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GOBIND RAM MARWARY v. MATHOORA SABOOYA.

Baboo *Taruck Nath Sen* for the respondents.

JACKSON, J.—The lower Appellate Court dismissed the appeal of the plaintiff, and, it may be said, virtually dismissed his suit, on the ground that notice—that is to say, formal written notice—of dishonor had not been served on the defendants. Now, neither the case which the lower Appellate Court cites, *Anunt Ram Agurwala* v. *Nuthall* (1), nor any other case, has been brought to our notice which decides that in this country either a written formal notice of dishonor is necessary, or that the absence of such a notice would be a sufficient defence unless it is shown that by such absence the defendant has been prejudiced. So far, therefore, the judgment of the lower Appellate Court appears to be erroneous, and must be set aside. [The learned Judge then proceeded to consider the other points in the case, and with reference to them, the case was remanded to the lower Appellate Court.]

Case remanded.

ORIGINAL CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Markby.

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Feb. 18 *&*
Mar. 4.

ELIZA SMITH (PLAINTIFF) *v.* THE SECRETARY OF STATE (DEFENDANT).

IN THE MATTER OF ACT II OF 1874.

Res Judicata—Civil Procedure Code (Act X of 1877), s. 13—Application under the Administrator-General's Act (XXIV of 1867), s. 60—Act II of 1874, s. 63—"Suit."

An application by petition under s. 63 of Act II of 1874 is a suit within the meaning of s. 13 of Act X of 1877, and therefore such an application is barred by the disposal of a former application in the same matter under the same section, or under s. 60 of Act XXIV of 1867, which the Act of 1874 repeals: this is so whether the order is one for payment of money or one dismissing the petition.

S. 63, Act II of 1874, contemplates that the money which is the subject of the petition may be claimed by parties other than the applicant, and that

(1) 21 W. R., 62.

those parties may appear and be represented at the hearing; and the words "binding on all parties" were intended to make the order binding upon such parties as well as on the petitioner.

The order passed under that section can be reviewed under s. 623 of Act X of 1877.

APPEAL from a decision of Kennedy, J., dated the 26th of November 1877. From the petition it appeared that, on the 24th of June 1873, the petitioner, Eliza Smith, applied under Act XXIV of 1867 for an order that the defendant should pay to her the sum of Rs. 82,695-8-11, or such other sum as should be in his hands, to the credit of the estate of R. J. H. Magness, deceased, whose niece the petitioner claimed to be. On that hearing an order was made adjourning the hearing, and directing the defendant, out of the monies in his hands belonging to the estate of the said R. J. H. Magness, to pay to Messrs. Robertson, Orr, Harriss, and Francis, the petitioner's attorneys, Rs. 1,000, for the travelling and other expenses of the petitioner and her witnesses to attend before the Court for examination. The further hearing of the application took place on the 8th of July 1873, when witnesses were examined in support of the application; and after hearing evidence, the Judge (Macpherson, J.) expressed his opinion that the petitioner had not proved her identity, and on that ground refused the application. On the 22nd of December 1873, the petitioner applied to the Court to review the former decision, or to grant her leave to renew the application; but that application was refused.

The petitioner subsequently discovered further evidence in the matter, having met with a Mr. DuBois, whom she had previously known, and who recognized her, and who made an affidavit in her favor.

The petitioner, with this additional evidence, again applied on the 10th of April 1874 for a rule calling on the Secretary of State to show cause why a review should not be granted, and Macpherson, J., made an order that the petitioner should be at liberty to renew her application for payment to her of the monies in the hands of the defendant belonging to the estate of R. J. H. Magness on notice to the defendant of such application.

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On the 10th of August 1874, the petitioner, in accordance with the leave reserved, renewed her application before Pontifex, J., who ordered that it be dismissed with liberty to the petitioner to renew the application before Macpherson, J. The application was accordingly renewed before Macpherson, J., on the 17th of August 1875, who, not being satisfied with the affidavit of DuBois, dismissed the application. The application on which the order appealed from was made was on further affidavits of a Mr. Johannes and a Mr. Patterson, which, she submitted, corroborated the evidence of Mr. DuBois.

The petitioner applied on the 29th of October 1877 to the Comptroller-General by letter enclosing copies of all her evidence, and received in reply a letter stating that the money would not be paid out to her without an order of Court.

On her application, the following judgment was delivered:—

KENNEDY, J.—In this case it seems to me that one of the principles which operate in inducing the Courts to view with the greatest possible disfavour attempts to reagitate a case once decided applies with more than ordinary force.

The application is one to get out money transferred to Government under the provisions of an Act which contemplates such transfer not being made till after the lapse of very many years. Therefore, in all cases the applications must refer to circumstances at a very distant date. Now lapse of time tells with more deteriorating influence against a true than a false case. The man who tells what he remembers, tells it with greater hesitation and risk of falling into error in proportion to the time that has elapsed. It is not so where a case is not based on memory but on imagination. Here the applicant had an opportunity of coming into Court, making her application and producing all the evidence available, which failed to induce the Judge who tried the case to believe her story. I cannot say that he decided absolutely that her case was false, but he reserved no leave for further application, and at least declined to decide it to be true; and the question would (to put it at the very best for the petitioner) still remain, is her case false or true? Now if it be

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a false case, it would be most dangerous to give her the opportunity of improving the imperfect evidence, and thus making it appear true, especially after the lapse of years had rendered it impossible to produce contradictory evidence, and this danger is one of the reasons for refusing again to agitate a decided issue. On these grounds, as well as on the ground of the necessity for finality, I should have been inclined to think that the ordinary principle of estoppel applies to such applications.

I do not, however, think that I am left to these considerations. The new Procedure Code incorporates all summary and miscellaneous proceedings by directing the procedure thereby prescribed to be followed in all civil proceedings other than suits and appeals; and by the 13th section, wherever an issue has been determined between the parties, that issue cannot be raised in any other proceeding between them. This is an express provision, as it seems to me, to refuse the application. The application is refused with costs.

From this decision the petitioner appealed, on the ground that s. 13 of Act X of 1877 did not apply to the application so as to prevent the Court from entertaining it; that the refusal of the petitioner's previous applications did not preclude her from making any fresh application in this matter on additional evidence, inasmuch as such previous applications were refused simply on the ground that the Court was not satisfied of the identity of the petitioner as niece of the said Captain Magness, and not on the ground that it was of opinion that the petitioner was not the party she represented herself to be; and that the Court ought to have heard and decided the application, inasmuch as it was based on additional evidence and on the fresh refusal of the Comptroller-General on such evidence, to admit the petitioner's claim without an order of a Court of Justice.

Mr. *Jackson* (Mr. *Branson* with him) contended that the application was not barred by s. 13, Act X of 1877, not being a suit within the meaning of that section; and referred to a former case — *Joyranee Dossee* v. *The Secretary of State* (1) —in which two applications were allowed to be made. Act II

(1) Unreported.

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of 1874, s. 63, says that the Court may make such order "for payment of such portion of the claim as justice requires." [The *Advocate-General.*—I read these words as descriptive of the petition, and not as referring to the order the Court may make.] It is submitted they refer to the nature of the order to be made. Under that section an order refusing payment of any portion would not be binding, as it is not an order for payment. It is in the discretion of the Court to allow any number of applications: if it is of opinion they were improper applications, it has power now, under Act II of 1874, to deal with them in their order as to costs, and not to give costs, or to give them against the applicant. An appeal is precluded in cases where an "order for payment" is made. [MARKBY, J.—Might not the word "binding" have been introduced to bind the Crown, which might otherwise have been considered not bound; in that view it would not bar an appeal.] It is submitted it was intended to bar an appeal in a case supposed by the section: this is not such a case. Any number of applications can be made in case of discovery of fresh evidence. This is an application which it is in the discretion of the Court to grant.

The *Advocate-General*, offg. (Mr. *Paul*) and the *Standing Counsel* (Mr. *J. D. Bell*) for the respondent were not called on.

The judgment of the Court was delivered by

GARTH, C. J.—This was an appeal against an order of Mr. Justice Kennedy, dismissing an application made by the plaintiff under s. 63 of Act II of 1874.

His Lordship considered that as a previous application of precisely the same nature had been made under the repealed Administrator-General's Act (No. XXIV of 1867, s. 60) to enforce the same claim, and which had been heard and decided against the applicant, she was barred by s. 13 of the new Civil Procedure Code (Act X of 1877) from renewing the application.

There is no doubt that, in the years 1871 and 1872, Mrs. Smith did apply to the Court under Act XXIV of 1867 to obtain the

sum now claimed, which application was refused; and that, in the year 1873, another application for the same sum was made by her to Mr. Justice Macpherson, which was also refused.

A further application for a review of his order was then made to Mr. Justice Pontifex, which was unsuccessful; and another similar application was afterwards made to Mr. Justice Macpherson, which was also unsuccessful.

The application to Mr. Justice Kennedy was made on the 26th of November last, upon certain fresh evidence, which, it was said, supplied the defects which had previously induced the Courts to decide against the applicant; and it has now been contended before us—

1*st.*—The application is not a suit within the meaning of s. 13 of Act X of 1877, and consequently that the applicant is by law entitled to repeat the application as often as she thinks proper; and

2*ndly.*—That if it were a question for the discretion of the Court to rehear the application or not, the learned Judge ought, in the exercise of that discretion, to have reheard the case, inasmuch as the new evidence, now brought before the Court, was such as the applicant could not, by using reasonable diligence, have procured before.

It will not be necessary for us to enter upon this last point, because we think, upon consideration, that Mr. Justice Kennedy was quite right in deciding that the application was barred under s. 13. It is the first time we believe that the question has been raised since the passing of the new Code, and it is desirable that it should be settled by an Appellate Court.

Section 13 provides "that no Court shall try any suit or issue in which the matter in issue has been heard and finally decided by a Court of competent jurisdiction in a former suit between the same parties."

Now there is no doubt here that the matter in issue, which is the claim made by Mrs. Smith to the fund in question, has been decided in the former application as between her and the Secretary of State; but then it is said, in the first place, that this is not a "suit" properly so called; and in the next place, that the issue in the former case was not finally decided,

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because the only order made upon the application was one dismissing the petition.

The 63rd section of Act II of 1874 (which is in the same terms precisely as s. 60 of the repealed Act XXIV of 1867) enacts "that, on the application being made, the Court shall make such order for payment of such portion of the sum claimed as justice shall require, and that such order shall be binding upon all parties to the suit."

It seems clear from the language here used that the proceeding for which the section provides is to be considered a summary "suit:" but the appellant contends that the order made by the Court is not to be binding upon any body, unless it is one for payment of the whole or some portion of the money claimed; or, in other words, that the decision of the Court is to bind the Secretary of State if the applicant succeeds; but that it is not to bind the applicant if the Secretary of State succeeds.

We consider that this is not the true meaning of the section; and that the words "binding upon all parties to the suit" were inserted with a different intention altogether from that which the appellant would ascribe to them. The section contemplates that the money, which is the subject of the petition, may be claimed by parties other than the applicant; and that those parties may appear and be represented at the hearing, although they may not have joined in the petition; and the words in question appear to be inserted for the purpose of making the order of the Court binding upon those other parties as well as upon the petitioner.

We think, therefore, *first*, that this proceeding must be considered as a "suit;" and *secondly*, that the issue raised in it having been once decided as between the appellant and the Secretary of State, no fresh suit or application can be made which raises the same issue.

This rule need be productive of no injustice, because, if the proceeding is a suit, there is no reason why the order made upon it should not be reviewed under s. 623 of the Code; and we are not prepared to say that Mrs. Smith, if an application upon sufficient grounds were made in this case to the Court below,

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would not be entitled to a review. That, however, would be a matter entirely in the discretion of the learned Judge who hears the application, and we give no opinion upon it.

The appeal is dismissed with costs.

Appeal dismissed.

Attorney for the appellant: Mr. *Leslie.*

Attorney for the defendant: The *Government Solicitor* Mr. *Sanderson.*

APPELLATE CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Markby, and Mr. Justice Ainslie.

IN THE MATTER OF THOMSON'S POLICY.*

1877
Dec. 21.

Stamp Act (XVIII of 1869), *ss.* 34, 41, *Sched II, cls.* 5, 20—*Policy of Assurance—Assignment and Retransfer by Endorsement.*

A policy of insurance bore three endorsements: the first, an assignment of all the right, title, and interest of the assured to the P Bank; the second, a retransfer from the P Bank to the assured, all claims having been satisfied; the third, an assignment by the assured similar to the first assignment to Messrs. B. R. S. and Company.

Held by MARKBY and AINSLIE, JJ., that the first and third endorsements were liable, as collateral instruments under Sched. II, cl. 20 of the General Stamp Act, to a stamp of one rupee, and that the second endorsement was not chargeable with stamp duty.

Held by GARTH, C. J., that none of the endorsements were chargeable with duty.

THIS was a reference made by the Board of Revenue, North-Western Provinces, to the High Court, under s. 41 of Act XVIII of 1869. The facts of the case were as follows:—A policy of assurance for Rs. 3,000, issued by the Indian Life Assurance Co.

* Reference from the Secretary to the Board of Revenue, N. W. Provinces, under s. 41 of Act XVIII of 1869, dated the 20th, August, 1877.