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clear that if it does not fall under section 9, it must fall under section 12. In either case the Act is sufficient to relieve the *tálukdári* estate, which is the only point in question at this moment.

The result is, that their Lordships think that the High Court ought to have reversed the decree below, and to have dismissed the suit with costs, and they will humbly advise Her Majesty to make that decree. The respondent must pay the costs of this appeal.

Their Lordships are sorry to find that this record contains what they so often observe upon, namely, an enormous mass of matter which could not by any possibility be of use upon this appeal. They would wish to call the attention of the Courts in India again to that circumstance, in the hope that they may find some remedy against that which is a serious mischief in increasing costs.

Appeal allowed.

Solicitors for the appellant:—Messrs. *Walker and Whitfield.*
Solicitors for the respondents:—Messrs. *Thomas and Hick.*

ORIGINAL CIVIL.

Before Mr. Justice Farran.

1887. *March* 12.

KESSOWJI TULSIDA'S AND ANOTHER, (PLAINTIFFS), *v.* HURJIVAN MULJI AND SHA'MKUVARVAHU, (DEFENDANTS).*

Guarantee—Consideration—Guarantee on condition of not taking criminal proceedings—Compounding felony.

S. gave to the creditors of H. a guarantee for the payment of the debts due to them by H. As a consideration for this guarantee the creditors were to abstain from taking criminal proceedings against H. for fifteen days, and by implication were to abstain from taking such proceedings altogether if the said debts were paid within that time.

Held, that such a guarantee could not be enforced by the creditors.

A man, to whom a civil debt is due, may take securities for that debt from his debtor, even though the debt arises out of a criminal offence and he threatens to

*Suit No. 499 of 1886.

prosecute for that offence, provided he does not, in consideration of such securities, agree not to prosecute. He must not, however, by stifling a prosecution obtain a guarantee from third parties.

SUIT to recover the sum of Rs. 3,181-12-2, with interest.

The plaintiffs alleged that between the 25th October, 1885, and September, 1886, they had paid to the first defendant various sums amounting in all to Rs. 43,756, in order that he should pay on their account certain dock, wharfage, and unloading charges and miscellaneous expenses connected with the export of goods to Europe. Of this sum the first defendant only accounted for Rs. 39,833, leaving a balance due by him to the plaintiffs of Rs. 3,923.

They further alleged that at the request of the first defendant they had ordered from Europe and paid for certain goods on his account, and that on the arrival of the said goods the first defendant failed to take delivery; in consequence whereof the said goods had been sold by the plaintiffs at a loss of Rs. 258, which the plaintiffs claimed to be due from the first defendant.

The plaintiffs further alleged that on the 5th September, 1886, there was due to them by the first defendant the sum of Rs. 4,181, and they were about to take proceedings against him, in order to recover the same, but at the request of the second defendant they forebore taking such proceedings, on condition that if the first defendant did not pay the said sum of money to the plaintiffs within fifteen days she (the second defendant) would pay such sum as might be due by the first defendant, and a writing to that effect was duly executed by the second defendant.

On the 20th September, 1886, the second defendant paid the plaintiffs Rs. 1,000 on account of their claim against the first defendant. They now sued to recover the remainder, *viz.*, Rs. 3,181.

The first defendant did not file any defence.

The second defendant put in a written statement, in which she alleged that the first defendant was a near relative of hers and lived in her house; and that the plaintiffs on the 5th September, 1886, had procured her signature to the above-mentioned document by threatening that if she did not sign it they would

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prosecute the first defendant, and have him imprisoned; and that she would thereby be ruined in character. She further pleaded that she was entirely illiterate, and had no independent advice; and that the plaintiffs had by their threats compelled her to sign the document of guarantee, for which she received no consideration; and she, lastly, contended that if there was any consideration for the said guarantee, and for the payment of Rs. 1,000, the same, being for the purpose of compounding a criminal offence, was illegal, and the guarantee was, therefore, void.

The document executed by the second defendant, and given by her to the plaintiffs on the 5th September, was as follows :—

"From Bhái Hurjivan Mulji, whom I have protected as a son, there appears to be due to you, as the balance of an account, Rs. 3,700. You want to take steps to recover the said amount immediately. But at my request you have at present ceased to take such steps, on condition that if Bhái Hurjivan Mulji should not pay you your money with interest within fifteen days I am to pay such balance as may appear to be due to you by Bhái Hurjivan Mulji. I, therefore, give this guarantee-paper in writing, as follows:—If within fifteen days Bhái Hurjivan Mulji should not pay such balance as may appear to be due to you in the account, I myself am duly to pay you the amount of such balance as may appear in the account."

Lang and *Russell* for the plaintiffs.

The defendants appeared in person.

March 14. FARRAN, J.:—It is not disputed that there must be a decree in this suit against the defendant, Hurjivan Mulji. He entered the service of the plaintiffs on the 15th of April, 1885, to assist in the management of their business as *mukádam*, and in that capacity was entrusted with moneys to expend on their behalf. In September, 1886, having been called upon to render an account of the moneys so entrusted to him, he made out the memorandum, exhibit A, which showed that he had received Rs. 43,275 and expended Rs. 39,891-0-6¼ on the plaintiffs' account. The general correctness of this account is admitted. [His Lordship upon the evidence found that the plaintiffs were

entitled to recover from the first defendant a sum of Rs. 2,781-12-2, and continued :—]

Hurjivan, during the time in which he was in the service of the plaintiffs, was living with the defendant, Shámkuvar, a widow who had brought him up as her son. The house in which they lived adjoined the plaintiffs'. Late in the evening of the 5th September, 1886, she executed, by putting her mark to it, a document, whereby, after reciting that there appeared due to the plaintiffs from Hurjivan Rs. 3,700 as the balance of an account, and that the plaintiffs wanted to take steps to recover the amount immediately, but had ceased to take such steps at her request, she agreed that, if within fifteen days Hurjivan should not pay such balance as might appear to be due to the plaintiffs in the account, she would herself duly pay the amount of such balance. On the face of the document there is no consideration for the guarantee, as there is nothing in it binding the plaintiffs to abstain from taking proceedings against Hurjivan forthwith. The undertaking is that she will pay Hurjivan's debt if he does not pay within fifteen days. To construe the document thus literally would, however, probably be to construe it differently from what its framers intended ; and the plaintiff Morárji says that he agreed to give fifteen days' time to Hurjivan if the defendant Shámkuvar signed the agreement. I only refer to the matter to show how completely in the interest of the plaintiffs the document was framed. Neither of them signed it, nor apparently was a copy of it given to the defendant.

Shámkuvar contends that the guarantee is not binding on her: (1) because when she executed it, she thought that she was not signing a guarantee for Hurjivan's debt, but an undertaking that he would not abscond from Bombay, but would be forthcoming at the end of fifteen days; (2) because she was coerced into executing the document by threats, that, if she did not do so, the plaintiffs would at once proceed to take criminal proceedings against Hurjivan for breach of trust as a servant.

The circumstances of the case were these. Hurjivan on the 5th of September, 1886, was unable to account for moneys entrusted to him by the plaintiffs to the extent of about Rs. 3,700

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or Rs. 3,900, and the plaintiffs were pressing him to make good the amount. Late in the evening, Shámkuvar, a poor illiterate Hindu widow, was summoned to the plaintiffs' house. The plaintiffs were rich and powerful merchants, and were related to Shámkuvar. Hurjivan stood to her in the position of a son. The plaintiffs considered that he had been guilty of breach of trust as a servant, and he was completely at their mercy. The defendant, Shámkuvar, had no independent advice, nor any adviser at all, and she executed a document, whereby she took upon herself the whole of Hurjivan's debt—Hurjivan being at the time a pauper. The only consideration alleged for her action was that Hurjivan should not be proceeded against for fifteen days. It is difficult to see what benefit either she or Hurjivan could possibly derive from such an arrangement. Upon the plaintiffs' own evidence, I should feel a difficulty in holding that an agreement taken from an ignorant Hindu female could, under such circumstances, be enforced against her.

I do, however, feel a great difficulty in believing that the steps which the plaintiffs then threatened against Hurjivan were not criminal proceedings. *Primâ facie*, the man had been guilty of criminal breach of trust as a servant, and to a large extent, and that was the aspect in which the plaintiffs viewed and still view his conduct. That they were pressing very hard is certain. I cannot doubt but that they were angry. They were clearly in haste. They sent for the lady at night and for their solicitors' clerk also at a late hour. They did not wait to procure a stamp (exhibit C has inadvertently been admitted unstamped), but had the document then and there executed. It is hardly in accordance with human nature to think that the plaintiffs did not suggest criminal proceedings. It is certainly not in accordance with the custom of native merchants in Bombay. It is true that Morárji says that he would be the last man to take criminal proceedings against Hurjivan, as he was related to him; but on the 13th of October following his solicitors wrote to Hurjivan in these words:—"Shámkuvar has not yet paid the monies misappropriated by you; and, unless you get her to pay the money forthwith, our clients will adopt criminal proceedings against you."

The defendant, Shámkuvar, swears that before the attorneys' clerk was sent for, the plaintiffs told her that she must become a surety; and that if she did not, they would take criminal proceedings against Hurjivan. In this she is corroborated by Hurjivan. The plaintiff Morárji denies it. He is supported in his denial by Veerji Vussonji. Veerji's evidence is, however, consistent with his not being present at the later stage of the interview. I have to judge between the two stories. Having regard to the extreme probability of that told by the defendant Shámkuvar, strongly corroborated by the terms of the letter of the 13th of October, and to the improbability of a poor woman like Shámkuvar willingly taking upon herself such a burden for such an inadequate reason as that assigned by the plaintiffs; and to the fact that the conduct of the plaintiffs, as deposed to by Morárji, differs from that which most men in their position would adopt, I feel constrained to accept the defendant Shámkuvar's account of the substance of the interview as correct. The fact that the plaintiffs' man kept watch and ward over the defendant till the first instalment of Rs. 1,000 was paid by Shámkuvar on the 20th of September, bears out this view. This sum was raised by Shámkuvar by borrowing small sums from her friends. I do not, however, accept that portion of Shámkuvar's story, in which she says that she thought the document she was signing was different from what it is. Morárji says that he read out the guarantee to her, and the fact that she paid Rs. 1,000 on the expiration of fifteen days from its date shows that to be so. I am not called upon to decide anything about that sum of Rs. 1,000; but as the defendants appear in person, and in order to prevent misapprehension in their minds as to the effect of my judgment, I may say that it seems to be irrecoverable. *Beati possidentes.*

The result of the evidence is, therefore, this, that the defendant, Shámkuvar, as a consideration for her guarantee, obtained immunity for fifteen days for Hurjivan from criminal prosecution, and impliedly total immunity if the guarantee were then fulfilled. Under these circumstances I must hold that the guarantee cannot be enforced. The case, as I find the facts, is governed by the decision of the House of Lords in *Williams*

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v. *Bayley*(1). Lord Westbury says, p. 220: "Now, such being the nature of the transaction, my Lords, I apprehend the law to be this, and unquestionably it is a law dictated by the soundest considerations of policy and morality, that you shall not make a trade of a felony. If you are aware that a crime has been committed, you shall not convert that crime into a source of profit or benefit to yourself. But that is the position in which these bankers stood. They knew well, for they had before them the confessing criminal, that forgeries had been committed by the son, and they converted that fact into a source of benefit to themselves by getting the security of the father. Now, that is the principle of the law and the policy of the law, and it is dictated by the highest considerations. If men were permitted to trade upon the knowledge of a crime, and to convert their privity to that crime into an occasion of advantage, no doubt a great legal and a great moral offence would be committed. And that is what, I apprehend, the old rule of law intended to convey when it embodied the principle under words which have now somewhat passed into desuetude, namely, 'misprision of felony'. That was a case when a man, instead of performing his public duty, and giving information to the public authorities of a crime that he was aware of, concealed his knowledge, and, farther, converted it into a source of emolument to himself."

The cases of *Flower* v. *Sadler*(2) and of *Ward* v. *Lloyd*(3) do not conflict with this view. A man to whom a civil debt is due, may take securities for that debt from his debtor, even though the debt arises out of a criminal offence, and he threatens to prosecute for that offence, provided he does not, in consideration of such securities, agree not to prosecute, and such an agreement will not be inferred from the creditor using strong language. He must not, however, by stifling a prosecution obtain a guarantee for his debt from third parties.

The suit as against Shámkuvar will stand dismissed with costs. Against the defendant, Hurjivan, there will be a decree

(1) 1 H. L., p. 220 at p. 200. (2) L. R., 10 Q. B. Div., 572.
(3) 7 Scott N. Rep., p. 499.

for Rs. 2,781-12-2 with interest on Rs. 156-11-2 at nine *per cent. per annum* from the 10th March, 1885, till payment; costs and interest on judgment at six *per cent.*

Attorneys for the plaintiffs:—Messrs. *Tobin and Roughton.*

Attorneys for the second defendant:—Messrs. *Crawford and Buckland.*

ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Jardine.

HIRA'BÁI, (ORIGINAL DEFENDANT), APPELLANT, *v.* LAKSHMIBÁI, (ORIGINAL PLAINTIFF), RESPONDENT.*

1887. *January* 8.

Will—Construction of Hindu wills—Joint tenancy—Tenancy-in-common—Appointment of persons "to be the heirs" of testator—Widow's estate in property devised to her by her husband's will.

B., a Hindu, died in 1876, leaving by his will all his property to his widow Hirábái and his adopted son Nathu "as his heirs," with a direction that they should maintain themselves out of the income, and pay one Dayábhái Rs. 1,000 a year for managing it. Nathu died intestate in 1880 in Hirábái's lifetime, and Hirábái then claimed the whole estate, contending that, under the will, she and Nathu had been joint tenants, and that, on his death, she took his share by survivorship. Nathu left a widow, the plaintiff Lakshmibái.

Held, that, under the will, Hirábái took only a widow's estate in half the property, and that (subject to her right, as a Hindu widow, to a widow's estate in a half share) the entire property vested absolutely in Nathu. On Nathu's death the property (subject as aforesaid) vested in the plaintiff Lakshmibái, as his widow and heir, for a widow's estate, and she became entitled to joint possession with the defendant Hirábái.

A widow taking under her husband's will takes only a widow's estate in the property bequeathed to her, unless the will contains express words giving her a larger estate.

APPEAL by the defendant from the decision of Scott, J.: (see the case of *Lakshmibái* v. *Hirábái* reported *ante*, page 69).

The appellant, (defendant), Hirábái was the widow of one Bhojráj Dessur. The respondent, (plaintiff), Lakshmibái was the daughter-in-law of Hirábái, being the widow of one Nathu Bhojráj who was the adopted son of Bhojráj Dessur.

Bhojráj Dessur died on the 27th September, 1876, leaving his widow, Hirábái, and his adopted son, Nathu Bhojráj, his only heirs and next of kin. The said Nathu Bhojráj died intestate