ORIGINAL CIVIL.

Before Mr. Justice Farran.

MOTIVAHU, PLAINTIFF, *v.* PREMVAHU AND ANOTHER, DEFENDANTS.* 1892. June 16.

Practice—Receiver—Estate administered by Court—Money in hands of Receiver—Pressing claims against estate, or part owners thereof—Power to order Receiver to pay—Interlocutory order once made, final, subject only to review or appeal.

Plaintiff was admittedly entitled to a half share of an estate, which this suit was brought to divide. A decree had been made referring it to the Commissioner to ascertain and divide the said estate, and a receiver had been appointed. No power had been specially reserved by the decree to the receiver to pay pressing or other debts due by the estate, or the part owners thereof. Some time would elapse before the accounts could be taken in the Commissioner's office, and meanwhile two creditors were threatening attachment of the property of the estate, and their debts were running at considerable interest. The estate was not otherwise indebted. There was money in the receiver's hands to the credit of the estate, half of which would be more than sufficient to pay off the claims of these creditors.

The plaintiff applied to the Court for an order to the receiver to pay these two debts out of the plaintiff's half share of the moneys in his hands, leaving the plaintiff to prove his right to debit the estate with such payments.

Held, that the Court had jurisdiction to make the order asked for, though such an order would only be made in special cases and on special conditions.

Held, further, that the present was a case in which the order asked for might properly be made.

If an interlocutory order is wrongly refused by one Judge, the proper course is to apply for a review or to appeal from it; not to seek to obtain the order by resorting to another Judge, even though arguments should then be forthcoming which were not put before the first Judge.

MOTION. The plaintiff moved for an order that the receiver appointed in this suit should satisfy, out of the moneys in his hands to the credit of this suit, the claims of one Assur Lálji and one Mowji Issur mentioned in the affidavit of the plaintiff.

The plaintiff sued as the heir of one Mulji Nathu, deceased; the defendants were the executrix and executor of one Prágji Nathu. Mulji and Prágji were the sons of one Nathu Chatu, deceased.

A decree had already been passed in this suit declaring that the plaintiff and the legal representatives of Prágji Nathu,

* Suit, No. 588 of 1890.

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deceased, were equally entitled to the estate of Nathu Chatu, deceased; and referring it to the Commissioner to ascertain and divide the said estate, &c.; and appointing a receiver. No power had been specially reserved to the receiver, by the decree, to pay pressing or other debts due by the estate, or either of the claimants thereto.

The facts of the case, and the arguments of counsel, appear at length from the judgment.

Inverarity for the plaintiff.

Jardine for the first defendant.

Anderson for the second defendant.

FARRAN, J.:—This was an application on the part of the plaintiff that the receiver should satisfy, out of the moneys in his hands to the credit of this suit, the claims of Assur Lálji and Mowji Issur. It is opposed by the first defendant. The decretal order in the suit passed on the 23rd of February, 1891, declared that the property, the subject-matter of the suit, belonged to the plaintiff and the legal representatives of Prágji Nathu in equal shares, and referred it to the Commissioner to ascertain and report of what such property, with its accretions, consisted, and to divide the same between the plaintiff and such legal representatives when ascertained. The receiver of the property, the subject-matter of the suit, who had been previously appointed, was continued by the decree.

A similar application was made to Bayley, J., by summons on the 28th of January last. That summons was dismissed, and I think rightly so. It seems to me that, impliedly, there is contained in the decree, which is rather inartificially drawn, a direction to the Commissioner to ascertain what are the charges on the property, and the debts due in respect of it; or, (if that is not so), that such a direction ought to have been contained in the decree, and that the proper course for the plaintiff to adopt, in that case, would be to obtain a supplementary direction to that effect. When the ascertainment of the estate has been placed by the decree in the hands of the Commissioner, it is inconvenient and irregular to ask a Judge to decide that there is a particular charge upon it, or debt due in

respect of it, and to order that such charge or debt be discharged and paid out of the estate. In many cases—as, for example, when debts due in respect of the estate, or the charges on it, have not been ascertained, and are numerous and large—it might cause injustice to others for a Judge to make such an order. At all events, Mr. Justice Bayley has decided in this case that the order should not be made. It is true that, as argued by Mr. Inverarity, that decision is not such a decision as to enable the defendants to raise the plea of *res judicata*. No question of the right of the plaintiff has been decided. His Lordship simply refused, at that stage of the case and in that proceeding, to entertain the plaintiff's application. The present application is, however, the same as the former one, and is based upon substantially the same allegations of fact; and the same reasons exist now, as then existed, for refusing to entertain it. Under these circumstances, though the jurisdiction of the Court to entertain the application is not ousted by the former proceedings, it would be contrary to the usual procedure and practice of the Court for one Judge to make an order which has been refused by another Judge, even though arguments should be urged before him which were not urged before the Judge to whom the first application was made. If an order is wrongly refused, the proper course is to seek to review it, or to appeal from it; not to seek to obtain the order by resorting to another Court. For these reasons I must refuse to make the order asked for by the notice of motion.

Mr. Inverarity has, however, *ore tenus*, asked for an order that the above claims should be paid out of the plaintiff's share, leaving the question whether they ought to be paid out of the whole estate to be determined in the office of the Commissioner, when the proper time for ascertaining that fact arrives.

I have, I think, undoubted jurisdiction to make an order for payment of these sums out of the plaintiff's share. From early times it was the practice of the Court of Chancery in England to make such orders, but the Court seems to have exercised the power very sparingly, and only in very special cases, and under special conditions. The authorities are collected in Daniell's Chancery Practice, (6th Ed.), p. 988, note (*o*). The Statute 15 and 16 Vic., c. 86, s. 57, widened and extended this power of

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the Court by enacting that whenever any real or personal property forms the subject of any proceedings in Chancery, and the Judge is satisfied that the same is more than sufficient to answer all the claims thereon which ought to be provided for in such proceedings, the Judge may, at any time after the commencement of such proceedings, allow to the parties interested therein, or to any one or more of them, the whole or part of the annual income of the real estate, or part of such *personal* property, or a part, or the whole, of the income thereof. A corresponding Act was passed for the Supreme Courts in India—Act VI of 1854, section 35 of which gave these Courts similar powers. That Act has been repealed by Act VIII of 1868, but the repeal (section 1) does not affect any practice or procedure directed by it.

My jurisdiction, therefore, to make the order is clear. The order is not, as a rule, made, unless there is some pressing reason for it, and the Court can see that the parties are clearly entitled. In this case the title of the plaintiff to half the property is established by the decree. The property is considerable. It consists of a house in Bazár Gate Street, which was purchased for Rs. 35,000, and there are about Rs. 10,000 in the hands of the receiver. It is not suggested that there are any charges on this property, or debts due in respect of it, save the debts the subject of this motion. Assur Lálji has obtained a decree against the plaintiff for about Rs. 3,000 and costs, which he threatens to enforce by attachment. There is strong reason for believing that the debt is payable out of the joint property. There is also a small claim for about Rs. 440, due to Mowji Issur, which is in nearly the same position, though no decree has been obtained in respect of it. These claims bear interest, while the plaintiff's monies in the hands of the receiver bear none. The decree in this suit was, as I have said, made in February, 1891, but the directions contained in it have not been proceeded with, because the defendants are quarrelling as to who is to take out probate to the will of Prágji, and till that is done, the suit is at a stand-still. It is difficult to conceive a greater case of hardship on the plaintiff. The order asked for by her should, therefore, if possible, be made.

So far as I can learn, Mr. Justice Bayley was not asked to make this order. The only difficulty in making it is that it

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is not asked for by the notice of motion, as I read it, in connection with the affidavits. Mr. Jardine, however, for the defendants, did not say that he was taken by surprise by the oral application of the plaintiff's counsel. I, therefore, think that I should make the order. If, however, Mr. Jardine considers that he can adduce further facts or arguments, I shall give leave to the plaintiff to amend his notice of motion, and adjourn the matter for a week. If not, I shall make the order.

Mr. Jardine making no further objection thereto, the following order was then made :—

Order :—That the receiver do pay, out of the funds in his hands, the claims of Assur Lálji and Mowji Issur, but such payments are not to extend beyond a half share of such funds ; and let such payments be debited against the plaintiff's share in the property the subject-matter of the suit, without prejudice to the plaintiff's contending and proving to the Commissioner, or the Court, when the directions contained in the decree are being carried out, that such claims were claims charged upon, or payable out of, the joint estate. Plaintiff to bear his own costs. Defendants' costs to be costs in the suit.

Attorneys for the plaintiff:—Messrs. *Conroy and Brown.*

Attorneys for the first defendant:—Messrs. *Craigie, Lynch and Owen.*

Attorneys for the second defendant:—Messrs. *Jandrdhan and Ardesir.*

ORIGINAL CIVIL.

Before Mr. Justice Farran.

WILLIAM LOUDON, PLAINTIFF, *v.* KHATÁO ROWJI AND OTHERS, DEFENDANTS.*

1892. *June* 25.

Practice—Costs—Partnership suit—Deceased partner—Costs of his legal representative ordered out of the estate he represents—Beneficiaries not represented—Invalid order.

The plaintiff, as Administrator General and administrator of the estate of one Hunsráj Currumsey, filed this suit against the partners of Hunsráj Currumsey to recover Hunsráj Currumsey's share in the partnership. A decree was made

* Suit No. 164 of 1876.