reduced to the necessity of engaging in a new one. The rules under the English Judicature Act, Order L (now reproduced as Order XVII in the edition of 1883) were before the Indian Legislature when it framed the new Codes of 1877, 1882. These provide that in any "case of assignment, creation or devolution of an estate or title *pendente lite*, the cause or matter may be continued by or against the person to or upon whom such estate or title has come or devolved." No leave of the Court is required. The difference in the Code is that this leave

is required except in the cases as of death, marriage, and insolvency specifically provided for. It is plainly intended that the leave which the Court may give, it should give in the proper cases, and that seems to us to be a proper case in which there has been a transfer of the property adjudged to a plaintiff, and an appeal may be pending against the adjudication which, not the formerly successful litigant, but his transferee is really interested in upholding. The decree-holder in the present case has died, and the appellant may, no doubt, make his sons respondents under section 368 of the Code, but by doing this he cannot preclude the purchaser from defending the estate he has bought. It is one of the "other cases" contemplated in section 372; and as the purchaser might be made a respondent in addition to his vendor, so we think he may be made a respondent in addition to the general representatives,—that is, the sons of the vendor,—should the appellant prefer this to the substitution of the purchaser for the sons. The sons may have or may set up a right as such which will equally entitle them, even against the will of the appellant, to be made respondents, but if the appeal can be honestly resisted, both they and the applicant have a common interest in resisting it, and may resist it in common without injustice to the appellant—see *Bower* v. *Hartley* [1]; *The Swansea S. Co. Ld.* v. *Duncan Fox and Co.*[2]

We give leave to the applicant, therefore, as purchaser by a registered conveyance of the house in dispute from the plaintiff, to whom it had been awarded, to be made a respondent in the appeal filed against the judgment which awarded it to his vendor.

Costs of this application to be borne by the opponent (appellant).

(1) L. R., 1 Q. B. D., 652. (2) *Ib.*, 644.