Original Suit No. 294 of 1865; Appeal No. 65.

FRA'MJI' BOMANJI' ..... *Plaintiff and Appellant.*
HORMASJI' BARJORJI' ..... *Defendant and Respondent.*

Right to appeal from decision of two Judges in Original Civil Jurisdiction—Alteration introduced by Amended Letters Patent.

Where two Judges decided a case of Original Civil Jurisdiction under the Original Letters Patent; but the decree was sealed and the appeal preferred after the Amended Letters Patent had come into operation:—

Held that the right of appeal to the High Court—constituted so as to hear an appeal from two Judges—which existed in such a case, under Sec. 14 of the old Charter, was taken away by Sec. 15 of the new Charter; as there was no reservation therein that parties should retain any right of appeal, which existed before its publication, in respect of suits then pending, of judgments given, or of decrees made, but not executed.

A right of action is not taken away by a change in the law, unless by express enactment; but in the case of mere procedure, unless something is said to the contrary, the new law, where its language is general in its terms, applies without reference to the former law or procedure.

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THIS was an Appeal from the decision of Sir M. R. SAUSSE C.J., and Sir JOSEPH ARNOULD, J., who gave judgment for the defendant, on the 7th of June 1865, in the Original Suit (No. 294 of 1865), which was brought to try the plaintiff's right to the possession of property in Bombay of the value of Rs. 50,000; and the preliminary question to be now decided by the Appeal Court (consisting of Sir R. COUCH, C.J., NEWTON and SARGENT, JJ.,) was whether, the Amended Letters Patent of December 1865 having come into operation before the sealing of the decree in the original suit, the High Court had jurisdiction to hear an appeal in accordance with the practice as regulated by the old Letters Patent, which were in force when the suit was heard and decided.

Pigot, for the appellant, contended that it could not have been the intention of the Legislature to cut off the right of

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appeal which parties enjoyed, at the time when the Amended Letters Patent were published, in respect of suits disposed of before the date of their publication. If Sec. 15 of the new Charter were to be read with that strictness which would prevent the plaintiff from appealing to this Court, the same words would take away all appeals of the same kind pending but not yet heard; as there was no saving with respect to them. The fact that there was no saving clause on the subject favoured a more liberal construction of the Charter; and presented an argument that the Legislature did not intend to interfere with the right to bring an appeal, or to hear an appeal already brought, under the old Charter.

Green for the respondent.—The only section of the new Charter which gives an appeal in a case like the present is, in its plain and unmistakeable language, against the form of appeal here contended for.

COUCH, C. J.—In this case, which is an appeal against a decree made by the late Chief Justice and Sir Joseph Arnould,—a decree which was sealed in May 1866, after the present Letters Patent constituting the High Court were published and had come into operation,—the question is, whether the appellant has a right to appeal to the High Court, by which is meant a Court of Appeal of the High Court constituted so as to hear an appeal from two Judges, under the practice which was regulated by the old Letters Patent; or whether that right of appeal is taken away by the new Letters Patent, and the only appeal which the party now has is an appeal to the Privy Council: so that in a case where the amount was under the appealable value in regard to appeals to the Privy Council (which, however, is not the case here) there would be no appeal whatever.

Now, this, as was stated by the learned counsel for the appellant, is a question of procedure. A new Charter has, in respect of appeals, substituted a different procedure for the procedure under the old Charter; and it is important to

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consider that such is the real nature of the question. In construing a Charter of this kind the Court should, I think, be guided by the rules and principles upon which Acts of Parliament are construed: and we have not been favoured by the learned counsel with any decisions of the Courts with regard to the mode in which Acts of Parliament regulating procedure ought to be construed; nor has any case whatever been cited to us in reference to the subject.

But the rule is very clearly stated in *Wright* v. *Hale* (*a*) in which there was disclosed what might be described as a case of hardship—what might possibly be as well entitled as the present case to be described by the learned counsel as involving an injustice if the appellant were not allowed an intermediate appeal from two Judges of this Court to three Judges, before going to the Privy Council.

In the case referred to the question was this: A party had commenced an action before the Common Law Procedure Act came into operation, and was entitled if he succeeded in that action to recover his costs under the then existing law; but the Common Law Procedure Act enacted that when a plaintiff in an action for an alleged wrong recovered by the verdict of the jury less than £5, he should not be entitled to costs in case the Judge should certify that the action was not really brought to try a right; and a power was thus vested in the Court, in regard to cases brought before the Common Law Procedure Act came into operation, to certify that the plaintiff should not have his costs in a certain event, although by the state of the law when he brought his action he was entitled to have his costs, and although he might have commenced proceedings in the full expectation that he would have those costs if he succeeded. The question before the Court in that case being, whether this provision was to have a retrospective effect, and was to apply to actions brought before the passing of the Act, the Court held that it did apply to such cases; and Baron *Wilde*,

(*a*) 30 Law J., Exch. 40.

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one of the Judges of the Court, states very clearly the principles upon which that was held as follows:—"The principle that seems to me to be applicable to the case is this, that where you are dealing with a right of action, and an Act of Parliament passes, unless something express is contained in that Act, the right of action is not taken away; but where you are dealing with mere procedure, unless something is said to the contrary, and the language in its terms applies to all actions whether before or after the Act, there, I think, the principle is that the Act does apply without reference to the former law or procedure. Now that that is the principle appears from the cases that have been cited on both sides."

Now, to apply that principle to the present case: The 15th section of the Charter says in express terms, and in language which admits of no doubt whatever as regards the suits to which it applies, that an appeal shall lie to the High Court from the judgment (not being a sentence or order passed or made in any criminal trial) of one Judge of the High Court, or of one Judge of any Division Court; and that an appeal shall also lie to the High Court from the judgment of two or more Judges of the High Court, or of such Division Court, wherever such Judges are equally divided in opinion, and do not amount in number to a majority of the whole of the Judges of the Court at the time being, but that the right of appeal from other judgments of Judges of the High Court or of such Division Court shall be to the Privy Council.

There is nothing in this section to show that it was not intended to apply to all suits then pending in the High Court, and to all judgments which had been given by Judges sitting in the High Court; or that it was not intended to apply to suits in which decrees had been made but had not been executed. So far from there being anything in the Charter to show that it was not intended to apply to decrees which had been made before the Charter was published, and that there was to be any reservation in favour of those decrees, Sec. 2 would appear to show that there was no such intention.

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That section says "that all proceedings commenced in the said High Court prior to the date of the publication of the Letters Patent shall be continued and depend in the said High Court, as if they had commenced in the said High Court after the date of such publication." I do not say that these words may not bear a more limited meaning, although it does not appear to me that they do; but the intention would appear to have been not to make any reservation in favour of suits brought before the publication of these Letters Patent, or to provide that they should be continued in the same way as they would have been continued before that time, and that the parties should have preserved to them any right of appeal which then existed. The intention was that at the time the Letters Patent were published every suit pending in the Court should be treated as if it had been a suit brought after the Letters Patent were published. And certainly, applying the rule which I have stated, and which is laid down in the passage I have read from the judgment of Baron *Wilde*, and looking to these two sections of the Charter, I can see no ground for holding that this decree is not to be governed by the provisions of the present Charter, and that the party should be allowed such right of appeal as he had under the former Charter.

In the present case he is entitled, if he thinks fit, to appeal to the Privy Council; and I do not see that there is any great hardship in holding that in the case of a judgment by two Judges of this Court the party should be obliged to appeal to the Privy Council, without being at liberty, in the first place, to bring the matter before three Judges of this Court—for that would be the only effect of holding that he had got a right of appeal to this Court. I cannot say that in a case of this kind it appears to me that there is any great hardship or injustice suffered by the party; nor do I see that even in a case where there was no right of appeal to the Privy Council he would have any good right to complain because, his case having been heard and determined by two Judges of the

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Court, Her Majesty, in constituting the High Court under the present Charter, had decided that there should be no right of appeal.

It appears to me that what I have stated was the intention of the framers of the Charter, and that we must decide in the present case that the party has no right of appeal now to the High Court. The appeal must be dismissed with costs.

NEWTON and SARGENT, JJ., concurred.

Appeal dismissed.

Attorney for appellant : *C. Tyabji.*

Attorneys for respondents : *Cleveland and Peile.*

NOTE.—The corresponding sections of the two Charters are as follow :—

Sec. 14.—And We do further ordain that an appeal shall lie to the said High Court of Judicature at Bombay from the judgment, in all cases of original civil jurisdiction, of one or more Judges of the said High Court or of any Division Court, pursuant to Section 13 of the said recited Act; Provided always that no such appeal shall lie to the High Court as aforesaid from any such decision made by a majority of the full number of Judges of the said High Court, but that the right of appeal in such case shall be to Us, Our heirs or successors, in Our or their Privy Council, in manner hereinafter provided.—*Letters Patent of 26th June* 1862.

Sec. 15.—And We do further ordain that an appeal shall lie to the said High Court of Judicature at Bombay from the judgment (not being a sentence or order passed or made in any criminal trial) of one Judge of the said High Court, or of one Judge of any Division Court pursuant to Section 13 of the said recited Act; and that an appeal shall also lie to the said High Court from the judgment, not being a sentence or order as aforesaid, of two or more Judges of the said High Court, or of such Division Court, wherever such Judges are equally divided in opinion, and do not amount in number to a majority of the whole of the Judges of the said High Court at the time being; but that the right of appeal from other judgments of Judges of the said High Court or of such Division Court shall be to Us, Our heirs or successors, in Our or their Privy Council, as hereinafter provided.—*Letters Patent of 28th December* 1865.