ORIGINAL CIVIL.

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

KHURSEDJI RUSTOMJI COLA'H, EXECUTOR OF DOSSIBA'I, WIDOW, (PLAINTIFF), *v.* PESTONJI COWASJI BUCHA', (DEFENDANT).* 1888. *August* 10.

Small Cause Court—Jurisdiction—Gift—Incomplete gift—Suit by executor to recover promissory notes on ground that the gift of them to defendant was incomplete—Act XV of 1882, *Sec.* 18.

The plaintiff as executor of D. sued the defendant in the Small Cause Court of Bombay, to recover two Government promissory notes, of the nominal value of Rs. 2,000, standing in the name of D. The defendant, who had been D.'s servant, alleged that the notes had been given to him by D. as a reward for past services. The Court held that there was evidence (though unsatisfactory) of a gift by D. to the defendant. It was then contended, on behalf of the plaintiff, that assuming there was evidence of a gift, such gift was incomplete, inasmuch as the notes had not been endorsed to the defendant, and that the defendant was not entitled to any aid from the Court to perfect the gift. The Judge held that the Court of Small Causes had no power to decree the return of the notes or payment of their value, and that so far as the jurisdiction of that Court was concerned, the defendant had a right to retain the notes.

Held by the High Court that the Court of Small Causes had jurisdiction to entertain the plaintiff's claim, on the ground that there was an incomplete gift of the notes to the defendant, and that it might on that ground pass a decree in favour of the plaintiff for the return of the notes or payment of the value.

REFERENCE to the High Court by Mr. Spencer, Acting Chief Judge of the Small Cause Court, Bombay, under section 69 of the Presidency Small Cause Courts Act XV of 1882.

The reference was as follows :—

"1. This is a suit in trover brought by an executor to recover from the defendant two Government promissory notes, of the nominal value of Rs. 2,000, standing in the name of the testatrix Dossibái.

"2. The plaint alleges that for some years during the lifetime of the said Dossibái and till her death the defendant was employed as a cook, and during her last illness he had possession of her keys of the cupboards and boxes in her house. That during the said illness of Dossibái, on or about the 19th June, 1886, the said defendant removed from her cash-box or cupboard two Government promissory notes of the value of Rs. 2,000, the pro-

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perty of the said Dossibái. The plaint goes on to state that the plaintiff, as the executor of the said Dossibái, had demanded the return of the notes, but that the defendant had refused to return them, and has set up a false claim to the same, alleging that he had received them by way of gift from Dossibái, and concludes with a prayer for judgment in the sum of Rs. 2,000 as the value of the said notes, or for the return thereof.

"3. The defence was that these notes were given to the defendant on the 19th June, 1886, by the plaintiff by direction of Dossibái, as a reward for his past services. The evidence of the defendant on this point was so very unsatisfactory that I could not rely upon it.

"4. On the other hand, the plaintiff did not adduce any evidence to show that the defendant had removed the notes from Dossibái's box, as in the plaint alleged; that was an inference which it was assumed the Court would draw from the fact of the defendant being in possession of the notes unendorsed; but the testimony of the plaintiff himself, his conduct, and the other circumstances, which I shall presently state, appeared to me to afford some evidence that the notes had been given to the defendant by Dossibái, though not in the manner deposed to by him.

"5. The evidence of the plaintiff was to the following effect:— He stated that on the 19th of June, 1886, he, by desire of Dossibái, opened the box which contained her securities, and made a list of them; this list was put in as an exhibit at the hearing, and it included the two promissory notes, the subject of this suit. Dossibái, though feeble from age, was then in her usual health, and there was no reason to apprehend that her death would take place, as it did, on the 27th of June following. On the 27th June, 1886, the plaintiff again opened the box and made a second list of securities. On that occasion the two notes were missing, and were at once produced by the defendant, who alleged that they had been given to him by Dossibái as a reward for his services. The plaintiff was the residuary legatee under Dossibái's will, and would have been entitled to the notes on her death; he did not, however, immediately accuse the defendant of having obtained possession of the notes dishonestly, but what took place was this.

The defendant, with the knowledge of the plaintiff went across the road to the house of Dr. Edulji Nussarwánji, a graduate of the Grant Medical College and a Justice of the Peace, who had been in the habit, for years past, of attesting Dossibái's mark whenever she sold or drew interest on her securities, and left a message that the doctor was wanted at Dossibái's house. On his return home, Dr. Edulji went to the house of Dossibái. Dr. Edulji's evidence both parties admit to be beyond impeachment, and is as follows:—'On entering the room in which the lady was lying, I saw the plaintiff and his wife. I asked the plaintiff why I was wanted; he said the defendant wanted two Government promissory notes to be signed by the deceased and attested by me. In the meantime the defendant came in and produced two promissory notes. I began to examine the lady in the presence of the parties. I found her in an exhausted and insensible state, almost in a dying state. I, therefore, said to the plaintiff the lady was not in a fit state to do any business. No complaint was made to me that the notes had come into the hands of the defendant by improper means. No complaint of any sort was made to me. No complaint was made that the defendant had got the notes without the knowledge of the deceased or of the plaintiff. When I said deceased was not in a fit state to transfer the notes, the defendant spoke to the plaintiff, and said that he, plaintiff, was aware of the intention of the deceased to give him those notes, or words to that effect, whereupon the plaintiff said if he could get the lady to transfer the notes he might do so. Dossibái died on the same day, and the notes were allowed to remain in the possession of the defendant. It was not until the 27th of July, 1886, one month after, that the plaintiff by an attorney's letter demanded the return of the notes, and for the first time charged the defendant with having abstracted them from his mistress's box without the consent or authority of his mistress.'

"6. On the facts as above set forth—namely, that the plaintiff, who would have been entitled to those notes on the death of Dossibái, did not, when they were produced by the defendant on the 27th of June, charge him with having fraudulently obtained possession of them, but acquiesced in Mr. Edulji being called to attest Dossibái's transfer of the notes to the defendant, and,

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further, had allowed the notes to remain in his possession, and did not accuse him of fraud until a month afterwards—I held that there was evidence of a gift of the notes to the defendant.

"7. It was then contended that, assuming there was evidence of a gift, the gift was incomplete, inasmuch as the notes had not been endorsed to the defendant, and he was not entitled to any aid from the Court to perfect the gift. I held that this Court had no power to declare that the gift was incomplete, and on that ground to decree the return of the notes or payment of their value, and that, so far as the jurisdiction of this Court was concerned, the defendant had a right to retain the notes.

"8. I, therefore, dismiss the suit, subject to the opinion of the High Court on the following question, which I have been asked to state on behalf of the plaintiff:—

"Assuming that there was evidence of a gift, had this Court jurisdiction to pass a decree in favour of the plaintiff for the return of the notes, or payment of their value, on the ground that the gift was incomplete?"

Latham (Advocate General) appeared for the plaintiff.

Jardine and *Viccáji* for the defendant.

The following authorities were cited:—*Rummens* v. *Hare*[1]; *In re Richardson*; *Shillito* v. *Hobson*[2]; *Barton* v. *Gainer*[3]; *In re Hancock*; *Hancock* v. *Berrey*[4]; *Bái Jádav* v. *Tribhuvandás Jagjivandás*[5].

SARGENT, C. J.:—This reference arises out of a suit by an executor in the Small Cause Court to recover from the defendant two Government notes, of the nominal value of Rs. 2,000, standing in the name of the testatrix, alleging that the defendant had removed them from the testatrix's box during her illness. The defence set up was that the notes had been given by the testatrix to the defendant as a reward for past services. The Judge of the Small Cause Court says that the defendant's evidence on this point was very unsatisfactory, and that he could not rely on it.

(1) L. R., 1 Ex. Div., 169.
(2) L. R., 30 Ch. Div., 396.
(3) 3 H. & N., 387.
(4) 36 W. R., 710.
(5) 9 Bom. H. C. Rep., 333.

However, he held, upon the whole of the evidence, that there was evidence of a gift of the notes to the defendant; but being of opinion, as it would seem, that he had not jurisdiction to go into the question whether there had been an incomplete gift of the moneys represented by the notes, he held, on the authority of *Barton* v. *Gainer*(1) and *Rummens* v. *Hare*(2), that the defendant had the right to retain the notes.

Those cases are, doubtless, decisions that where there is evidence of a gift to the defendant of the paper writing constituting the security, an action of detinue will not lie at common law in England for the recovery of such paper writing, on the ground that there is an imperfect gift of the moneys which are the subject of the security. In such actions at common law as Lord Cairns points out in *Rummens* v. *Hare*(3) there is no question with regard to the right to the money secured by the paper writing, but for the detention of the paper writing only. However, in a Court of equity the question is regarded from a wider point of view. In *Searle* v. *Law*(4) the plaintiff, who was the holder under an incomplete voluntary assignment of turnpike securities and shares, sought for a declaration that he was beneficially entitled to them, and the Court having found that he was not so entitled ordered him to deliver them up. Again in *In re Richardson; Shillito* v. *Hobson*(5) it was held that the defendant could not retain possession of a title-deed which had been given to him, as it could not be separated from the equitable mortgage created by its deposit, of which there had been no valid and complete gift to the defendant. Lastly, in *In re Hancock; Hancock* v. *Berrey*(6) a mortgagee of a share in a certain sum of consols delivered the mortgage-deed to a third person, intending to make a gift of the mortgage, but which was not completed, and the Court directed the defendant to restore the deed to the representative of the mortgagee.

In the first two of these cases in equity there were special circumstances which may prevent their being regarded as authorities for holding that a Court of equity will, in all cases of an

(1) 3 H. & N., 387.
(2) L.R., 1 Ex. Div., 169.
(3) L. R., 1 Ex. Div., 169
(4) 15 Sim., 95.
(5) L. R., 30 Ch. Div., 396.
(6) 36 W. R., 710.

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incomplete gift, direct documents of title to be handed over to the person beneficially entitled to them. The last decision, however, cannot well be supported on any other ground. Nor is it possible to draw any real distinction between a mortgage-deed in that case and the Government promissory notes in the present one. They are both the documents of title upon which the creditor must rely to enforce his claim—in the one case against his mortgagor, and in the other against Government. We think, therefore, that the plaintiff, in a Court competent to deal with all the rights of the parties, ought to succeed, if there was no complete gift of the moneys secured by the notes.

It was argued, however, that a Court of Small Causes cannot deal with the question in its entirety, as to do so would be virtually to declare the defendant to be a trustee for the plaintiff, thus making a declaratory decree, which is excluded from the competency of the Court by section 19, sub.-cl. (*s*) of Act XV of 1882. But that clause refers to a declaratory decree properly so called, and not to one in which the declaration is merely introductory to the relief sought. Again, it was contended that the jurisdiction of the Small Cause Court is confined to suits where the right sought to be enforced would have been the subject of a suit on the plea side of the Supreme Court. The jurisdiction of the Small Cause Court under the Acts IX of 1850 and XXVI of 1864 was doubtless held to be so limited (except as specially provided by section 32) in *Bái Jádav* v. *Tribhuvandás Jagjivandás*[1]. That conclusion was arrived at on the language of section 25 of the Act of 1850, which gives jurisdiction to the Small Cause Court in suits where the debt or damage claimed or value of the property in dispute is not more than Rs. 500. The language of section 2 of Act XXVI of 1864 was more comprehensive, but the Court notwithstanding held that "the object of the Legislature in passing Act XXVI of 1864 was to increase the money limits of the jurisdiction of the Court, not to enlarge the class of suits on which it had jurisdiction. The language, however, of section 18 of Act XV of 1882, which now determines the jurisdiction of the Small Cause Courts, is quite general, and gives jurisdiction to the Courts to try

1) 9 Bom. H. C. Rep., 333.

"all suits of a civil nature" when the amount or value of the subject-matter does not exceed Rs. 2,000, subject only to the exceptions in section 19, none of which have any application to the present case, which raises only the question whether there has been an incomplete gift of the moneys secured by the notices. We have, therefore, no doubt that the Court of the Small Causes has jurisdiction to entertain the plaintiff's claim, on the ground that there was an incomplete gift, and must answer the question referred to us in the affirmative.

Attorneys for the plaintiff:—Messrs. *Wádia and Ghándy.*

Attorneys for the defendant:—Messrs. *Ardesir, Hormasji and Dinshá.*

ORIGINAL CIVIL.

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

HASSANBHOY VISRA'M AND OTHERS, (PLAINTIFFS), *v.* THE BRITISH INDIA STEAM NAVIGATION COMPANY, LIMITED, (DEFENDANTS). *

1888. *August* 24.

Presidency Small Cause Courts Act XV of 1882, *Sec.* 38—*Re-hearing—Case in which order for re-hearing granted on ground that decision of Small Cause Court was against weight of evidence—Practice.*

On an application for a re-hearing by the High Court, under section 38 of Act XV of 1882, of a suit already heard and decided by a Judge of the Small Cause Court,

Held by the High Court that the evidence being of a very conflicting character, and not such as to justify a distinct opinion that the Judge of the Small Cause Court was wrong in his decision, the application for a re-hearing should be refused.

Section 38 of Act XV of 1882 does not authorize the High Court to grant an order for a re-hearing where that Court merely feels that the evidence is doubtful without forming any opinion as to whether the conclusion arrived at by the Small Cause Court is a wrong one. The section requires that there should be such an opinion before granting the order, and such opinion should be a distinct opinion, and not merely what is termed the inclination of opinion.

APPLICATION for a re-hearing under section 38 of the Presidency Small Cause Courts Act XV of 1882.

The plaintiffs filed this suit in the Court of Small Causes, Bombay, to recover from the defendants Rs. 2,000 as damages alleged to have been sustained by them to 1,300 bags of Mauritius

* Small Cause Court, No. $\frac{44}{4670}$ of 1888.