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Each impliedly undertakes to indemnify his co-debtor or co-debtors respectively to the extent of his proper proportion of their joint debt, and where there are several co-debtors, as in the present case, they incur no joint liability for the proportionate contribution due from each.

But though the liability is individual and limited, still it arises out of the joint contract of all to pay the original debt, and the cause of action to enforce such liability accrues to the co-debtor, who pays the debt, against all at one and the same time.

We are, therefore, of opinion, after consideration of Section 8 of the Code of Civil Procedure, that the defendants in this case were not improperly included in one plaint, and that the suit ought to have been heard and determined on the merits. If decided in favor of the plaintiff, the decree should order payment separately by each defendant of the amount only of his just proportion of the debt which the plaintiff has been compelled to pay.

APPELLATE JURISDICTION (*a*)

Referred. Case No 11 *of* 1866.

ARUNÁCHELLA PILLAI *against* APPÁVU PILLAI.

Plaintiff owed defendant a judgment debt. He paid the debt, but not through the Court. Defendant then fraudulently applied to the Court to execute the decree, and the Court, being debarred by Section 205 of the Code of Civil Procedure from recognising payments made otherwise than through it, executed the decree by making the plaintiff pay again the sum decreed. Plaintiff sued to recover the amount overpaid.

Held by the majority of the Court (Scotland, C. J. and Innes, J dissenting) that such a suit is not maintainable.

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THIS was a case referred for the opinion of the High Court by F. M. Kindersley, the Acting Judge of the Court of Small Causes of Combaconum, in Suit No. 300 of 1866.

No Counsel were instructed.

The Judges delivered their opinions in the following order :—

(*a*) Present : Scotland, C. J., Bittleston, Holloway, Innes and Collett, J. J.

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HOLLOWAY, J. :—The question is whether a sum of money, paid by a judgment debtor out of Court to a judgment creditor, can be recovered, when the creditor has fraudulently levied the sum a second time through the process of the Court, which, by Section 206, was forbidden to notice the payment not certified to it by the decree holder.

The very statement of such a case naturally leads to a strong desire to remedy such injustice, if such remedy is not forbidden by the law itself.

The original payment and receipt were perfectly rightful. An action therefore could not lie as on a payment of money not owing (*condictio indebiti*). It was the second demand which was wrongful, the one which the Court enforced, not the first ; and the action is therefore in truth and fact for the recovery of the sum exacted by the process of the Court, and not for the sum originally paid.

The case therefore has, at the first blush, a strong resemblance to *Marriot* v. *Hampton* (*a*). It is money paid under the compulsion of legal process of which the recovery is sought. In *Marriot* v. *Hampton* it was so paid under compulsion, because the plaintiff had lost his receipt. Here it is because the Court which tried the case (for, under Section 11 of Act XXIII of 1861, case it was and the only case) could not receive evidence of the previous payment. Does this make any difference ? I can see none in principle. The money wrongfully exacted has in each case been exacted by legal process, and the original payment in each case was of money rightfully due, and, if nothing more had happened, could by no process be recovered. Then is there anything on the face of this case to justify an action in the shape of the Roman *condictio ob causam datorum* (*i. e.*, *causa data causa non secuta*, one of the numerous obligations enforced by the English action for money had and received. The general principle of such an action is that if anything is given on account of something to be done in future and that which is so to be done does not follow, there is a right of recovering the money paid (Dom. Bk. XIV, Cap. XX, § 2). Now no doubt if we shut our eyes to the facts, we may say that the belief that the receiver

(*a*) VII T. R. 269. II. Sm. L. C. 356.

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would represent the matter to the court was the cause of the payment, and so it was a cause but not *the* cause. Perhaps it was the *causa sine qua non*, but not the *causa causans*. Probably it was not even *a* cause; he perhaps really believed that he would never be troubled and that nothing more would be done. The cause causans was the original debt which he really discharged by the payment. It seems to me impossible therefore to say that, it any point of view, the plaintiff is suing or can be suing for the money originally paid. I have treated the question up to this time as if nothing had happened but the recovery by process of law of a sum on an obligation, already discharged naturally, and only not discharged civilly because of certain positive provisions of the law.

Act XXIII of 1861 is, by Sec. 44, part of Act VIII of 1859. To see, therefore, what the legislature has orderd as to procedure, we must insert its provisions in the places in the Code dealing with the same object matter. The result of inserting Section 11 in Cap. I, to which it belongs, would be to introduce 'but no suit shall be brought for the recovery of the amount of mesne profits or on questions relating to sums alleged to have been paid in discharge or satisfaction of the decree.' It seems to me impossible to dispute that this is such a question; it is therefore a question which is not to be determined by separate suit. Can the fact that Section 206 forbids the Court to recognise the payment, alter this plain provision? it may of course be said that, as the Court cannot notice the matter, it cannot be said to be a question within the meaning of this Section. The correct answer seems to be, it is a question and you may ask it, but the Court is forbidden either to answer it or to give effect to its answer. This, however, cannot prevent it, in any natural and reasonable meaning of the words, being a question.

I regret that I feel myself compelled to retain my original opinion, that this action cannot be maintained because it is a suit for money levied by legal process, although for a debt no longer due; and, secondly, because by his suit the plaintiff raises a question as to money alleged to have

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been paid in satisfaction of a decree, and the legislature has not only said affirmatively how such questions shall be answered, but by express negative words that it shall not be answered by separate suit (1 H. C. 453). I should have thought the plaintiff's case more favorable if the legislature had declared any payment out of Court absolutely void, and if I had found this Section XI in the original Act in the Chapter relating to execution of decrees, I should have thought it possible, although even then somewhat violent, to narrow the meaning to "such questions as the Court is permitted to entertain." The act, however, contains many miscellaneous matters, which must all be distributed under the heads to which they respectively belong, and the question referred clearly operates upon the power of entertaining suits with particular objects. It enlarges the power of receiving and entertaining suits. Each provision must be referred to its proper head.

SCOTLAND, C. J.—The effect of Section 206 of the Civil Procedure Code is to render an adjustment of a decree out of Court unavailing as satisfaction, unless certified by the decree-holder. It does not prohibit such an adjustment, if, as in this case, the judgment debtor is willing to trust to the good faith of the decree—holder. The question then is, whether the plaintiff can maintain a suit for the amount obtained from him in excess of the judgment debt after the adjustment of the decree, the same having been recovered by process of execution. There is no doubt that the suing out of such process by the defendant was a gross fraud, committed for the purpose of extorting money when nothing was due, and, if the case had stood independently of the above Section and Section 11 of Act XXIII of 1861, I am disposed to think that the plaintiff even then would have had a right in equity and good conscience to maintain the suit. (See, as bearing on *Marriot* v. *Hampton*, the cases at common law of *The Duke of Cadaval* v. *Collins*, 4 A. and E. 858, and *D'Medina* v. *Grove*, 10 Q. B. 170). But, giving to those Sections what appears to me to be their proper construction, the suit is in my opinion clearly maintainable.

The rule of law that money obtained *bona fide* under

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compulsion of legal process cannot be recovered back in a second suit, proceeds on the grounds that the party proceeded against has had an opportunity of defending himself from the claim, either by evidence on the trial or by taking proper steps to set aside the process, though he may not have been prepared at the time with the requisite means of doing so successfully. Here it seems to me that it was not open to the plaintiff, under the Civil Procedure Code, to defend himself in any way against the execution in the former suit, by shewing that the decree had been satisfied out of Court, or even to raise a question on the subject, and consequently that the suit is not within the Rule. On the same ground I think that the suit is not prohibited by Section 11 of Act XXIII of 1861. The plaintiff, in my opinion, had no other remedy open to him for the fraudulent extortion of the debt. The language of Section 11, describing the questions to be decided by an order of the Court in the course of execution, and not by separate suit, is certainly applicable to the adjustment of a decree out of Court. But it also clearly shews that the questions intended to be provided for, were such as the Court could, at the instance of either party, hear and determine by passing an order, against which the unsuccessfully party might appeal. In fact it substitutes a hearing in the couse of execution for a trial in a suit. Now Act XXIII of 1861 is declared to be a part of Act VIII of 1859, and Section 206 of the latter Act, in effect, prohibits every Court from entering upon the question of a disputed adjustment out of Court at the instance of the judgment debtor. Both this Section and Section 11 of Act XXIII of 1861 can consistently have full operation given to them, and reading them together, I think I am bound to put upon them the construction, that an adjustment out of Court cannot be made a question in execution between the parties for determination by order of the Court, and is, consequently, not a matter to which the prohibition of a separate suit in Section 11 applies. It is not, it appears to me, enough that the adjustment might have been brought to the notice of the Court, if it could not have been made a question for determination. The effect of Section 206, I think, is

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to take such an adjustment out of the operation of Section 11.

For these reasons I am of opinion that the suit is maintainable to recover the money obtained under compulsion of the execution process fraudulently sued out.

INNES, J.—The plaintiff in the suit, in which the present question arises, owed the defendant a judgment debt. He paid the debt, but not through the Court. Defendant then fraudulently applied to the Court to execute the decree, and the Court, being debarred by Section 206 of the Code of Civil Procedure from recognising payments made otherwise than through it, executed the decree accordingly by making the plaintiff pay again the sum decreed.

Plaintiff now sues to recover the amount overpaid. He claims it as the sum first paid. But it seems obvious that what he seeks to recover is neither of the two specific sums, but the debt which is the result of the double payment.

However viewed, it is clear that what he claims in this suit is the amount of a sum paid in discharge of a decree; and Section 11, Act XXIII of 1861, provides that questions relating to sums alleged to have been paid in discharge of a decree, shall be determined by the Court executing it and not by separate suit. It would, therefore, at first sight seem that such a suit as the present could not be entertained. But Section 11, Act XXIII of 1861, must be read with the Civil Procedure Code with which it is incorporated. Section 206 of the Code precludes any question arising in execution as to sums alleged to have been paid in discharge of a decree *out of Court*, and reading these two Sections together, I come to the conclusion that the questions relating to payments in discharge of a decree referred to in Section 11 above mentioned, must, to preserve consistency with Section 206, be questions relating to payments such as the Court could entertain, *i. e.*, payments made *through the Court*; such as questions regarding part payment of instalments extending over a long period; questions as to payments through the Court raised by the transferree of a decree who applies for further execution under the decree; questions raised as to payments by the representative of a deceased

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person against whom the decree is ordered to be executed under Section 210, who may be unaware what sums have been already paid ; and many other questions of a like kind.

Such questions must all be settled in execution. But there is nothing, I think, to bar an action for the recovery of a payment made otherwise than through the Court. I have said above that it seems to me that the claim of plaintiff is for recovery of neither the former nor the second payment, but of the debt which results from defendant having received double what was due to him ; but I do not mean to say that it can be distinguished in this respect from *Marriot* v. *Hampton*. The circumstance that the action in that case was to recover back the specific sum paid under compulsion of legal process, and that in this the claim is for the first sum paid, merely constitutes a distinction in description. Substantially, no doubt, the object of the present suit is, equally with *Marriot* v. *Hampton*, the recovery of the amount paid under compulsion of legal process, and, if we are bound in other respects by the rule in *Marriot* v. *Hampton*, to permit the plaintiff to recover would be to enable him to do under one description of his claim what, according to that rule, he could not do under another. But I think that the present case is distinguishable from *Marriot* v. *Hampton* in the manner pointed out by the Chief Justice. In that case there had been a decision adverse to the plaintiff upon the very point of former payment upon which he grounded his claim. In the case before us, Act XXIII of 1861 itself precluded any inquiry into the question of former payment. Upon that question there has been no trial and no decision, and the argument on which the decision in *Marriot* v. *Hampton* was based, that such actions, if maintainable, would lead to the continual re-opening of decided cases upon the appearance of new evidence which ought to have been brought foward at the trial, has therefore no application to the case before us.

Supposing, however, that the present case falls clearly within the rule of *Marriot* v. *Hampton*, yet if to follow that rule would be manifestly inequitable, we are not bound to

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do so. Nothing could be more inequitable than to shut out plaintiff from the means of recovering the sum over-paid to defendant, and I think that the rule of the Civil law should be followed, which gives an action for recovery of a thing given for a cause which ceases, or a condition which does not happen. The cause, as it seems to me, for payment of the first sum, was that it might be appropriated in discharge of the debt, and so soon as the second sum was paid in execution the first sum ceased to be a sum so appropriated. I therefore think that the action is maintainable.

COLLETT, J.—This case has already been so fully discussed that I will only briefly state my views. I quite agree that the suit is not maintainable in the form in which it has been brought, as a suit to recover back the sum first paid ; that was a perfectly good payment. But I think it right for us not to turn the plaintiff round upon this technicality ; but to give an opinion as to whether the suit would have been maintainable if brought to recover the second sum paid under process of execution. I agree with the Chief Justice that such a suit would be distinguishable from the English leading case referred to. The rule laid down by that and other like cases, and the reason for it I understand to be, that where a party has been compelled to pay a sum of money under a decree of a Court, he cannot recover it back, though he had what the Court would have deemed a good defence, but which, either from his fault or misfortune, he omitted to bring forward, and this is because there must be some end to litigation, or otherwise one suit would generate another, and so on *ad infinitum*. Here, certainly, the plaintiff could not have offered as his defence the prior payment out of Court, because the Court could not have listened to it. I doubt, therefore, if the case of *Marriot* v. *Hampton* assists to a decision of the present question. But I entirely concur with Mr. Justice Holloway in his reasoning as to the effect of the two Sections cited from the Code. It seems to me clear that Section 11 of the Amending Act lays down a general rule, prohibiting all separate litigation upon the questions falling within the general description contained therein ; and then Section 206 of the Code prohibits the Court, to which the sole consideration of

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all such questions is reserved, from receiving a particular defence which might otherwise have been offered on the trial of one of the several kinds of questions so generally described and reserved. I have therefore no hesitation in agreeing that, if the present suit had been to recover the sum last paid under process of execution, the language of the Code is sufficient to prohibit such suit.

It is to be regretted that the policy of the law (as I conceive it to be) in preventing one suit from generating another suit, and in shutting the door altogether to a defence so prolific of perjury and forgery as in this country would be a plea of payment out of Court in satisfaction of a decree, should occasionally, as perhaps in the present instance, be availed of to perpetrate a fraud. It may be that the Legislature has been content to leave clear cases of fraud to be dealt with by the Criminal Law ; but however this may be, and however hard it may seem that the present plaintiff should be without Civil remedy, I am quite satisfied that the language of the Code precludes him from recovering by separate suit the money paid by him under process of execution.

BITTLESTON, J.—After carefully considering the provisions of Section 206 of the Civil Procedure Code and Section 11 of the Amending Act (XXIII of 1861), together with the observations of my colleagues thereon, I have come to the conclusion that this suit cannot be maintained. It appears to me that, by holding it maintainable, we should open the door to a kind of litigation which it was the intention of the Legislature to prevent ; for if this suit can be maintained, then every defendant, from whom the amount of a decree is levied by execution, may commence a suit to get rid of that execution by alleging and giving evidence of a previous payment in satisfaction out of Court.

But Section 206 of the Code prohibits the Court, which is charged with the execution of the decree, from recognising any adjustment of it, unless made through the Court, or certified to the Court by the decree-holder, or unless the Court has ordered that the money payable under the decree shold not be paid into Court. And Section 11 of the

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Amending Act provides that "questions relating to sums alleged to have been paid in discharge or satisfaction of the decree or the like, and any other questions arising between the parties to the suit in which the decree was passed, and relating to the execution of the decree, shall be determined by order of the Court executing the decree and not by separate suit." In other words the Legislature appears to me to have said—"If either of the parties to a suit has any question to raise respecting alleged payments in satisfaction of the decree or respecting the execution of the decree in any other particular, he must raise it in that suit, and not being another suit for the purpose, and, further, the Court is not to recognise an adjustment out of the Court." The mode of proceeding is pointed out to the parties; and a rule is laid down for the guidance of the Court in determining certain questions which may be brought before it; but I do not think that the rule laid down for the guidance of the Court affects the procedure to be adopted by the parties.

If a defendant is aggrieved by a fraudulent execution, by an abuse of the process of a Court of Justice, the natural and obvious remedy is an application to the Court itself to set aside the execution and order restoration of whatever may have been levied under it; and the Legislature has tied the defendant down to this course. But if, by reason of Section 206 of the Code, the defendant cannot make out his case, because it depends upon an alleged private adjustment of the decree out of Court, is that a ground for saying that he has a remedy by action? I think not. It is improbable that the Legislature should have so intended. Doubtless the object of Section 206 was to prevent litigation arising, after the decree, from allegations of payment or adjustment out of Court; and that object would be wholly defeated, if such questions could be raised in a fresh suit, and if the operation of Section 11 of the Amending Act were limited in the manner suggested by the Chief Justice.