Original Suit No. 35 of 1865; Appeal No. 83.

PI'RBHA'I RA'VJI and another. ..*Plaintiffs and Appellants.*
NENBA'I, widow .....*Defendant and Respondent.*

Limitation, defence of—Waiver—Accounts—Commissioner—Order of Reference—Amendment.

In a suit for an account where the defendant, while alleging the balance to be in her favour, contended that the plaintiff's claim was barred by the Limitation Act; and the accounts were afterwards referred by consent to the Commissioner, who refused, without special direction, to notice the defence of limitation; and the Judge of the Division Court amended the order of reference, by directing the Commissioner to investigate the accounts with reference to the operation of the Act:—

Held, on appeal (*by Couch*, C.J., *and Westropp*, J.), that the order of amendment was justified by the circumstances of the case; and that the defendant having raised the defence of limitation, and not having subsequently abandoned it, that question should be first decided.

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APPEAL from an order of Sir Joseph ARNOULD. J.

The original suit was for an account of partnership dealings between the legal representatives of deceased partners.

On application under Sec. 119 of Act VIII. of 1859, a judgment passed *ex parte* in this case, on the 24th of July 1865, was set aside, on the 9th of September following. The defendant subsequently filed a written statement, in which, while alleging the balance of account to be in her favour, she says that she will, if necessary, contend that the plaintiffs' claim is barred by Act XIV. of 1859.

On the 30th of November 1865, the Suit came on for hearing before Mr. Justice ANSTEY, when the plaint was amended, by consent, so as to include a cross claim by the defendant; and by consent all the accounts were referred to the Commissioner, under Sec. 181 of the Code.

Howard, on the 18th of August 1866, before ARNOULD, J., moved for an order to suspend the reference to the Commissioner, until after the trial of a special issue, as to whether all the items in the account, with which the plaintiffs seek to charge the defendant, were not barred by Act XIV. of 1859; and a *Rule Nisi* was granted.

The Advocate General and *Green*, on the 20th of September following, appeared to show cause; and contended that what

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was done when the case was referred by consent to the Commissioner, amounted to a waiver of the objection of limitation.

Howard, in support of the Rule :—There was no abandonment of the defence of limitation raised in the written statement. The Commissioner ought to take notice of that defence without special direction; and it is only because he refused to do so, that we have made this application.

PER CURIAM :—*Rule Nisi* discharged with costs : And in lieu thereof the Court orders, that there be inserted in the order of reference, by way of amendment, a direction to the Commissioner, to investigate the accounts referred to him, with reference to the operation of the Limitation Act; and that he do dispose of the question so arising, at the earliest possible stage in the course of his investigation of the accounts.

The Appeal was argued, on the 21st of February 1867, before COUCH, C.J., and WESTROPP, J.

The Advocate General (*the Honourable L. H. Bayley*), for the appellant, contended that the amendment of the order was not warranted by Sec. 181 of the Code, which contemplated a reference once for all. If the whole of the plaintiffs' claim was barred by the Law of Limitation, the consenting to an account was unnecessary. There was an implied waiver of the defence of limitation, by consenting to the reference.

Green, on the same side :—The Law of Limitation was abandoned by both parties. The defendant, in her written statement, asked for an account of dealings and transactions which ended on the 12th of October 1855. The reference of the accounts to the Commissioner was in the nature of a compromise ; and the plaint was amended as part of the arrangement. The defendant now insists on the defence of the statute, as going to the root of the whole claim ; and it is sufficient for us to say, that such an allegation is inconsistent with her consent to the reference. It was clearly the intention of the defendant then to obtain the plaintiffs' consent to go into the entire account of the mutual dealings ; and the Court will not now allow her to change her

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mind. A party by consenting to an account admits that he is an accounting party. Had the objection of limitation been expressly withdrawn, there would have been no doubt in the case. There was, however, clearly an implied waiver; and, as the practice here was not settled, the plaintiffs should not be prejudiced by following a settled practice in England. That practice is, that a special exception should be introduced into a decree for an account, if the defence of the statute is intended to be relied upon.

Howard, for the respondent:—It is clear that the plaintiffs cannot be damnified if this appeal be dismissed. The decree says that the Commissioner is to report whether anything is "due." That must mean *legally* due; and the Commissioner is bound to notice the defence of limitation: *Sáluji Kesráji* v. *Rájsangji Jálamsangji*. (*a*) It does not follow that consenting to refer an account, all the items of which were *primâ facie* barred, was a consent to waive the defence of limitation. There was no direction in the decree excluding the defence. There was no counter claim set up in the written statement independently of the transactions alleged in the plaint.

McCulloch, on the same side:—I did not understand that there was any waiver of the defence of limitation, in consenting to have the accounts referred to the Commissioner.

Cur. adv. vult.

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COUCH, C.J.:—There can be no doubt that the defendant, in her written statement, set up the defence of limitation as a preliminary objection, before asking for an account; and that question should have been settled first.

But the parties by consent agreed to a reference; and it is contended that the defendant thereby waived the defence of limitation; and, therefore, that the learned Judge was wrong in holding that he was bound to give effect to that defence, by amending the order of reference, as he did, on the 20th of September 1866.

(*a* 2 Bom. H. C. Rep. 169.

We think, the defendant having raised the defence in her written statement, it should be clearly made out that she subsequently intended to abandon it. 1867. April 8. Appeal No. 83.

The defendant obtained no advantage by the amendment of the plaint, so as to meet the written statement. There was, therefore, no consideration for waiving the defence of the Law of Limitation. And Mr. McCulloch says that he did not at the time understand that he was waiving it.

We think that the order made by the learned Judge was a proper one, and justified by the circumstances of the case; and we therefore affirm it, but without costs.

WESTROPP, J., concurred.

Order affirmed.

Attorney for appellants: *C. Leggett.*

Attorneys for respondent: *Macfarlane and Green.*

In re MA'NEKJI FRA'MJI, an Insolvent.

Insolvent Court Rules—Fresh Petition—Practice.

Held that Rule 14 of the Insolvent Court at Bombay,—requiring a special application, on affidavit, and notice to opposing creditors, before a fresh petition can be filed—has reference to a dismissal upon hearing; and not to the case of a petition dismissed under Rule 10.

THIS was an appeal, by an opposing creditor, from an order made by the Commissioner in Insolvency, on the 7th of January 1867, by which the petition of the Insolvent was dismissed, under Rule 10 of the Court, as the schedule had not been filed within thirty days after the filing of the petition (*a*); but leave was at the same time granted to file a fresh petition. 1867. April 4.

Dunbar, for the appellant, contended that the Commissioner had no right to allow the insolvent to file a fresh petition, without a special application to the court having been made,

(*a*) RULE 10:—"In every case where the schedule shall not be filed within thirty days after the filing of the petition by a party not in custody, such petition shall be dismissed."