Original Civil Jurisdiction.

1863. Sept. 19.

ARDESIR LIMJI v. SORA'BJI PESTANJI and others.

Settlement of Issues—Payment of Money into Court—Costs.

At the settlement of issues, defendants paid money into court, which plaintiff took out in part satisfaction of his claim, and raised an issue as to damages. The plaintiff subsequently accepted the sum paid in full satisfaction, and withdrew the suit.

Held—That the plaintiff was entitled to his costs up to and including those of the settlement of issues.

THIS was an action to recover Rs. 25,378, money alleged to be due for goods sold and delivered and as the balance of an account. The case came on for settlement of issues, on the 9th of July 1863. The defendants stated they had tendered Rs. 14,619, and then, by leave of the Court, paid Rs. 17,645 into court.

The plaintiff obtained leave to take the money out, and the issue raised was whether the defendants were indebted to the plaintiff beyond the amount paid into court.

On the 15th of September 1863, Messrs. Kelly and Hore, the plaintiff's solicitors, wrote to Mr. Keir, defendants' solicitor :—

"The amount you have paid into court is so much in excess of the sum you previously tendered that our client will not go on with the action. Your clients will have to pay our costs down to the settlement of issue. Will you undertake to pay these, or must we apply to the court ?"

The defendants declined to pay the costs, and the question was by arrangement brought before the court.

White, for the plaintiff, contended he was clearly entitled to his costs: under the practice of the late Supreme Court, a plaintiff, if he discontinued any time before trial, was entitled to his costs up to the time of payment of money into court. Under the new procedure the same rule ought to apply until the settlement of issues took place. The plaintiff had no means of ascertaining what case his opponent intended to set up, and if a defendant then paid money into court he was in the same position as a defendant who had done so by plea under the old system. The fact that a plaintiff did not at once accept the money in full satisfaction could not deprive him of the right to costs which he had already acquired.

1863.

ARDESIR LIMJI v. SORA'BJI PESTANJI *et al.*

Bayley, for the defendant:—The plaintiff, by continuing his suit after the settlement of issues, has lost his right.

COUCH, *J.*:—I think that the plaintiff is entitled to the costs he claims: until the issues are settled he has no means of knowing what case his adversary intends to set up, and if he accepts the amount paid at the settlement of issues in full satisfaction, he does so at the earliest possible moment, and he is, therefore, entitled to his costs up to that time. I think that the fact of his having at first refused to accept the money does not deprive him of his right to these costs if he does so before trial. I, therefore, hold that the plaintiff is entitled to his costs up to and including the costs of the settlement of issues.

LATE SUPREME COURT, EQUITY SIDE.

Sept. 10.

GA'NGBA'I, wife of NU'R MUHAMMAD DA'TTU-BHA'I.....*Plaintiff.*

THA'VAR MULLA', Executor of RAHIMATBA'I, widow of SA'JAN MI'R ALLI' .....*Defendant.*

Will — Charity — Charitable Bequest — Dharm — *Gift in* Dharm — *Stat.* 43 *Eliz., c.* 4.

In the Will of a Khojá Muhammadan written in the English language and form, a gift of a fund "to be disposed of in charity as my executor shall think right," is a valid charitable bequest, and it will be referred to the proper officer of the Court to settle a scheme for the application of the fund to charitable objects, by analogy to Act 43 Eliz., c. 4.

Where, however, the Will is in the Native langnage, and the word "*dharm*" or "*daram*" is used, the word is held too vague and uncertain for the gift to be carried into effect by the Court, the word "*dharm*" or "*daram*" including many objects not comprehended in the word "charity" as understood in English law.

THIS was a suit instituted in the late Supreme Court for the administration of the estate of one Sájan Mír Allí, a Khojá Muhammadan of Bombay, who died in the year 1843. Under his Will, which was in the English language and form, his widow, Rahimatbái, became entitled to his residuary estate and effects for her life, with a general power of appointment by will. Rahimatbái died in the year 1851, having shortly before her death executed her Will in the English language and in English form. She thereby, after reciting the power of appointment, bequeathed and appointed the residuary estate of Sájan Mír Allí, and also her own separate property, to the defendant, Thávar Mullá, upon certain trusts therein