ORIGINAL CIVIL.

Before Mr. Justice Telang.

1891. *August* 8.

ASSUR PURSHOTAM, PLAINTIFF, *v.* RUTTONBÁI AND OTHERS, DEFENDANTS.*

Practice—Attorney—Costs—Order for payment to attorney of taxed costs against heir or representative of client—Rule No. 183 of High Court Rule.

Rule 183 of the High Court Rules provides that "an Attorney, when he has taxed his bill of costs against his client, may obtain an order in Chambers for payment of the sum allowed on taxation, and such order may be executed under chapter XIX of the Code of Civil Procedure."

Held, that the heirs or representatives of the client are not included in the words of this rule, and the attorney's claim cannot, under it, be enforced against them.

IN Chambers. Summons dated the 18th July, 1891, taken out by Messrs. Mansukhlál Dámodar and Jamsetji, attorneys for the plaintiff, calling upon Lálbái, the widow and legal representative of the plaintiff Assur Purshotam, deceased, to show cause "why she, as such legal representative, should not be ordered to pay to Messrs. Mansukhlál Dámodar and Jamsetji the sum of Rs. 2,588-15-0, being the balance of their taxed costs payable to them by the estate of the deceased plaintiff, out of the assets (if any) in her hands belonging to such estate.

The suit had been filed by the plaintiff on the 25th August, 1888, and sought to restrain the defendant Ruttonbái from adopting a son, without the consent of the plaintiff.

The affidavit, upon which the above summons was granted, stated that the plaintiff had died on or about the 12th March, 1890, intestate, leaving his widow Lálbái and a minor daughter as his only next of kin; that the plaintiff had died possessed of considerable property, which was taken possession of by Lálbái as the person entitled thereto by Hindu law, but no letters of administration to his estate had been obtained by her.

It further stated that Lálbái had, under Counsel's advice, elected to allow the suit to abate, and the defendant accordingly had obtained an order dismissing the suit with costs; that subsequently Messrs. Mansukhlál Dámodar and Jamsetji got their

* Suit No. 343 of 1888.

bill of costs made out, and called upon Lálbái as legal representative of the deceased plaintiff to settle the same, but she had not done so. The said attorneys then got their bill taxed at Rs. 3,698-15-0 and served the allocatur upon her on the 13th July, 1891.

The applicants finally set forth that the plaintiff had in his lifetime paid divers sums of money to Messrs. Mansukhlál Dámodar and Jamsetji, and that Lálbái had also paid certain sums of money to them in respect of work done in this suit at her request after the plaintiff's death; that after giving the estate of the deceased plaintiff credit for all sums so paid, there was still due the sum of Rs. 2,588-15-0, which had been duly demanded, but had not been paid.

Brown (for Lálbái) showed cause.

Viccáji for Messrs. Mansukhlál Dámodar and Jamsetji in support of the summons.

They cited *Seton* on Decrees, p. 605, 649, *In the matter of James Campbell*[1], *Shaik Domun* v. *Shaik Emáum Ally*[2].

TELANG, J. :—This is an application on behalf of Messrs. Mansukhlál Dámodar and Jamsetji for an order under Rule 183 of the rules of this Court for the payment of a sum of Rs. 2,588-15-0, being the amount of the taxed costs due to them by their client, one Assur Purshotam, now deceased. The application is made against one Lálbái, the widow of the deceased, and on the affidavits there does not appear to be any dispute about her being the legal representative of the deceased Assur Purshotam. Assur Purshotam, however, had died before the bill of Messrs. Mansukhlál Dámodar and Jamsetji was taxed, and the question has been raised, whether under the rule above referred to, a summary order for the payment of costs can be made as against his personal representative.

It appears from the judgment of Bayley, J., in *Abbá Háji Ishmail* v. *Abbá Thara*,[3] that a rule—No. 149 of the Common Law Rules—authorizing the summary enforcement of attorneys'

(1) 3 De G. M. and G., 585. (2) I. L. R., 7 Calc., 401.
(3) I. L. R., 1 Bom., 253.

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claims for their costs without a regular suit, was first made by the late Supreme Court as far back as 1825, and the learned Judge there points out that the "novel practice" introduced under that rule "has never been questioned down to the present time"—that is to say, till 1876. In the case above referred to that rule was enforced by Bayley, J., and his decision was approved by the Court of Appeal. Since then new rules have been made by the Judges, and there is now substituted for that old rule the one under which this application is made. The new rule runs as follows:—"No. 183. An attorney when he has taxed his bill of costs against his client may obtain an order in Chambers for payment of the sum allowed on taxation, and such order may be executed under chapter XIX of the Code of Civil Procedure."

Now, it is to be remarked that both in the old Common Law Rule No. 149, and the present Rule No. 183, it is only the client that is expressly referred to. There is nothing in the words of either rule expressly authorizing the enforcement of the attorneys' claim against any one other than the client himself; and the question is, whether on the true construction of the rule the heirs or other representatives of the client can be deemed to be included under the words used. It appears to me that there are many considerations which ought to induce the Court not to construe the rule so widely. In the first place, as pointed out by Bayley, J., in the case above cited, the proceeding sanctioned by the rule is one of a special character and one which did not exist in England when it was originally introduced here. It confers a special privilege on attorneys and solicitors, and although the objections pointed out in the case cited by Mr. Brown, of *Shaikh Domun* v. *Shaik Emaum Ally*,[1] are of no force under our practice, whereby it is open to the party against whom the application is made to come in and show cause against the issue of the order for payment, still it is a well-established principle that where a law creates a special privilege it is to be strictly construed; see Maxwell on Statutes (2nd Ed.), pp. 356, 363, *et seq.* and cf. *Brunskill* v. *Watson*[2]. Again, it is to be noted that the later stages

(1) I. L. R., 7 Calc., 401. (2) L. R., 3 Q. B., 418.

of this summary proceeding were at first treated as constituting a proceeding in contempt (see *Abbá Háji Ismail* v. *Abbá Thara*),[1] and in England the attorney could enforce payment of the amount of the *allocatur* by attachment among other remedies; *In re Woodhouse*[2]. It can hardly be said that the proceeding in contempt is an appropriate remedy as against representatives of the client who themselves never entered into any undertaking at all to the attorney.

Further, it is remarkable that in England, where the summary remedy for payment of costs has now been adopted for many years, there appears to be no case in which it has been employed by the Courts against the representatives of the client. I find no reference to the employment either at Law or in Equity of such a remedy against a client's representatives, in either Cordery's or Pulling's Text Books on the law of Attorneys; and in Seton on Decrees, to which Mr. Brown referred, there is no form of order given suited to such a case. Form No. 36, section I, is limited to the client only (p. 605). Form No. 2, section V, is for a case where the client's representative moves in the matter (p. 624). Form No. 1 (p. 623) is against the solicitor's representative.

Nor, again, is it unworthy of remark that although, as already pointed out, this rule or one substantially identical has been in force here since 1825, the applicants have not been able to adduce more than two instances in which any order such as the one now applied for has been made in this Court. With those two instances I shall presently deal. But the paucity of actual instances both here and in England is certainly a circumstance entitled to no little weight in the decision of the point now under consideration.

Before proceeding to those instances, however, I may perhaps refer to a case, *Jefferson* v. *Warrington*,[3] which is not without an important bearing upon the point before me. There the executrix of a deceased plaintiff obtained an order for the taxation of the bill of the plaintiff's attorney. Under Stat. 2 Geo. 2, c. 23, s. 23,

(1) I. L. R., 1 Bom. at p. 254. (2) 2 C. B., 290.
(3) 7 M. and W., 137, S. C., 8 Dowl., 880.

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less than one-sixth having been taken off on taxation (as to this compare Seton, p. 604, Form No. 1), the attorney applied for an order for payment of the costs of the taxation by the executrix and by her husband in right of her. It was there argued for the executrix and her husband, that the executrix was not the client but only his representative. The Court decided against them; but it is important to notice that it did so not on the ground that the representative of the client was the client within the meaning of the Statute, but on the ground that the executrix having obtained an order for taxation, which only a party chargeable with the bill was entitled to obtain, could not, after taxation, be heard to say that she was not so chargeable. And Alderson, B., expressly said :—"If it had been the testator who had made the application to tax, the executrix ought not to have been held liable." It seems to me to follow from those words of Baron Alderson, as well as from the fact that the general ground of a client's representative being the client for this purpose was not there taken, that it was considered alike by the Court and the Counsel that that ground would not be tenable.

It was, indeed, argued by Mr. Viccáji that the proceeding under this rule was the only one open to attorneys, because an action on a taxed bill would be a contempt of Court. I must confess I was startled by that argument, but in truth there is no foundation for it, and the case cited does not support it in any way whatever. In that case, *In re Campbell*,(1) a bill had been taxed in Chancery, and the Master had allowed £32 1*s.* 7*d.* out of £61 13*s.* 9*d.* the original amount of the bill; but in spite of that circumstance, the attorney filed an action at Common Law for the full amount of £61 13*s.* 9*d.*, giving credit only for an amount of £6 and 12*s.*, which may be briefly described as receipts by the attorney on account of the client. Both Knight Bruce and Turner, L.JJ.—the latter more emphatically than the former—thought that constituted a contempt of Court. Knight Bruce, L.J., said that the attorney there "took the strange course .... of bringing an *action for the whole amount of his bill as if no taxation had been had*"; and Turner, L.J., "it was a high contempt to do that which in effect *brought the authority of taxation made by*

(1) 3 De G. M. and G., 585.

an officer of this Court under the cognizance of a Court of Law". Having regard to these observations, it is obviously impossible to rely either on the decision in that case or on the language used by the learned Judges as in any way laying down the broad proposition contended by Mr. Viccáji, that every action by an attorney for the amount of a taxed bill is a contempt of Court. On the other hand, the old Supreme Court Rule above referred to expressly laid down that an action might be brought at the option of the attorney; and the same has always been the rule in England also; see Pulling, p. 387, note (*y*), where some of the cases are collected, and Cordery, p. 285. Under the Limitation Acts of 1871 and 1877 (Articles 84 and 85, respectively, of Schedule II) such suits are distinctly contemplated by the Indian Legislature; and I know of more than one case in this Court—and in at least one of them the defendant was represented by Counsel—in which such suits have been instituted and decrees made.

In spite, however, of the considerations above discussed, I should have probably considered myself bound to follow the practice—if one had been established here—of making a summary order for payment of costs against the representative of a client, for, as said by Lord Esher in the very recent case of *Joyner* v. *Weeks*,(1) "an inveterate practice amounts to a rule of law" (cf. *Nenbái* v. *Haim Musáji*,(2) per Westropp, C.J.) And a question of the character of the present one—involving merely the form of proceeding to be resorted to to enforce an existing right—is a question on which an inveterate practice should be specially treated as binding. But no such practice, "inveterate" or otherwise, appears to have prevailed in this matter. In one of the cases relied on as proving the existence of such a practice (Suit No. 395 of 1886), an order such as is asked for here was, no doubt, made in Chambers, but it was made *ex parte*, and there is nothing to show that the point now raised was even considered by the learned Judge who made the order, or was in any way present to his mind; and, therefore, the rule laid down by the Privy Council for itself, even as a Court of ultimate appeal, in regard to *ex parte* decisions, is *à fortiori* applicable here, viz., that their

(1) L. R., 2 Q. B. D. (1891), at p. 43. (2) 4 Bom. H. C. Rep., (O. C. J.) at p. 123.

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Lordships are "at liberty to examine the reasons upon which an *ex parte* decision was arrived at, and if they should find themselves forced to dissent from these reasons, to decide upon their own view of the law;" *Ridsdale* v. *Clifton*[1] approved in *Tooth* v. *Power*[2]. In the other case, which was relied on by Mr. Viccáji as indicating the established practice of the Court, *Jeannissa Ladli Begam* v. *Navább Mir Abdul Rasul*,[3] the order referred to appears also to have been made *ex parte*, and is on other grounds of even less authority as a precedent in the present case than the one last considered. There apparently an order was, in fact, made, in the first place, against the client, and the order relied upon by Mr. Viccáji was only an order under section 248 of the Civil Procedure Code for the enforcement as against the representatives of the client of the order for payment already made against the client himself. The order of enforcement in such a case was almost a matter of course, but it has no bearing on the question before me. Whether the original order for payment made in that case was rightly made may, perhaps, admit of doubt. But that order too was made *ex parte*, and was made against the client at a time when he was dead, a circumstance which would rather seem to indicate that it was probably made *per incuriam*.

Upon the whole, it appears to me that the only two precedents which have been relied upon in support of the argument about the practice of the Court fail to afford a sufficient basis for that argument. I must, therefore, act on the view I have expressed above about the true construction of Rule 183; and under the circumstances which exist here, I cannot give any effect to the warrant in favour of Messrs. Mansukhlál Dámodar and Jamsetji, which appears to have been signed by Lálbái after the death of Assur Purshotam. The result is that the order applied for must be refused. But under all the circumstances, and especially having regard to the fact that in two cases such applications have been allowed, I think the parties must bear their own costs, respectively.

Attorneys for Lálbái:—Messrs. *Conroy* and *Brown*.

Attorneys for applicant:—Messrs. *Mansukhlál, Dámodar* and *Jamsetji*.

(1) L. R., 2 P. D. at p. 308. (2) L. R. App. Cas. (1891), at p. 292.
(3) Suit No. 417 of 1885 (not reported).