ORIGINAL CIVIL.

Before Sir C. Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

1887. *September* 23.

KARIM MAHOMED JAMA'L AND ANOTHER, (PLAINTIFFS), *v.* RAJOOMA' AND NOORBA'I, (DEFENDANTS).*

Specific performance—Decree in favour of plaintiff—Rectification of decree on application of defendant—Motion to set aside decree dismissed—Subsequent application to rectify decree—Res judicata—Practice—Objection taken at hearing that the application made to Court was not the application of which notice had been given to opposite party—Preliminary point.

The plaintiffs sued in 1877 for specific performance of an agreement, dated 27th September, 1871, by which certain landed properties were to be divided, as specified in the agreement, between them and the defendants. The case came on for hearing on the 13th September, 1878. The defendants did not appear, and a decree *ex parte* was made, which declared that the plaintiffs were entitled to have the agreement of the 27th September, 1871, specifically performed, and referred the suit to the Commissioner for the preparation of conveyances, &c. The decree was sealed on the 9th October, 1878. No further steps were taken by any of the parties for six years, and in September, 1884, the matter was first brought before the Commissioner. He then directed the defendants to lodge with him all the title-deeds of the properties which by the agreement were to go to the plaintiffs as their share. The defendants thereupon applied that the plaintiffs should be directed to lodge the title-deeds of the properties which by the agreement were to go to them, but the Commissioner refused to make this order, being of opinion that he was not authorized to do so under the decree, which contained no direction to him in respect thereof. The defendants on the 10th November, 1884, gave notice to the plaintiffs, that they would apply to the Court—(1) "to set aside or vary its order of the 13th September, 1878, so far as it related to the lodging of title-deeds, &c.; (2) to appoint a receiver of certain properties mentioned in the agreement; (3) to order the plaintiffs to deliver up to the defendants the properties which belonged to their share under the agreement; (4) to order certain accounts to be taken." This motion was not brought on until the 10th September, 1885, on which day it was dismissed with costs; the Judge holding that the defendants had not shown sufficient cause to justify the setting aside of the decree under section 108 of the Civil Procedure Code (Act XIV of 1882). The plaintiffs having still kept possession of certain of the properties which by the agreement were to go to the defendants, notice was given by the defendants to the plaintiffs on the 28th April, 1887, that they would apply to the Court for an order that the plaintiffs should perform their part of the agreement of the 27th September, 1871, so far as it remained unperformed by them, by giving up to the defendants possession of certain properties, and by accounting for the rents thereof, &c., &c. At the hearing of this motion, counsel for the defendants asked that the decree should be rectified, by directing that the agreement should be specifically performed by the plaintiffs

* Suit No. 667 of 1877.

and defendants respectively. The defendants contended that the application was barred by lapse of time, and that the question was *res judicata* by the order of the 10th September, 1885.

Held, that the defendants were entitled to have the decree rectified. The fact that the decree declared that the plaintiffs were entitled to have the agreement of the 27th September, 1871, specifically performed, implied an order for specific performance of that agreement by all the parties to it. The mandatory words, however, as against the plaintiffs having been, in the first instance, omitted, might now be inserted in the decree, so as to put the decree into the ordinary and usual form of decree in cases of this nature. The Court has inherent power over its own records so long as those records are within its power, and it can set right any mistake in them.

Held, also, that the motion was not *res judicata* by reason of the previous order of the 10th September, 1885. Although the notice of motion then served by the defendants on the plaintiffs included matters in respect of which the defendants sought relief by their present application, the Judge in making the order dealt with them as ancillary to the first and main point raised in that motion, *viz.*, the defendants' right to set aside the decree under section 108 of the Civil Procedure Code (Act XIV of 1882). Having decided that point against them, he did not really consider the other points at all, and did not adjudicate upon them, and, therefore, the present application in respect of those matters was not *res judicata*.

Counsel for the plaintiffs contended that the defendants were not entitled, on the present motion, to ask for a rectification of the decree, inasmuch as their notice of motion did not intimate that the point would be raised.

Held, that such an objection ought to be taken at once as a preliminary point. As it was not made until the argument of counsel for the defendants was concluded, it should be taken that the form of the motion as made to the Court was acquiesced in. The objection was then too late.

MOTION.—The plaintiffs brought this suit, in 1877, against the defendants, to obtain specific performance of an agreement dated the 27th September, 1871.

The defendants were the daughters of one Tájoobhoy Kállábhoy, who died intestate in May, 1869, leaving a considerable amount of moveable and immoveable property. The first plaintiff was the nephew and the second plaintiff was the sister of the said Tájoobhoy.

In July, 1869, the defendants applied for joint letters of administration to their father. The plaintiffs thereupon entered caveats. In July, 1870, the second plaintiff assigned her interest in the estate of the intestate to the first plaintiff, Karim Mahomed Jamál.

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On the 27th September, 1871, by a registered memorandum of agreement it was agreed between the defendants and the plaintiffs that the caveats entered by the plaintiffs should be dismissed, and that joint letters of administration to the estate of Tájoobhoy should be issued to the defendants, and that, with reference to the estate of the said Tájoobhoy, the following arrangement should be carried out:—

(1) Certain properties, specified in schedule A annexed to the agreement, were to go to the plaintiffs as their share.

(2) Certain other properties, specified in schedule B, were to go to defendants as their share.

(3) A property mentioned in schedule C was, after certain preliminaries, to be divided between the plaintiffs and the defendants.

On the 25th September, 1877, the plaintiffs filed this suit for specific performance of the above agreement. In their plaint they stated that they were ready and willing on their part to carry out the agreement; and they prayed (1) for specific performance of the said agreement; (2) that the defendants might be ordered to execute to the plaintiffs conveyances of the several properties specified in the schedule, and to hand over the title-deeds; and (3) for accounts, &c., &c.

On the 13th September, 1878, the case came on for hearing. The defendants did not appear, and an *ex-parte* decree was passed for the plaintiffs. The following is the material part of the decree:—

"This Court doth pass judgment for the plaintiffs, and doth declare that the *plaintiffs are entitled to have the agreement of the 27th September, 1881, specifically performed*, and this Court doth order and decree that the title-deeds and the several properties mentioned in schedule A to the said agreement be lodged in the office of the commissioner for taking accounts, &c., of this Honourable Court, to enable the plaintiffs to prepare the conveyance of the said properties. And this Court doth further order that proper deeds for carrying out the provisions of clause 9 of the said agreement be prepared by the several parties to whom the said properties are agreed to be conveyed at their own expense, and that such deeds when prepared be executed by the proper authorities. And this Court doth further order that the plaintiffs do pay to the defendants the sum of Rs. 3,300 on or before the execution of the said conveyances. And this Court doth further order that it be referred to Charles Edward Fox, Esq., as Commissioner appointed for that purpose, in pursuance of Act VIII of 1859,

section 181, to take the accounts of the rents of the several properties and outstandings due to Tájoobhoy Kállábhoy, deceased, received by them or come to their hands respectively prior to the said 27th day of September, 1871, and the said Commissioner is to ascertain and report to this Honourable Court, with all convenient despatch, upon the matters hereby referred, after making all just allowances; and for the better taking of such accounts it is ordered that the plaintiffs and defendants do produce before the said Commissioner all books, papers, and documents in their or any or either of their custody, possession or power relating thereto."

The decree then ordered that the case should be referred to the Commissioner to take accounts of rents, &c., and concluded in the usual form, *viz.*, "any of the said parties are to be at liberty to apply to the Court as there may be occasion." The decree was sealed on the 9th October, 1878.

The case having thus been referred to the Commissioner's office, no steps were taken by the parties for six years, *viz.*, until September, 1884, when the matter was first brought before the Commissioner. He then directed the defendants to lodge with him all the title-deeds of the properties included in schedule A of the agreement, which, as above stated, were to go to the plaintiffs as their share. The defendants at once applied that the plaintiffs on their part should be directed to lodge the title-deeds of the properties in schedule B which were to be conveyed to them, but the Commissioner refused to make this order, being of opinion that he was not authorised to do so under the decree, which contained no directions to him in respect thereof. The defendants thereupon, on the 10th November, 1884, gave notice to the plaintiffs, that they would make an application to the Court "to set aside or vary its order of the 13th September, 1878," in certain specified particulars. The terms of the notice of motion are set out in full in the order made by the Court upon the motion. *(See infra.)*

This motion was not brought on until September, 1885, and on the 10th September, 1885, it was dismissed with costs; the learned Judge (Bayley, J.,) being of opinion that the defendants had not shown sufficient cause to justify the setting aside of the decree under section 108 of the Civil Procedure Code (Act XIV of 1882), and further that the application was barred by limitation under

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article 164 of the Limitation Act XV of 1877. The order dismissing the motion was drawn up, and was as follows:—

"Upon hearing Mr. Macpherson, advocate for the defendants, who on the 2nd February, 1885, moved, on notice of motion dated 10th November, 1884, for the following orders and directions of the Court, namely:—

"1. To set aside or vary the order of the Court made in this suit on the 13th September, 1878, so far as it relates to the lodging in the office of the Commissioner or handing over the title-deeds, and executing the conveyances as mentioned in the said order.

"2. To appoint a receiver to collect and get in the rents, profits, and income of the immoveable property situate at Butcher Street, and more particularly described in schedule C to the agreement of 27th September, 1871.

"3. To order the plaintiffs, or any or either of them, to deliver up possession forthwith to the defendants of the immoveable property situate at Máhim, and more particularly lastly described in the schedule B to the said agreement of 27th September, 1871.

"4. That the Commissioner of the Honourable Court be directed to take from the plaintiffs, or either of them, the following accounts, namely:—(i) an account of the rents and profits of the aforesaid property at Máhim received by the plaintiffs, or either of them, from the time of their or either of their taking forcible possession as stated in paragraph 14 of the defendants' affidavit affirmed on the 5th November, 1884, up to the time of delivering possession thereof to the defendants; (ii) an account of the rents and profits of the aforesaid property at Butcher Street received by the said plaintiffs, or either of them, from the passing of the decree mentioned in paragraph 17 of the foregoing affidavit up to the time of delivering possession thereof to the receiver aforesaid; and (iii) an account of the building materials which the plaintiffs, or either of them, appropriated to their, his, or her own use, as mentioned in the said paragraph 17 of the said affidavit; and upon reading, &c., &c, and the motion being this day called on for judgment, it is ordered that the motion be refused, and that the defendants do pay to the plaintiffs their costs of, and incidental to, the said motion."

On the 28th April, 1887, the defendants through their attorneys sent the following notice of motion to the plaintiffs:—

"Take notice that on Thursday next, the 5th day of May, 1887, or so soon thereafter as he can conveniently be heard, counsel will move on behalf of the defendants abovenamed, before the Honourable Mr. Justice Bayley, on the grounds of the joint affidavit of the defendants abovenamed, (copy whereof is sent herewith), for an order and direction of the Court that the plaintiffs do perform their part of the agreement of the 27th September, 1871, referred to in the said plaint so far as it remains unperformed by them, by forthwith giving up possession to the defendants of the Máhim property referred to in the defendants' said affidavit, and by rendering an account of the rents, produce, and profits thereof, and after ascertaining the amount of such rents, produce, and profits, by paying the same to the defendants; and that a division or sale of the property, described in

schedule C to the said agreement and situate in Butcher Street, Bombay, be made, and that the plaintiffs, or one of them, do account for the rents and profits of the said property; and that the defendants receive their shares upon such division or sale and also their shares in the rents and profits thereof; and take further notice that at the time of making such motion as aforesaid the defendants will rely upon their affidavits affirmed respectively on the 5th November, 1884, 1st December, 1884, and 18th June, 1885, and the affidavits of Herbert William Buckland affirmed on the 15th December, 1884, and the 18th June, 1885, and filed in support of and the affidavit of the first plaintiff affirmed on the 25th November, 1884, filed in opposition to the motion made on their behalf before the Honourable Mr. Justice Bayley and dismissed by His Lordship on the 10th September, 1885. Dated this 28th April, 1887."

The motion having come before Bayley, J., he referred it to the Chief Justice as a proper case to be heard by two Judges; and it accordingly came on for hearing before Sargent, C.J., and Bayley, J.

Macpherson, (Acting Advocate General), for the defendants, in support of the motion:—The plaintiffs obtained, *ex parte*, a decree against the defendants for specific performance of the agreement of September, 1871. In order that the decree may be carried out, the matter has been referred to the Commissioner; but as the decree stands, the Commissioner is authorized only to enforce the agreement against the defendants, and not against the plaintiffs. Under the agreement, all the properties mentioned in schedule B are to go to the defendants as their share, and the property mentioned in schedule C is to be sold, and the proceeds divided. But the plaintiffs still keep possession of one of the properties, (called the "Máhím property"), mentioned in schedule B and also the property in schedule C. The decree ordered nothing on behalf of the defendants, but gave specific performance to the plaintiffs, and the result is that the Commissioner considers that he cannot enforce it in our favour against the plaintiffs. But the Court in giving judgment must have intended the whole agreement to be performed.

[SARGENT, C. J.:—You ask for a rectification of the decree. But there is no doubt that the decree meant to give specific performance to the plaintiffs, on the condition of their performing their part of the agreement. Upon a decree for specific per-

formance both sides can go into chambers, and obtain all that is necessary to carry out the agreement.]

That is all we ask. We ask either that the Court should now declare that that is what is meant by a decree for specific performance, or that it should now insert in the decree the directions that are necessary in justice to the defendants. The agreement and decree have been carried out, except that some of the property, which ought to come to the defendants, is still withheld by the plaintiff. We now ask the Court to order him to carry out his part of the agreement, for the specific performance of which he got a decree. We have demanded possession of our property, but he has not given it. The decree might be in these words: "declare that the said agreement ought to be specifically performed, and this Court doth order that it be specifically performed by plaintiffs and defendants respectively." We also ask that the plaintiffs should be directed to account for the rents and profits of the Máhím property. The Court can alter the decree—Daniell's Chancery Practice (last ed.), pp. 813-823; *In re Swire*[1]. Section 206 of Civil Procedure Code (Act XIV of 1882) does not apply to the High Court. This Court has its powers independently of the Code. Counsel also referred to *Lawrie* v. *Lees*[2] and Seton on Decrees, 1284.

Jardine for plaintiffs, *contra*:—I appear for the plaintiffs to resist the motion, of which we got notice by the letter of the 28th April, 1887. In that letter there is nothing said about any intention to apply for a rectification of the decree, and I, therefore, do not propose to argue that point.

[SARGENT, C. J.:—But this question of rectification has been now argued at length before us. If the point does not arise out of the notice served upon you, the objection ought to have been taken at once, so that the discussion before the Court might be limited to the points raised in the notice. Such an objection ought to be taken as a preliminary point. As it was not taken, we must hold that the form of the motion as made to the Court was acquiesced in, and the motion must now proceed on that basis.]

(1) 30 Ch. Div., 239. (2) 7 App. Cas., 19, at p. 34, 35.

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Then I submit that the Court has no materials before it to enable it to deal with the question of rectification of the decree. The decree is now ten years old. The defendants have had, in some respects at all events, the benefit of that decree, and now at the end of ten years they ask that it may be rectified. If they were dissatisfied with the decree, they might have had it set aside, or have got a review. They did not avail themselves of either of these remedies. How can they complain now?

But, further, I submit that this question is *res judicata*. On the 10th November, 1884, the defendants gave notice of motion "to vary the decree",—that is, to rectify it. They did not bring on that motion until the following year, and on the 10th September, 1885, it was dismissed with costs. The defendants asked then for precisely the same relief that they ask now, but in a different way. They might have urged then all that they urge now. They were bound to bring forward every ground on which they could ask relief—sec. 13 of the Civil Procedure Code (Act XIV of 1882). They use the same affidavits now that they used then. Their application was refused.

[SARGENT, C. J.:—That application appears to have been refused on the ground that, unless the decree was set aside, nothing could be done. The alteration they then asked for was ancillary to setting aside the decree. They asked that the decree should be varied in case it was first set aside, and the Judge thought that sufficient cause was not shown justifying the setting aside of the decree under section 108 of the Code. The application now is to amend the decree by inserting certain words.]

The relief asked for is the same. The order recites the whole application, and refuses it. The Court can only look at the order to see what was asked for and what was done, and that order shows that the present application is *res judicata*.

Further, is no lapse of time to be a bar to an application of this kind? This is really an application for review, but a review is barred. Will the Court, on an application of this kind, do what it would refuse to do on an application for review?—*Azeer Ali v. Woolfutoonissa*[1].

(1) 13 Calc. W. R., 38.

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[BAYLEY, J.:—This application is not made under the Code, but under the general powers of the Court.]

Where a special remedy is given by law, parties cannot seek similar relief under the general powers of the Court.

Macpherson in reply:—This is not an application for review under section 623 of the Code. That section gives the right to apply for a review of judgment. The word "judgment" is defined by section 2 of the Code. In a review you attack the judgment. We do not complain, in any way, of the judgment. We ask rather that the decree may be made to conform to the judgment.

SARGENT, C.J.:—The question before us arises on the notice of motion given by the defendants to the plaintiffs on the 28th April. (His Lordship read the notice above set forth.) The motion having come before Bayley, J., he has referred it to this Court for decision.

The whole matter has been referred to us, and there is no doubt, therefore, that the plaintiff might have taken here any objection which he might have taken before. If, when the case first came on before Mr. Justice Bayley, it had been objected that the defendants, on the notice which they had given, could not ask for a rectification of the decree, and that objection had been repeated here, I should have been disposed to refuse this application on that ground.

In this case, however, the objection, that the notice of motion did not state that an application would be made to rectify the decree, was not made until Mr. Macpherson had concluded his argument, and was then too late. The question, therefore, now is, whether the order asked for can be made, having regard to the terms of the decree; and, if not, whether the decree can now be rectified so as to allow the order to be made.

Under the terms of this decree I should not myself have had any difficulty in making all the orders necessary against both parties for its performance. The declaration which the decree contains, that the plaintiffs are entitled to have the agreement of the 27th September, 1871, specifically performed, implies that he is himself specifically to perform it, as well as the defendant.

As, however, the absence of mandatory words as against the plaintiffs has given rise to difficulties, we have now to consider whether the decree can now be rectified so as to allow the necessary orders to be made. Can we now insert the mandatory words? We have been referred to *In re Swire*[1]. In that case Lindley, L.J., says: "There is no such magic in passing and entering an order as to deprive the Court of jurisdiction to make its own records true, and if an order as passed as entered does not express the real order of the Court, it would, as it appears to me, be shocking to say that the party aggrieved cannot come here to have the record set right......It appears to me, therefore, that if it is once made out that the order, whether passed and entered or not, does not express the order actually made, the Court has ample jurisdiction to set that right, whether it arises from a clerical slip or not." And Bowen, L. J., says: "Every Court has inherent power over its own records as long as those records are within its power, and it can set right any mistake in them. It seems to me that it would be perfectly shocking if the Court could not rectify an error which is really the error of its own minister. An order, as it seems to me, even when passed and entered may be amended by the Court so as to carry out the intention and express the meaning of the Court at the time when the order was made, provided the amendment be made without injustice, or on terms which preclude injustice."

These passages, which I have read from the judgments of the Lords Justices, must commend themselves to the common sense of every one.

It is true that a considerable time has elapsed since the decree was made. The decree was passed in 1878, and we are now in 1887. What is it, however, that we are really asked to do? We are merely asked to put the decree into the ordinary and usual form of decrees in cases of this nature. I can see no difficulty in doing this. The plaintiffs asked for a decree for specific performance of an agreement, and they got it. How can they object to the decree being in the form in which such decrees are ordinarily framed? The decree, as it stands at present, declares

(1) L. R., 30 Ch. Div., 239, at pp. 246 and 247.

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that "the plaintiffs are entitled to specific performance of the agreement." The usual form is to declare that "the agreement ought to be specifically performed, and the Court doth order and decree that the same be specifically performed accordingly." I think the decree may be amended so as to put it into the usual form.

But we have been asked by the defendants to do more than this. We have been asked to add further and consequential directions. We think, however, that we cannot do this. Many things may have happened to affect the position of the parties, and we are of opinion that it would not be safe to do more than we have said. Under the decree as amended, the parties can, no doubt, have the agreement carried into effect.

It has been contended that the present motion is *res judicata*; and that the question was decided by Mr. Justice Bayley by his order of the 10th September, 1885. No doubt, reading literally the notice of motion on which that order was made, the relief there asked for would seem to be the same as that applied for now. But it is impossible not to see how the Judge there dealt with the motion. The first clause of the notice of motion, as stated in the order itself, was that the defendants would apply to set aside the decree of the 13th September, 1878. That was an application under section 108 of the Code. The notice of motion, however, included other points, and no doubt these points included the matters in respect of which the defendants now seek relief. It is clear, however, that Mr. Justice Bayley dealt with these subsequent points as ancillary to the first and main point raised in that motion, *viz.*, the defendant's right to set aside the decree. Having decided that point against them, he did not really consider the other points at all, and did not adjudicate upon them, and, therefore, I do not think that the present application is *res judicata* by reason of the order of the 10th September, 1885.

Then it was argued that the defendants might have applied for a review, and that having failed to apply within the prescribed time they are now barred from obtaining relief. We do not, however, think that this is a matter for review. It is the decree we are asked to alter, and not the judgment. There cannot be a

review because of an error in a decree. Section 206 of the Code deals with amendments of decrees; section 623, with review of judgments. The former section, however, does not apply to this Court.

For the reasons which I have given, we are of opinion that the decree may be amended in the manner which I have pointed out. Inasmuch as the difficulties have plainly arisen in consequence of the defendants not having appeared at the hearing of the case in September, 1878, we think they ought to pay the costs of this motion.

Attorney for the plaintiffs:—Mr. *Khanderáv Moroji.*

Attorneys for the defendants:—Messrs. *Crawford and Buckland.*

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Before Mr. Justice Farran.

KARSANDÁS NÁTHÁ AND OTHERS, (PLAINTIFFS), *v.* LA'DKA'VAHU, KARAMSI MÁDHOWJI, (A MINOR), AND KESSARBÁI, (DEFENDANTS.)*

1887. September 29, October 1.

Hindu law—Will—Adoption—Adoption directed to be made, not by testator's widow, but by the widow of his deceased son—Such adoption is an adoption, not to testator himself, but to his deceased son—Adoption of testator's nephew directed by will—Bequest of property to such nephew—Adoption a condition precedent to his taking the property under the will—Persona designata—Bequest of property to an unmarried grand-daughter of testator, and after her death to her children, if any, is a gift of life interest in such property.

K., a Hindu, by his will dated the day before his death, declared that it was his wish to adopt his nephew Karamsi as his son, but that, if he should be unable to do so in his lifetime, his daughter-in-law Ládkávahu, (the widow of his deceased son Liládhar), was "to take the said Karamsi in adoption." This will then continued: "His adoption ceremony is to be performed. My property, which may remain as a residue after all the things mentioned in my will have been done, I give to this lad as his inheritance, and I appoint him as my heir." A subsequent clause of the will directed as follows:—

46. "In the twenty-eighth clause above it has been directed (that a son) should be adopted. In accordance therewith, after the said Karamsi shall have been adopted, should he die without (leaving) any descendants, then *Choru* Ládkávahu is duly to adopt, out of my father Jádu Asar's descendants, any lad who may be found fit. And if the said Ládkávahu should not be living at that time, then

* Suit No. 185 of 1887.