APPELLATE CIVIL.

Before Mr. Justice Bayley, Chief Justice (Acting), and Mr. Justice Candy.

KHUSRUBHAI NASARVA'NJI (ORIGINAL PLAINTIFF), APPELLANT, *v.* HORMAJSHA PHIROZSHA (ORIGINAL DEFENDANT), RESPONDENT.*

1892, *September* 6.

Administrator—Liability of, for loss to estate—Compromise of claim by administrator—Subsequent suit by a creditor of estate to set aside the compromise and for damages for negligence of administrator—Indian Succession Act (X of 1865), Secs. 280 and 328—Administrator's liability for neglect to get in any part of the deceased's property.

One Phirozsha Shápurji mortgaged certain property to Homjibhai Jámásji for Rs. 2,667. Homjibhai sued Phirozsha to recover the mortgage debt. Pending the suit Phirozsha died in 1878. Thereupon Hormajsha, the son of Phirozsha, took out letters of administration to the deceased's estate and contested Homjibhai's claim. Homjibhai obtained a decree in the Court of first instance for the sale of the mortgaged property, and in execution of this decree the property was sold for Rs. 810 and purchased by Homjibhai. The decree was afterwards—*viz.* on 2nd August, 1883—reversed, on appeal, by the Assistant Judge. Thereupon Homjibhai entered into a compromise with Hormajsha by which it was arranged that Hormajsha should give up his claim under the appellate decree of the Assistant Judge, to be repaid by Homjibhai the sum of Rs. 810 which he had realized by sale of the mortgaged property, and that Homjibhai should pay to Hormajsha Rs. 240 on account of his costs incurred in the suit and in taking out letters of administration. This compromise was effected on 16th November, 1883.

In the meantime on 4th September, 1883, the plaintiff had purchased from one Bái Bhikáiji an old decree which was outstanding against the estate of the deceased Phirozsha. On 10th September, 1883, the plaintiff sought to execute this decree against the mortgaged property. Having failed in this attempt, the plaintiff filed a suit against Hormajsha for a declaration that the compromise of the 16th November, 1883, had been fraudulently effected with the object of defeating his (the plaintiff's) claim, and to recover Rs. 1,000 as damages from the defendant on account of his fraudulent and negligent conduct as administrator of his deceased father's estate. This suit was dismissed by both the lower Courts, on the ground that as there were other creditors who had claims against the estate, the plaintiff's proper remedy was an administration suit, which would enable the Court to assess the claims of all the creditors

Held, reversing the lower Court's decree, that the plaintiff was entitled to recover. By the compromise of the 16th November. 1883, the defendant had given up his right under the Appellate Court's decree of the 2nd August, 1883, to be repaid by Homjibhai the sum of Rs. 810 and had thereby occasioned a loss to the estate of that amount. He was, therefore, liable to the plaintiff to make good the amount under section 328 of the Indian Succession Act (X of 1865), subject, however, to a deduction, under section 280 of that Act, of the expenses incurred by him in obtaining letters of administration, and the costs of any judicial proceeding that might be necessary for administering the estate.

*Second Appeal, No. 876 of 1890.

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THIS was a second appeal from the decision of C. G. W. Macpherson, District Judge of Surat, in Appeal No. 54 of 1888.

The facts of this case are fully stated in the head-note and in the judgment.

Lang (with him *Mánekshúh Jahangirsháh*) for appellant:—The defendant was administrator of the estate of his deceased father. As such he obtained a decree against one Homjibhai, but failed to execute it. He abandoned all his rights under the decree by entering into a compromise with Homjibhai. By so doing he occasioned a loss to the deceased's estate. He is, therefore, bound to make good the loss. See Williams on Executors, secs. 1806—11. See also section 328 of Act X of 1865. An executor or administrator has no authority to compromise or release a debt due to the estate. The compromise in the present case was in the nature of a release. It is, therefore, invalid and *ultra vires.* It is, moreover, fraudulent and collusive, made with the express object of defeating the plaintiff's claim. The suit in its present form will lie. There is no necessity of filing an administration suit. It is not shown that there are any other creditors of the estate whose claims are recoverable at law.

Káldbhai Lalubhai (with him *Ganpat Sadáshiw Ráo*) for respondent:—The plaintiff's suit is one to recover damages from the defendant personally on the ground of fraud and negligence. Both the lower Courts have found that there was no fraud or negligence committed by the defendant. As regards any damage alleged to have been caused to the estate, the plaintiff has no *locus standi,* as he does not represent the estate. It is found that there are other creditors of the estate, and unless they all join in an administration suit, the claims of one creditor alone cannot be considered. The suit in its present form will not lie. Besides, it is wrong to attribute to the defendant any negligence in recovering any thing from Homjibhai. There was nothing to recover from Homjibhai. Homjibhai was already in possession as a mortgagee before he purchased the equity of redemption. This mortgage-debt was considerably more than the price at which he purchased the equity of redemption. The estate, therefore, suffered no loss by reason of the compromise.

BAYLEY, C.J. (Acting):—On the 15th November, 1886, the plaintiff filed his plaint in this suit against Hormajsha Phirozsha and Homjibhai Phirozsha to recover Rs. 1,000 as damages, which the plaintiff claimed in consequence of a certain settlement come to by the defendants on the 16th November, 1883, in respect of a decree in Appeal No. 40 of 1883, which settlement, the plaintiff alleged, was fraudulently come to by the defendants in collusion with each other, with the object of defeating a claim which the plaintiff then had against the property of one Phirozsha Shápurji, the deceased father of the first defendant, to whose estate the first defendant had obtained letters of administration from the District Court of Surat.

After the filing of the suit the second defendant Homjibhai died, and the suit as against him being withdrawn proceeded against Hormajsha.

On the 13th September, 1888, the Subordinate Judge at Surat rejected the claim and ordered the parties to bear their own costs. The plaintiff appealed, and on the 30th June, 1890, the District Judge of Surat confirmed the decree of the lower Court, ordering each party to bear his own costs in appeal.

The District Judge in his judgment stated the facts of the case as follows:—

One Phirozsha Shápurji died in 1878 indebted, it was said, to the extent of Rs. 50,000, and Homjibhai (original second defendant), who had filed a suit for the recovery of a mortgage-debt prior to Phirozsha's death, applied to the District Court to issue letters of administration. The defendant Hormajsha, son of Phirozsha, at first refused to take out letters of administration, but finally did so, and contested Homjibhai's claim. Homjibhai was successful in the Court of the Subordinate Judge, but in appeal the decree was reversed on the 2nd August, 1883, by the Assistant Judge at Surat. Meanwhile, and before the decree was reversed by the Assistant Judge, the mortgaged property, which seemed to have been Phirozsha's only assets, had been sold for Rs. 810 under the decree of the Subordinate Judge and purchased by the decree-holder Homjibhai, and the sale had been confirmed. After the decision of the appeal by the Assistant Judge, and before Homjibhai's time for appealing

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to the High Court had expired, Homjibhai seems to have opened negotiations through Dr. Dosábhai, a mutual friend, with Hormajsha, with whom he was on bad terms, for the compromise of the matter, and after consultation with Mr. Ládkoba, a pleader, an agreement was arived at, the terms of which were that Homjibhai should refrain from appealing to the High Court and should retain the mortgaged property, but should pay Hormajsha Rs. 240, the amount of his costs in the suit and in taking out letters of administration, as assessed by Mr. Ládkoba. This compromise, which was effected before the expiration of the time for appealing to the High Court, was duly certified.

The present plaintiff, however, had, after the Assistant Judge had reversed the Subordinate Judge's decree, purchased (on 4th September, 1883) for Rs. 499 from one Bái Bhikáiji an old decree of 1878 for Rs. 2,171 and costs, obtained on the 27th March, 1878, by her in Suit No. 43 of 1878 against Phirozsha Shápurji, the first defendant's father, which was still in force, and he endeavoured to execute this decree against the mortgaged property, *i. e.*, the mortgaged property which Homjibhai had bought for Rs. 810 under the decree subsequently reversed by the Assistant Judge. At first the plaintiff applied, under section 234 of the Civil Procedure Code, for execution of the decree against the defendant Hormajsha as the legal representative of Phirozsha. The Subordinate Judge passed an order directing execution to issue against Hormajsha personally to the extent to Rs. 810. The District Judge reversed that order in appeal, and on second appeal to the High Court the decree of the District Court was confirmed with costs. The case in the High Court is reported in I. L. R., 11 Bom., 727. The High Court held that in section 234 of the Civil Procedure Code it is not provided that in an execution proceeding the representative shall be made answerable as well for what with diligence on his part would have come to his hands as what actually has come to his hands, and that the Legislature did not intend to make him answerable in other cases except through the medium of a regular suit.

The plaintiff then brought the present suit, contending that the compromise was come to in order to defeat his claim, he and defendant being bitter enemies, and that he was thus deprived of

Rs. 810, which with interest would be fully Rs. 1,000, for which he contends the defendant Hormajsha is personally liable to him.

The District Judge states that the record shows that Phirozsha's estate had many other creditors. The Subordinate Judge at the close of his judgment says that the defendant had produced Exhibit No. 35 to show that the plaintiff is not the only decree-holder who has tried to execute his decree against the sum of Rs. 810 recovered by Homjibhai, but that he did not think it necessary to consider how far it assists the case of the defendant. We do not see that the District Judge has found or stated that there were any other decree-holders against the deceased Phirozsha or his estate.

Among the plaintiff's grounds of appeal to the District Court against the decision of the Subordinate Judge were the following:—That the lower Court erred in holding that the defendant was not bound to collect the debt of Rs. 810 due from Homjibhai; that the lower Court ought to have held that the compromise with Homjibhai was illegal and fraudulent, and made with a view to cause loss to plaintiff, and that it was not made in the interests of the estate of the deceased Phirozsha; and that the lower Court ought to have held that defendant intentionally failed to collect Rs. 810 due from Homjibhai and thereby prevented the execution of plaintiff's decree, thus rendering himself personally liable, and the lower Court ought, therefore, to have passed a decree as prayed for by plaintiff.

The District Judge ruled that the point for determination appeared to be, has plaintiff established his claim to the damages he asks for or to any portion of them? And he found such issue in the negative.

He says that the appellant asked that the issues annexed to the proceedings should be raised, the fourth of which was as follows:—"Did Hormajsha as administrator neglect to get in any part of the property of the deceased and release a debt of Rs. 810 due to it by one Homjibhai? Did he unjustly and fraudulently release it? Is he personally liable for that debt to the plaintiff?" But the District Judge states that such issues did not appear to him to be necessary to the disposal of the appeal.

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We are unable to concur with the views entertained by the Subordinate Judge and the District Judge.

At the conclusion of the operative part of the agreement of compromise dated the 16th November 1883 (Exhibit No. 22), the defendant says: "I have given up my claim to the right which has accrued due to me under the decree of the Assistant Judge, in my favour, of taking back from Homjibhai the amount recovered by him (under the Subordinate Judge's decree)."

Section 278 of the Indian Succession Act (X of 1865), an Act binding on the defendant, who is a Pársi, and described in the plaint as residing in the Surat District, enacts that an administrator shall collect with reasonable diligence the property of the deceased and the debts which were due to him at the time of his death. By section 280 the expenses of obtaining letters of administration, including the costs incurred in respect of any judicial proceedings that may be necessary for administering the estate, are to be paid next after the funeral expenses and death-bed charges. And by section 282 it is enacted that save as aforesaid no creditor is to have a right of priority over another by reason that his debt is secured by an instrument under seal or on any other account, but the administrator shall pay all such debts as he knows of, including his own, equally and rateably, as far as the assets of the deceased will extend.

By section 327 when an executor or administrator misapplies the estate of the deceased, or subjects it to loss or damage, he is liable to make good the loss or damage so occasioned. By section 328 when an executor or administrator occasions a loss to the estate by neglecting to get in any part of the property of the deceased, he is liable to make good the amount. Illustration (*a*) to section 328 says: "The executor absolutely releases a debt due to the deceased from a solvent person, or compounds with a debtor who is able to pay in full. The executor is liable to make good the amount."

In *Nilkomul Shaw* v. *Reed*[1] it was decided by Sir R. Couch, C. J., and Ainslie, J., that where a person obtains a decree against an executor or administrator he is entitled to have his decree

(1) 12 Beng. L. R., 287.

satisfied out of the assets of the deceased, and that section 282 of the Indian Succession Act does not interfere with that right.

In *Remfry* v. *De Penning*[1], a decree for money had been obtained against a person who afterwards died intestate. Letters of administration to his estate were granted to the Administrator General of Bengal. The decree-holder applied for execution of his decree against the assets in the hands of the Administrator General. Pigot, J., held that he was entitled to have his decree satisfied out of the assets of the deceased, although those assets were not sufficient to pay in full all the claims made against the estate. Mr. Justice Pigot said that he must follow the course pursued in a case (unreported) cited in argument of *The Alliance Bank of Simla* v. *Hoff*, decided by Mr. Justice Cunningham in 1884, where execution was ordered to issue against the executor of a judgment-debtor for the full amount of the decree, though the testator's estate was not sufficient to pay all his debts.

In the first of the above cited cases Sir R. Couch, C. J., said: "The provision in section 203, Act VIII of 1859, entitled the decree-holder to have his decree satisfied out of the property of the deceased or out of the property of the defendant, the executor, if it should appear that he had not duly applied the property of the deceased; and section 282 of the Indian Succession Act does not interfere with that right."

The two subsequent cases just cited appear to have been decided under or by analogy to the corresponding section 252 in the Civil Procedure Code, Act XIV of 1882, relating to a decree against the representative of a deceased person for money to be paid out of the deceased's property, which enacts that if no property of the deceased remains in the possession of the judgment-debtor, and he fails to satisfy the Court that he has duly applied such property of the deceased as is proved to have come into his possession, the decree may be executed against the judgment-debtor to the extent of the property not duly applied by him, in the same manner as if the decree had been against him personally.

(1) I. L. R., 10 Calc., 929.

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In each of those two cases the decrees had been obtained against the deceased debtor. Such was the procedure here, the decree in the Suit No. 43 of 1878, brought by Bái Bhikaiji against Phirozsha Shápurji, having been passed on the 27th March, 1878, after the passing of which decree Phirozsha died, and his son, the defendant, then obtained letters of administration to his estate.

Now the defendant by compromising Homjibhai's claim on his mortgage (which at the time of such compromise had been held to be an unfounded one, the Assistant Judge having decided that it had been paid), and by giving up (as stated in the agreement of compromise (Exhibit 22) dated the 16th November, 1883), his claim to the right which had accrued due to him under the decree of the Assistant Judge in his favour of taking back from Homjibhai the amount recovered by him under the Subordinate Judge's decree, undoubtedly occasioned a loss to the estate by neglecting to get in that part of the property of the deceased, and by section 328 of the Succession Act "he is liable to make good the amount."

Had the property worth Rs. 810 been recovered by the defendant, as it ought to have been, it would have been available, wholly or in part, to be applied towards satisfaction of the plaintiff's decree. But having neglected to get in that portion of the estate of Phirozsha he is liable to the plaintiff to make good the amount.

The defendant is entitled under section 280 of the Succession Act (X of 1865) to first deduct the expenses of obtaining letters of administration, which, we think, were stated in the argument before us to have amounted to Rs. 100, and also the costs incurred by him in respect of any judicial proceedings that may be necessary for administering the estate, such costs being directed to be paid next after the funeral and death-bed charges. These costs can be ascertained in execution of the present decree. Taking the value of Phirozsha's property, which the defendant ought to have recovered, at Rs. 810, the balance, with six per cent. interest from the 16th November, 1883, must be paid by defendant to plaintiff.

The decree of the District Judge is reversed and a decree passed in favour of the plaintiff in accordance with the above remarks. All costs on defendant.

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Decree reversed.

APPELLATE CIVIL.

Before Mr. Justice Fulton and Mr. Justice Telang.

GANPATRA'M JEBHAI (ORIGINAL PLAINTIFF), APPLICANT, v. RANCHHOD HARIBHAI (ORIGINAL DEFENDANT), OPPONENT.*

1892. *November* 23.

Mámlatdár's Act (Bombay Act III of 1876)—Suit in a Mámlatdár's Court—Procedure where one of several plaintiffs in such a suit dies and the right to sue does not survive to the surviving plaintiffs—Code of Civil Procedure (Act XIV of 1882), Chapter XXI—Its applicability to a suit in a Mámlatdár's Court—Practice—Procedure.

The Bombay Mámlatdár's Act (III of 1876) makes no provision for the substitution of the names of heirs in the case of the death of one of the parties, and Chapter XXI of the Code of Civil Procedure (Act XIV of 1882) cannot be held to apply to proceedings in a Mámlatdár's Court. Accordingly where a possessory suit was filed by two persons in a Mámlatdár's Court, and one of them died pending the suit, and it appeared that the right to sue did not survive to the surviving plaintiff alone,

Held that the Mámlatdár had no alternative but to dismiss the suit.

THIS was an application under section 622 of the Code of Civil Procedure (Act XIV of 1882).

One Ganpatrám Jebhai and Adesang Himdás filed a suit in the Mámlatdár's Court to recover possession of certain property, and while the suit was pending Adesang died.

On Ganpatrám's application the case was adjourned for a fortnight to enable the heirs and legal representatives of the deceased plaintiff to be made parties to the suit.

As the deceased's heirs did not express their willingness to join as co-plaintiffs, the Mámlatdár rejected the plaint under section 13 of Act III of 1876, holding that in the absence of one of the plaintiffs the suit could not be proceeded with.

Thereupon the widow of the deceased Adesang applied to the Court, apparently under section 108 of the Code of Civil Proce-

* Application under Extraordinary Jurisdiction, No. 136 of 1892.