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In the first place, it is not clear that any trust property was left to be administered after the debts were paid; and until that is ascertained, I doubt if any question, beyond one of mere account, can be raised. In the second place, no breach of trust is alleged on the pleadings, and no order could be made in the suit as it stands, charging any default against the trustee. It thus becomes, not a suit for the purpose of recovering trust property, but only a suit for an account against an executor or his representative. Such a suit, Mr. Starling argues, comes within section 120 of the second schedule, and is barred in six years.

The six years have already elapsed, and to admit the suit now would be tantamount to a suspension of the operation of section 120 while the Commissioner ascertains by an account, (1) whether there was any trust money, and (2) whether there was any breach of trust sufficient to charge the estate of the deceased executor. Section 10 could hardly have been intended to cover such a suit.

I hold, therefore, that section 10 does not apply. That being so, section 120 of the second schedule becomes applicable; and as Pestonji died in 1876, and this suit was instituted in 1884, this suit is barred.

The suit must be dismissed with costs, including costs of *de bene* issue.

*Suit dismissed.*

## ORIGINAL CIVIL.

*Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Scott.*

1886. *March 26.*

DEVKA'BA'I, (ORIGINAL PLAINTIFF), APPELLANT, *v.* JEFFERSON, BHA'I-SHANKAR AND DINSHA', RESPONDENTS.*

*Costs—Next friend—Administration suit—Unnecessary suit—Liability of next friend for costs—Adoption of suit by plaintiff—Costs of solicitor of next friend where suit unnecessary—Solicitor's lien on estate recovered or preserved by suit—Preservation of estate from future risk—Appointment of receiver—Insane executrix.*

The plaintiff, who was a minor, sued by her next friend (her husband) for the administration of her father, Purshotam Rámji. The defendants in the suit were the plaintiff's mother, Náubái, who was the widow and executrix of Purshotam

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Rámji, and one Burjorji, who had been appointed by Nánbái to act for her during her absence on pilgrimage. The plaint alleged that Nánbái was insane and unfit to manage the estate, and that Burjorji was mismanaging and wasting it. A receiver was appointed shortly after the filing of the suit. At the hearing the suit was dismissed as against Burjorji, and the Court ordered that his costs should be paid by the plaintiff's next friend, being of opinion that he was the real actor in the suit, and that it would be unfair to make the plaintiff's estate bear the costs of proceedings in which she had no real voice. The Court was further of opinion that at the time the suit was filed, Nánbái was not of unsound mind, but that she had subsequently become insane. The usual accounts were ordered to be taken as against Nánbái. The result of taking these accounts was that her administration of the estate as executrix was found to be unimpeachable, and in December, 1883, the Court made an order directing that the next friend should pay the costs of the infant plaintiff. The next friend became insolvent, and his solicitors (the respondents) obtained an order from the Judge in chambers that the receiver should pay their costs out of the estate in his hands. The plaintiff appealed. The respondents contended that the plaintiff had adopted the suit, and that they had a lien for their costs—at any rate so far as they were incurred for the recovery and preservation of the estate.

*Held*, that the respondents were not entitled to be paid out of the estate. The plaintiff had done no overt act signifying her adoption of the suit, and the fact that she remained passive was consistent with her disapproval of it, as the decree did not immediately affect her, or require her to take action until the death of her mother Nánbái.

*Held*, also, that the property in the hands of the receiver could not be held to have been recovered by means of the suit, as it appeared that the investments were of a perfectly legitimate nature; that there was no cause for alarm with respect to the safety of the property, and that the suit, so far as it was based on alleged danger to the estate, was quite uncalled for.

It was argued for the respondents that the appointment of a receiver preserved the estate from future risk arising from the fact that the executrix Nánbai was of unsound mind.

*Held*, that the mere fact that the appointment of a receiver would preserve the estate from a possible danger in the future, could not bring the case within the ordinary rule as to solicitor's lien.

APPEAL against an order made in chambers by Bayley, J., on the 7th May, 1885, directing that the costs of the respondents, who were the solicitors to the next friend of the plaintiff, should, when taxed, be paid by the receiver out of the plaintiff's estate.

The suit was filed in August, 1880, by the plaintiff, Devkábái, a minor, by her next friend and husband, Mávji Sivji, for the administration of the estate of her father, Purshotam Rámji, who

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died in January, 1877. The respondents, Messrs. Jefferson, Bhái-shankar and Dinshá, were the plaintiff's solicitors. The defendants in the suit were the plaintiff's mother, Nánbái, who was executrix of Purshotam Rámji's will, and one Burjorji Pallonji. The plaint alleged that Nánbái was of unsound mind and unfit to administer the estate; that she had gone on a pilgrimage and had appointed the second defendant, Burjorji, to act for her during her absence; that he had, accordingly, taken possession of the property, and was mismanaging and wasting it. The plaint prayed for administration by the Court with the usual accounts and inquiries and for an injunction and receiver. A receiver was appointed shortly after the filing of the suit.

The suit came on for hearing before West, J. He was of opinion that Nánbái was of sound mind at the date of the filing of the suit, but had since become insane. He dismissed the suit, as to the second defendant, with costs to be paid by the next friend, Mávji; and as to Nánbái, he directed certain accounts to be taken. He made the following order as to costs:—

"Mávji Sivji brought the suit, not upon any well-considered or reasonable supposition of advantage to the nominal plaintiff, Devkábái; she was made a mere stalking horse by him,—prompted probably, as regards Burjorji, by other members of the family. Nánbái no doubt at first supported Mávji, or those who were about her did so, but the rule *nisi* was granted on Mávji's motion, and the expenses were not necessarily and materially added to by Nánbái's course through all that time, no doubt, hostile to Burjorji. It seems probable at this time and till she became insane she was under the influence of her relatives, and eventually on the 4th July, 1881, she filed a written statement, submitting to the account, and not alleging misconduct against Burjorji.

"As she said what she thought essential it is to be taken that she did not charge Burjorji, and his costs were caused by the conduct of Mávji. It would be unfair to make the estate of the helpless Devkábái to bear the costs of proceedings in which she had no real voice; and albeit Mávji may be insolvent, I must give Burjorji his costs against Mávji alone: so also those of

Nánbái subsequent to the first day of hearing. The costs of that day will depend on the account which I direct to be taken."

The usual accounts were ordered to be taken as against Nánbái. Her accounts as executrix were found to be in perfect order, and in December, 1883, the Court made an order directing that the next friend should pay the costs of the infant plaintiff.

The next friend having become insolvent, his solicitors, the respondents, sought to recover costs from the plaintiff's estate, and on the 7th May, 1885, obtained an order that the receiver appointed in the suit should pay them their costs when ascertained by the taxing officer. From that order the plaintiff appealed.

*Lang* and *Jardine* for the appellant:—No property has been recovered or preserved by this suit. West, J., thought the suit unnecessary—*Baile* v. *Baile*[1].

*Macpherson* for the respondents:—The property has been preserved by the appointment of a receiver. Nánbái, the executrix, is insane. Nánbái not having disavowed the suit must be taken to have adopted it—Civil Procedure Code (XIV of 1882), secs. 450 and 452; *Baile* v. *Baile*[1]; Daniell's Chancery Practice, Vol. II, pp. 1985, 1987.

SARGENT, C.J.:—This is an appeal against an order made in chambers by Mr. Justice Bayley whereby he referred it to the taxing officer to ascertain the costs which had been properly incurred by Messrs. Jefferson, Bháishankar and Dinshá in Suit No. 375 of 1880 for the preservation of the property, the subject-matter of the suit; and directed that the receiver appointed in the suit should pay out of the moneys in his hands the amount of such costs and also the costs of the said Messrs. Jefferson, Bháishankar and Dinshá and of the plaintiff, of and incidental to the summons upon which the order was made.

Suit No. 375 of 1880, referred to in the order, was filed by the plaintiff, Devkábái, a minor, daughter of one Purshotam Rámji, who died in 1877, by her next friend and husband, Thaker Mávji Sivji, against Nánbái, the widow of Purshotam Rámji and executrix appointed by his will, who had obtained probate, and

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also against one Burjorji Pallonji, alleging that, previously to her husband's death, Nánbái was of weak intellect, and that since his death she had become much worse, and was at the date of the suit of unsound mind and quite unfit to administer the estate; that, soon after obtaining probate, Nánbái went on a pilgrimage, and before doing so had executed a power of attorney authorizing the second defendant, Burjorji Pallonji, to act for her in the management of the estate during her absence; that the second defendant, Burjorji, accordingly took possession of the estate and grossly mismanaged it, and that there was great danger of the estate being wasted and made away with. The plaint prayed (1) for the administration of the estate by this Court, with the usual accounts and inquiries; (2) that the defendants should account for their mismanagement and account for losses; (3) for an injunction and the appointment of a receiver.

The suit came on for hearing before Mr. Justice West in 1881. In his judgment that learned Judge expressed an opinion that, at the time the suit was filed, Nanbái was not of unsound mind, but admitted that she had since become so. He further held that no case whatever of mismanagement had been proved against the second defendant; and as against him he dismissed the suit, and ordered that his costs should be paid by the plaintiff's next friend, who he considered was the real actor in the suit, the plaintiff having no real voice in the matter. As against Nánbái in her character of executrix an ordinary administration decree was passed, directing the usual administration accounts to be taken. The result of taking those accounts was that Nánbái's administration of the estate was found to be in perfect order; and in December, 1883, West, J., ordered that the next friend should pay the costs of the infant plaintiff, by which must have been meant that he should not have his costs out of the estate of the testator. The next friend having become insolvent, Messrs. Jefferson, Bháishankar and Dinshá now seek to have their costs paid out of moneys in the hands of the receiver appointed in the suit, on the ground that they have a lien on that fund for their costs, or at any rate so far as they were incurred for the recovery or preservation of the fund. It was

also urged that the appointment of a receiver, owing to Nánbái's having gone out of her mind, was beneficial to the estate, and entitled them to have their costs out of the estate.

It is to be borne in mind that the solicitor's lien in the High Courts of India is governed exclusively by the law as it existed in English Courts before the passing of 23 and 24 Vic., cap. 127, by which that lien was very much extended. By that law the solicitor had a lien for his costs on any funds or sum of money recovered for, or which became payable to, his client in the suit—see Morgan on Costs. It was contended that Messrs. Jefferson, Bháishankar and Dinshá must be deemed to have been employed by the infant Devkábái, because she had adopted the suit. But it was admitted that Devkábái had done no overt act, as was the case in *Baile* v. *Baile*[1], signifying adoption; and that it was only to be inferred from her remaining perfectly passive. Her maintaining that attitude, however, was quite as consistent with her disapproval of the suit; as the decree in no way immediately affected her, or required her to take action of any sort until the death of her mother. But, in any case, the fund in the hands of the receiver cannot, in our opinion, be held to have been recovered by means of the suit, as it clearly results both from the proceedings in the suit and the judgment of the learned Judge who tried the case, that the investments were of a perfectly legitimate nature and gave rise to no alarm whatever for the safety of the funds, as was indeed shown by the facility with which they were got in by the receiver; and that the suit, so far as it was based upon alleged danger to the estate, was quite uncalled for.

But it was said that the suit, regarded as a simple administration suit, and the appointment of a receiver in the suit preserved the fund in Court from future risk arising from Nánbái's unsoundness of mind. This is an argument which undoubtedly might have been, and, for aught we know, was, addressed to the Judge who tried the case, and who might, if he had thought it right to do so, have directed that the next friend should have

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his costs incidental to the suit, as an administration suit, out of the estate, but who as a matter of fact directed that he should pay all the minor's costs, *i.e.*, the costs incurred by himself as next friend, out of his own packet. But the mere fact, that the appointment of a receiver in the suit would preserve the fund now in Court from a possible danger in the future, cannot certainly bring it within the ordinary rule as to the solicitor's lien, even if it could, which we much doubt, by the existence of the word "preserved" which is introduced into the English Act 23 and 24 Vic., cap. 127. In *Baile* v. *Baile*(1), where the lien was allowed, the rents due to the estate were considered to be in actual danger of being lost when the suit was brought. In *Pinkerton* v. *Easton*(2) it was held that, as the administration suit had resulted in nothing, the solicitor was not entitled to a lien.

We must, therefore, discharge the order with costs on Messrs. Jefferson, Bháishankar and Dinshá throughout.

*Order reversed.*

(1) L. R., 13 Eq., 497. (2) L. R., 16 Eq., 490.

## REVISIONAL CRIMINAL.

*Before Mr. Justice Birdwood and Mr. Justice Jardine.*

1885. *December* 10.

QUEEN-EMPRESS *v.* PIR MAHOMED. *

*Indian Penal Code (Act XLV of* 1860), *Secs.* 71, 193, 211—*Concurrent sentences—Criminal Procedure Code (Act X of* 1882), *Sec.* 35—*Enhancement of sentence.*

Where the accused, who was a head constable, was found guilty of making a false charge under section 211, and of giving false evidence under section 193 of the Indian Penal Code (XLV of 1860), and the Sessions Judge passed sentences of three months' simple imprisonment for each offence, and, taking into consideration the accused's past conduct, directed that the sentences should run concurrently,

*Held*, that the sentences were inadequate and illegal.

Accordingly, the sentences were enhanced to three months' rigorous imprisonment for each offence; and as the two offences were distinct, the High Court directed, under section 35 of the Criminal Procedure Code (X of 1882), one sentence to commence after the expiration of the other.

*Queen* v. *Abdool Azeez*(1) followed.

* No. 188 of 1885.

(1) 7 Calc. W. R. Cr. Rul., 59.