ORIGINAL CIVIL.

Before Mr. Justice Davar.

1907. *August* 3.

BANOO BEGUM, PLAINTIFF, *v.* MIR AUN ALI, DEFENDANT.*

High Court Rules and Forms, 1901, Rule 577†—Costs—Taxing Master's decision on a question of costs—Review by the Chambers Judge—Third Counsel's costs in a defended long cause—Practice as to retaining of Counsel and their costs—Costs of a third Counsel engaged to ask for transfer of case from one Judge to another—Practice.

As a general rule the Judge in Chambers will not, on a review of taxation, interfere with items of taxation which are entirely within the Taxing Master's discretion or go into details of such discretionary items; but there is nothing to prevent him from doing so if it appears to him that the interests of justice require his interference and it would be his duty in all such cases to review and revise taxation and judge and decide for himself what would be a just order to make under the circumstances.

Where two counsel are already briefed in a case, and a third is instructed to make an application to transfer the case from one Judge to another, and the order making the transfer makes no provision as to costs, the costs should on taxation be refused between party and party, though they may be allowed between attorney and client.

A party to a defended long cause is entitled to appear by two counsel. If both Counsel attend throughout the hearing and the other party is ordered to pay costs of the suit their brief fees and full refreshers would be allowed on taxation against the losing party. If the suit is conducted by one counsel only throughout, the full refreshers of the conducting counsel and a nominal refresher of 2 G. Ms. of the other counsel would be properly allowable against

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* O. C. J. Suit No. 577 of 1906.

† RULE 577.—"Any party who may be dissatisfied with the certificate or allocatur of the Taxing Officer as to any item or part of an item which may have been objected to as aforesaid may, before the allocatur is signed, apply to a Judge at Chambers for an order to review the taxation as to the same item or part of an item, and the Judge, may thereupon make such order as to him may seem just, but the certificate of allocatur of the Taxing Officer shall be final and conclusive as to all matters which shall not have been objected to in manner aforesaid: Provided that the Taxing Master shall not be bound to delay the signing of the allocatur more than twenty days from the date of the certificate."

the opponent if ordered to pay costs. If the absent counsel attends for portions of the time the case is at hearing, his refresher, proportionate to the time he attends would also be properly allowable, in addition to the full refresher allowed to the counsel who attends and conducts the case.

Where a party to a defended long cause engages two counsel he has a right to the services of at least one of them. He is under no obligation whatever to engage a third counsel. If both counsel find that they would owing to other engagements be unable to go in and conduct the case when it is called on it is obviously the duty of one of them to return the brief.

If three counsel are engaged *before* the hearing it will be for the Taxing Master to consider the fees and refreshers of which two he will allow between party and party and which counsel's fees should go between attorney and client. A Solicitor engaging three counsel is entitled to have his third counsel's costs taxed between attorney and client if he proves express authority from his client or if he proves that some peculiar contingency arose which made it necessary for him to engage a third counsel in order to safe-guard his clients' interests. If a third counsel is added after the hearing of the suit has commenced such addition must be at the cost of the party doing so.

Proceedings in Chambers.

Application for review of taxation.

On the 10th January 1907, Russell, J., passed a decree in the following terms :—

"I pass a decree for the plaintiff in the terms of paragraphs (*a*) to (*f*) of the plaint and direct the defendant 1 to pay the costs of the suit throughout, including all costs reserved, except the costs of the appearance for defendant 3 by separate counsel. Costs of appearance for defendant 3 by separate counsel, the defendant 3 must bear down to the time when her counsel Mr. Mirza ceased to appear for her and appeared for the plaintiff in lieu of the plaintiff's junior Counsel after which the defendant will have to bear the costs of such Counsel."

Pursuant to these directions the plaintiff's attorneys prepared their bill of costs and lodged it with the Taxing Master for taxation. The bill was finally taxed on the 15th April 1907.

On the 18th April, the first defendant's attorneys applied for a review of taxation under Rule 575 of the High Court Rules and the matter came on before the Taxing Master on the 25th of April.

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At the review, the items objected to by defendant No. 1 were as follows :—

Items objected to.	Amount charged.	Amount allowed.
Instructions for counsel to have the suit transferred to the board of Russell, J. ...	Rs. 6	Rs. 3
Short instructions for counsel thereon ...	1	1
Attending Mr. Mirza and paid his fee ...	30	15
Attending when the application was made and the same was granted	10	5

The objection of defendant No. 1 as to these items was :—

"All the entries ought to go between attorney and client, there being no provision for costs."

The reply which the plaintiff's attorney returned to this was as follows :—

"This is not an interlocutory application. The application is proper. Suit is called on before a Judge who has advised 1st defendant and actually drawn his plaint in the cross suit. Counsel is instructed to bring these facts to his notice which is accordingly done and the Judge refuses to hear the case.

"There is no suggestion that the charges themselves are improper. The point now urged is not new. It was urged before the Taxing Master on taxation and discussed at great length."

The Taxing Master overruled the defendant No. 1's objection and adhered to his former taxation, on the following grounds :—

"I have gone through these points at great length during the course of hearing the objections. I have already held and I adhere to my decision that these costs of mentioning matter to Court were necessary and proper and should be allowed between party and party. Taxation stands."

The other item that was objected to ran as under :—

Item objected to.	Amount charged.	Amount allowed.
Paid to Mr. Mirza and all the refreshers paid to him (December 11th, 13th, 14th, 15th, 18th, 20th)	Rs. 108	Rs. 108

The attorneys of defendant No. 1 objected to this item, remarking—

"All the refreshers paid to Mr. Mirza ought to go between attorney and client, he being the third counsel."

The plaintiff's attorneys in reply said :—

"Mr. Mirza was not the third counsel. He was the second counsel, engaged in the case, Mr. Inverarity being unable to attend. The learned Judge in his judgment has expressly allowed Mr. Mirza's fees."

Here also the Taxing Master kept to his former taxation, on grounds which he stated as follows :—

"On general principles I hold that a party to a defended long cause is entitled to appear by two counsel throughout the hearing if he chooses to do so. He is at liberty to add a new counsel during the course of the hearing if the most senior counsel is unable to attend. In such a case the proper course to follow would be to allow fees between party and party of the two counsel who actually attended at the hearing of the case and tax off the absent counsel's refreshers between attorney and client."

The defendant No. 1 thereupon obtained the Taxing Master's certificate : and applied to the Judge in Chambers for review of taxation.

Strangman, for the plaintiff.

Nariman (of *Messrs. Ardeshir, Hormasji, Dinshaw & Co.*), for the defendant No. 1.

DAVAR, J.—Under Rule 577 the first defendant's attorneys applied to me for an order to review the taxation of the plaintiff's Bill of Costs. Mr. Strangman appeared for the plaintiff to support the Bill as taxed. It was originally intended to urge objections against four items namely : (1) Instruction charges ; (2) Costs incurred in applying to me in Court to have this suit placed on another Board ; (3) Refreshers allowed to Mr. Mirza, counsel for the plaintiff ; and (4) Bhatta allowance of a witness named Shaik Hyat Saheb.

The first objection was not pressed before me : in fact as soon as the matter was brought on, Mr. Nariman abandoned his objection to the Instruction charges. The last item was one which appeared to me to be clearly within the Taxing Master's discretion and on my intimating my disinclination to go into

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that item Mr. Nariman did not press this matter further. The first and the fourth items objected to by the first defendant therefore go out of consideration. In view of Mr. Strangman's contention that the Chamber Judge ought not or will not interfere with the Taxing Master's discretion I think I ought to say here that I must not be taken to lay down a Rule that the Chamber Judge ought not or will not go into questions which are within the discretion of the Taxing Master or enter into questions of quantum *in all cases*. Rule 577 permits "any party who may be dissatisfied with the certificate or allocatur of the Taxing Officer as to any item or part of an item . . . . to apply to a Judge at Chambers for an order to review the taxation as to the same item or part of an item" and on such application "the Judge may make such order *as to him may seem* just."

In the case of *Smith* v. *Buller*[1] where counsel in arguing one of the items contended that it was a mere question of detail in which the Court will not interfere and urged that there must be some question of principle involved to induce the Court to review a taxation, Vice-Chancellor Malins in answer says:— "Although the Court is reluctant to go into questions of detail, it *will* do so in a proper case, and even in a question of *quantum* will do so, where there has been a charge of a very exhorbitant character."

If my information is not incorrect recently in the case of *Dahibai* v. *Soonderji*[2] the learned acting Chief Justice allowed to one of the attorneys Rs. 500 more for remuneration for work done by him than was allowed by the Taxing Master. Of course the Judge in Chambers will not go into details of taxation but will as a general rule confine his attention to such items objected to as involve some questions of principle. The rule deduced from a large number of authorities is laid down in Morgan and Wurtzburg on the Law of Costs, at page 480, 2nd Edition, where it is said: "Unless there has been some very gross overcharge . . . the Court, on an application to review, will only determine questions which involve some principle, and

(1) (1875) L. R. 19 Eq. 473. (2) (1907) 31 Bom. 430: 9 Bom. L. R. 819.

not those relating to *quantum* only, which will be left to the discretion of the Taxing Master." As a general rule therefore the Judge in Chambers will not interfere with items of taxation which are entirely within the Taxing Master's discretion or go into details of such discretionary items but there is nothing to prevent him from doing so if it appears to him that the interests of justice require his interference and it would be his duty in all such cases to review and revise taxation and judge and decide for himself what would be a just order to make under the circumstances.

The second and third objections urged before me are not questions that are entirely within the discretion of the Taxing Master. They involve questions of principle and as such I felt it to be my duty to hear arguments and express my opinion on them. The first objection is to a group of small items of costs involved in instructing counsel to apply to me in Court to have the case removed from my Board and have it placed on another Board. The reason for the application was that I had been counsel in the case for one of the parties. This application was made to me and I intimated that I would not hear the case. Now under what circumstances are the costs of this application sought to be made payable by the first defendant? In the first place no notice of this application was given to the first defendant. The first defendant did not appear on the application. Mr. Mirza, who mentioned the matter to me, never asked me to make the costs of that application costs in the cause. If such an application had been made I should have unhesitatingly refused it. In numbers of cases since I took my seat on the Bench counsel engaged in those cases have sometimes when the case is called on and sometimes before that asked me if I would take a particular case or would wish it to be placed on another Board by reason of my having been counsel in the case. No one has yet asked me to make costs of such an application costs in the cause for the simple reason that no separate costs are at all necessary. In this particular case, however, the circumstances under which the costs were incurred seem to be peculiar. Briefs for hearing were delivered to Messrs. Inverarity and Strangman for the

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plaintiff. On the day that Mr. Mirza applied to me these gentlemen were actually holding the plaintiff's briefs. Any one of them could have come into my Court or come into my room and asked me if I would take the case or not. When I asked Mr. Strangman, who tried to justify these items of costs as properly allowed between party and party, why the counsel in the case did not mention the matter to me, he told me that both his learned leader and himself were unable to come into my Court and therefore another counsel had to be briefed to make the application as it is called. It seems to me that it was clearly the duty of one of the counsel in the case to have mentioned the matter to me. Where was the necessity of instructing a third counsel? Surely one of the counsel would have been before me when the case would be called on and he could have mentioned the matter then—and the case would have appeared on another Board the next day. If the plaintiff's two counsel were so busy as not to be able to spare two minutes of their time to come in and mention this matter to me, if the plaintiff or her advisers were anxious to do so before the hearing was reached, and the plaintiff is put to extra expenses, surely that is no reason why the first defendant should pay the costs so incurred. That the action of the plaintiff's solicitor who attended to this case was not in the least degree improper in doing what he did I am anxious to acknowledge. I believe he had witnesses from the moffusil and he was anxious to avoid delay as far as possible and he preferred to incur small costs rather than wait till the case was called on or till his counsel were free to come in. He ought to have pressed one of his two counsel to come in and mention the matter to me and I am sure none of them would have endorsed their Briefs or charged a fee for doing this. If he did not succeed in getting his counsel to come in, it is his or his client's misfortune for which his adversary, the first defendant, could not be made to pay. I think the Taxing Master ought to have refused to allow these costs as between party and party in the absence of any provision for them and any order making them costs in the cause. These items ought to be disallowed between party and party and may be allowed between attorney and client.

The next group of items to be considered are refreshers allowed to the plaintiff's counsel, Mr. Mirza. The dispute in respect of these refreshers arises under the following circumstances. Previous to the hearing of this suit the plaintiff's solicitors briefed Messrs. Inverarity and Strangman for the plaintiff. The third defendant in the suit is a daughter of the plaintiff. She did not contest the plaintiff's claim and only one counsel Mr. Mirza was instructed on her behalf. The case was called on for hearing before the learned Acting Chief Justice on Friday the 7th of December 1906. The same day Mr. Mirza was relieved from attendance. His Lordship's note is: "I direct that Mr. Mirza's attendance, as counsel for defendant No. 3, can be dispensed with. No order as to her costs." The case is again heard on Monday the 10th, Tuesday the 11th, of December and on six subsequent days. The plaintiff's senior counsel never appeared at the hearing of this suit at any of its stages. Mr. Mirza formally reappears at the third hearing on the afternoon of Tuesday, the 11th, after the luncheon hour.

So far as I can gather from what was told to me and what I find in the printed appeal book what happened was this. The plaintiff's solicitor attending to the suit found that his senior counsel was not attending to the suit—his junior counsel was a busy gentleman with many engagements in other Courts. A counsel who was fully conversant with the details of the case and who had appeared for a party who practically supported the plaintiff's claim was discharged from attendance. His services were available and the plaintiff's solicitor secured those services for his client. From what was stated to me I believe his services were secured for the plaintiff as soon as he was discharged from attendance on behalf of the third defendant. He, however, did not formally announce his appearance till the afternoon of the third day of hearing. It appears that he did so when Mr. Strangman was called away to the Appeal Court. The learned Judge's note is: "Mr. Mirza now appears for plaintiff with Strangman." I have the learned Judge's authority for saying that he did not know that Mr. Mirza was the third counsel for the plaintiff. He was under the impression that Mr. Inverarity

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was out of the case and Mr. Mirza had come into it. During the temporary absence of Mr. Strangman, Mr. Mirza conducted the plaintiff's case. When Mr. Strangman returned he took up the case again but Mr. Mirza continued to attend till the case was concluded. The Taxing Master under the circumstances allowed Mr. Inverarity's nominal refreshers of 2 G. Ms. as between attorney and client and allowed the full refreshers of Messrs. Strangman and Mirza during the time they attended between party and party. The first defendant is ordered to pay the plaintiff's costs of the suit and his solicitor has strenuously argued before me that such taxation is most unfair to his client and the Taxing Officer is in error in principle in allowing Mr. Mirza's refreshers against his client.

His objection, as recorded before the Taxing Master and urged before me, was that Mr. Mirza being third counsel for the plaintiff, refreshers paid to him ought to go between attorney and client. The answer to this objection is recorded in the following terms: "Mr. Mirza was not the third counsel. He was the second counsel engaged in the case, Mr. Inverarity being unable to attend. The learned Judge in his judgment has expressly allowed Mr. Mirza's fees." The Taxing Master in dealing with this contention between the parties says:—"*On general principles* I hold that a party to a defended long cause is entitled to appear by two counsel throughout the hearing if he chooses to do so. He is at liberty to add a new counsel during the course of the hearing if the most senior counsel is unable to attend. In such cases the proper course to follow would be to allow fees between party and party of the two counsel who actually attend at the hearing of the case and tax off the absent counsel's refreshers between attorney and client. See judgment of Russell, J."

Before dealing with the question on the merits it is necessary to deal with the contention of the plaintiff that the learned Judge who heard the case expressly allowed Mr. Mirza's fees. The Taxing Master evidently is also under that impression for he refers to the judgment at the end of his decision. I felt some difficulty in believing that the learned Judge while giving his judgment would give direction as to *who* should pay a particular

counsel's fees. I was most anxious to do nothing that would have the least semblance of an interference with the orders or directions of the Judge who heard the suit. Portion of the paragraph printed at page 218 of the Appeal Book did not read very clear and under the circumstances I consulted the learned Judge as to what directions he meant to give. The learned Judge has been good enough to make his meaning quite clear by correcting in his own handwriting the paragraph in the copy of the book left with me and the passage now reads as follows :—

"Costs of appearance for defendant 3 by separate counsel the defendant 3 must bear during the time when her counsel Mr. Mirza appeared for her but after that time when Mr. Mirza appeared for plaintiff the defendant 1 must pay the costs."

His Lordship has removed all doubt from my mind by saying that when he made his order as to costs he had no intention whatever of giving any directions as to which of the parties was to bear Mr. Mirza's fees. He was not even aware that plaintiff was appearing by three counsel. This I think disposes of the plaintiff's contention founded on the judgment. Of course *some one must pay* Mr. Mirza's fee and refreshers—the question is between whom should they be allowed—should the refreshers be allowed against the plaintiff's opponent or should they be allowed between attorney and client.

A party to a defended long cause is entitled to appear by two counsel. If both counsel attend throughout the hearing and the other party is ordered to pay costs of the suit their brief fees and full refreshers would of course be allowed on taxation against the losing party. If the suit is conducted by one counsel only throughout the full refreshers of the conducting counsel and a nominal refresher of 2 G. Ms. of the other counsel would be properly allowable against the opponent if ordered to pay costs. If the absent counsel attends for portions of the time the case is at hearing his refresher proportionate to the time he attends would also be properly allowable in addition to the full refresher allowed to the counsel who attends and conducts the case.

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Of course a party is at liberty at any time if he or she chooses to employ a third counsel—for the matter of that there is no prohibition or limitation to the party employing a dozen counsel but this right of employing counsel must not be allowed to work hardship on the losing opponent. The counsel briefed by a party before the hearing of the suit are his proper counsel. The object of allowing a party to appear by two counsel is that the senior counsel should have the benefit and advantage of his junior's assistance, but in Bombay what has been happening for many years is that the moment a solicitor is employed to attend to what would be a contested long cause he tries to retain the two most senior counsel he could secure and generally the two are not able to attend to the case at the same time. If however they do, the client, if successful, is entitled to have the costs of the attendance of both of them taxed against his losing opponent. When a party to a defended long cause engages two counsel he has a right to the services of at least one of them. He is under no obligation whatever to engage a third counsel. If both counsel find that they would, owing to other engagements, be unable to go in and conduct the case when it is called on it is obviously the duty of one of them to return the brief—as a rule it is the junior counsel who has to return the brief, unless, as it very often happens, the senior offers to return *his* brief. If neither of his two briefs are returned to the solicitor in time to enable him to instruct another counsel in the place of the counsel returning his brief, the solicitor has a right to conclude that one of his counsel can come in. In this case though Mr. Inverarity did not, or could not, come in, Mr. Strangman was present when the case was called on and conducted it for the first two days and a portion of the third day. On the third day it seems he was called away to another Court. I assume it must have been known beforehand that he may be called away any time that day. The plaintiff's solicitor was entitled to have his case conducted by one of his two counsel. If Mr. Strangman had to go away and Mr. Inverarity was not able to relieve him and take up the conduct of the suit one of the two briefs should have been returned to the solicitor in time to instruct another counsel. I have no doubt what-

ever in my mind that if the difficulty likely to arise had been placed before the plaintiff's senior counsel he would immediately have returned his brief as it would be obviously unfair to the client to allow the junior counsel who had till then conducted the case and who was able to come in and take up the case to return his brief. The plaintiff's solicitor however from motives of prudence and caution had already provided for the contingency that arose. He secured the services of a counsel conversant with the details of the case as soon as the same were available and long before the difficulty arose, and, therefore, there was no necessity for either of the plaintiff's two counsel returning his brief. There would have been no question about Mr. Mirza's refresher if before he was instructed one of the plaintiff's counsel had returned his brief. As the facts stand Mr. Mirza was undoubtedly the plaintiff's third counsel. There is no prohibition against employing three counsel. If three counsel are engaged before the hearing it will be for the Taxing Master to consider the fees and refreshers of which two he will allow between party and party and which counsel's fees should go between attorney and client. A solicitor engaging three counsel is entitled, in the event of his recovering costs from the opponent, to have his third counsel's costs taxed between attorney and client if he proves express authority from his client or if he proves that some peculiar contingency arose which made it necessary for him to engage a third counsel in order to safeguard his client's interests.

If a third counsel is added after the hearing of the suit has commenced such addition must be at the cost of the party doing so. I differ entirely with the general principles as laid down by the Taxing Master in his decision. I have thought it necessary to write this judgment because I have felt that the principles to which the Taxing Master has given expression are wholly erroneous and if not corrected would lead to most undesirable results. I am told that this is the practice prevailing in the Taxing Master's office for a long time. I can only say that I feel very strongly that the sooner it is corrected the better for the parties coming to the Court for justice and better for the reputation of His Majesty's High Court of Bombay. Such a

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practice seems to me to be most oppressive and unjust to the party losing a case and having to pay his opponent's costs.

Let me for one moment turn and contemplate what may probably be the consequences of allowing a party to a defended suit adding a third counsel at the hearing of the suit and at some stage after its commencement. A party when he enters upon a fight is usually sanguine about winning his case and making his opponent pay his costs. He is at the same time anxious to secure the best assistance he could obtain in the way of counsel for the conduct of his case. If he finds that one of the two counsel who are engaged for him is not able to come in and once it is known that he can make his opponent pay the full fees of two counsel if he adds a third one—he would invariably insist on his solicitor adding a third counsel as soon as he finds that one of the counsel originally instructed for him cannot or does not appear simultaneously with his colleague. The only sacrifice he would have to make would be to pay the 2 G. Ms. nominal refresher of the absent counsel, himself. This in most cases he would cheerfully do. Then, again, a party entertaining reasonable hopes of success and maliciously inclined towards his opponent as he generally is when entering upon a fight would, if he knew that he could add a third counsel, insist on his solicitor doing so in order to make the defeat of his opponent as burdensome or ruinous as possible. There are other ways in which this practice if once sanctioned is liable to be abused but it is not necessary to discuss the matter further.

I had the advantage before now of hearing and ascertaining the views of the Taxing Officer on this question. I regret I am unable to agree with the views of so experienced and painstaking an officer as Mr. Mody.

As the senior counsel of the plaintiff never appeared throughout the hearing he is entitled to his brief fee and nominal refresher of 2 G. Ms. and this must be taxed as between party and party. The full refresher of only one counsel should be allowed throughout the hearing as between party and party. Mr. Mirza for the purposes of taxation as between party and party must be taken to be either holding Mr. Strangman's brief

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or appearing in the place of Mr. Strangman during his absence. All fees and refreshers payble to Mr. Mirza may be taxed as between attorney and client.

I refer back the bill to the Taxing Officer to enable him to tax the same in the way I have indicated.

No order as to costs.

Counsel certified for purposes of taxation between attorney and client the plaintiff.

Attorneys for the plaintiff: *Messrs. Mirza, Mirza & Mangaldas.*

Attorneys for the defendants: *Messrs. Ardeshir, Hormasji, Dinshaw & Co.* and *Messrs. Mirza, Mirza & Mangaldas.*

R. R.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Knight.

GANGU KOM DAGDU RAKHMAJI GODSE (ORIGINAL DEFENDANT), APPELLANT, *v.* CHANDRABHAGABAI KOM GOVIND PURSHOTTAM BHAGAWAT (ORIGINAL PLAINTIFF), RESPONDENT.*

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December 11.

Hindu law—Disqualified heir—Widow of the disqualified heir—Exclusion from inheritance—Rule as to construction of Hindu law texts.

The wife or widow of a disqualified Hindu does not become incapable of inheriting property merely by reason of her husband's disqualification, whether she claims as heir to a deceased person through her husband or otherwise, if she is herself free from any of the defects which exclude a person from inheritance under Hindu law.

It is a canon of interpretation in Hindu law that a special text forming an exception to a general text should be construed strictly and applied only to the cases falling clearly within it.

PER CURIAM:—According to a well-known rule of interpretation in Hindu Law, when there is a collocation of two texts, dealing with the same subject, and in the first of them two words or expressions occur, of which only one is repeated in the second text, the other word or expression must be excluded as not applying to cases falling within that second text.

SECOND appeal from the decision of V. V. Wagh, Joint First Class Subordinate Judge with A. P., reversing the decree passed

* Second appeal No. 95 of 1907.