Appeal No. 146.

SHA'MRA'V PA'NDURANG .....*Appellant.*
TRUSTEES OF BHAGVA'NDA'S PURSHOTAMDA'S.*Respondents.*

1868. Dec. 17.

Attorney—Costs—Retainer of Attorney by Trustees of an Insolvent—Liability for Costs.

The contract to be implied from the employment, by the trustees of an insolvent, of an attorney to carry on a suit already commenced by the insolvent as plaintiff, and in which such attorney was retained for him, is a contract to pay all future costs, but not the costs incurred prior to such employment.

IN 1863 Bhagvándás Purshotamdás filed a suit (No. 642 of 1863) against Gokalnáth Sávaknáth and others, praying for an account, and employed Mr. Shámráv Pándurang as his attorney to conduct it for him.

On the 6th of November 1865 a decree was obtained in that suit, by which it was referred to the Commissioner to take the accounts between the parties. Bhagvándás Purshotamdás also employed Mr. Shámráv Pándurang to bring another suit (No. 31 of 1866), and in that suit a decree was made for the plaintiff, in the early part of 1866. In July 1866 Bhagvándás Purshotamdás took the benefit of Act XXVIII. of 1865, and his estate was subsequently vested in Trustees under the Act.

These Trustees signed a warrant appointing Shámráv Pándurang their attorney to carry on Suit No. 642 of 1863. He accordingly obtained a Judge's order to substitute the Trustees as plaintiffs, instead of Bhagvándás Purshotamdás, which was done, and the suit was entitled *John Beattie and others, Trustees of Bhagvándás Purshotamdás*, v. *Gokalnáth Sávaknáth and others*, but no further steps were taken. In Suit No. 31 of 1866 the Trustees directed Shámráv Pándurang to issue execution, but nothing was done in that suit.

In the latter portion of 1867 Shámráv Pándurang sent in his bill of costs to the Trustees, but they refused to pay in full for any part of it, except for what was actually done subsequent to their retainer, but they allowed him to rank as a creditor on the estate for the whole amount.

1868.

SHA'MRA'V PA'NDURANG v. TRUSTEES OF BHAGVA'NDA'S PURSHOTAMDA'S.

On the 27th of July 1868 Shámráv Pándurang took out a summons in chambers, calling upon Mr. M. R. de Quadros (the then sole surviving Trustee of the estate of Bhagvándás Purshotamdás) to show cause why he should not pay his attorney, Shámráv Pándurang, his costs of Suit No. 642 of 1863 (*John Beattie and others, Trustees of Bhagvándás Purshotamdás*, v. *Gokalnáth Sávaknáth*) from the time of the institution thereof down to the then present time. This summons was dismissed by Arnould, J., on the 18th of August 1868.

From the order dismissing the suit, Shámráv Pándurang, appealed, and the appeal was argued before COUCH, C.J., and SARGENT, J., October 1 and 2.

White (with him *Mayhew*), for the appellant:—The Trustees, by the appointment of the appellant as their attorney, have rendered themselves liable for all the costs of the suit. They have adopted the contract between the original plaintiff and his attorney. Having had the benefit of the papers in the case, and of the knowledge of the attorney, they are bound to pay: "*qui sentit commodum sentire debet et onus.*" The contract between the attorney and client is an entire contract: *Harris* v. *Osbourn* (*a*), *Mason* v. *Pollhill* (*b*).

Dunbar and *McCulloch*, for the respondents:—The appellant is only entitled to claim on the estate, and to his lien on the papers in his hands. He might have refused to go on with the suit except upon terms of the Trustees rendering themselves liable for all the costs, but in the absence of an express promise the law will not imply one for him. It would be unjust to do so. The Trustees have received no benefit. They cited *Ex parte Dean* (*c*), *Parker* v. *Tootal* (*d*), *Simmonds* v. *Grt. Eastern Ry. Co.* (*e*).

White in reply.

Cur. adv. vult.

Dec. 17. COUCH, C.J.:—This was an appeal from an order made, by Sir Joseph Arnould, on the 18th of August,

(*a*) 2 Cr. & M. 629. (*b*) 1 Cr. & M. 620.
(*c*) 2 Mont. D. & D. 438. (*d*) Law Rep. 1 Exch. 41.
(*e*) Weekly Notes, 8th August 1868, p. 239.

dismissing a summons, dated the 27th of July of the present year, which directed Mr. M. R. de Quadros, the surviving Trustee of the estate of Bhagvándás Purshotamdás, to show cause why he should not pay Mr. Shámráv Pándurang his costs of suit from the time of the institution thereof down to the date of the summons.

The facts appear to be that two suits, Nos. 642 of 1863 and 31 of 1866, were brought by Mr. Shámráv Pándurang as attorney for Bhagvándás Purshotamdás, and that in Suit 642 of 1863 a decree was obtained, by which the suit was referred to the Commissioner, who has not yet made his report; and in the other suit there was a decree for the plaintiff. Bhagvándás Purshotamdás subsequently took the benefit of Act XXVIII. of 1865, and the Trustees of his estate applied to Mr. Shámráv Pándurang to continue the suit in the one case, and in the other to issue execution on the decree already obtained. In the latter suit nothing was done, but in the former the names of the Trustees were inserted as plaintiffs. It is contended, on the part of the appellant, that, under these circumstances, the surviving Trustee is liable for the whole of the costs in that suit.

I am of opinion that the learned Judge was right in dismissing the summons. The only fact upon which the appellant relies is a retainer to continue the suit, and I think that the contract that is to be implied from the employment to continue the suit is to pay for the work that may be done under it, and not for the costs previously incurred. *Harris* v. *Osbourn* was cited for the appellant. In that case the Court held that where an attorney is employed to conduct a suit, it is an entire contract to carry on the suit to its termination, and determinable only by the attorney on reasonable notice; and where no such notice has been given, the statute of limitations does not commence to run till the suit is at an end. What the Court decided there was, that the employment not having been determined, the statute did not begin to run. It is settled law that it is a contract that may be determined; and though the contract is entire in the sense

1868.
SHA'MRA'V PA'NDURANG v. TRUSTEES OF BHAGVA'NDA'S PURSHOTAMDA'S.

that if not determined the statute of limitations does not begin to run till the termination of the suit, it is not entire so as to prevent a person from taking it up without being liable for the whole of the costs. The attorney might, if he had thought fit, have refused to accept the employment; he might have retained his lien on the papers; but in the absence of an agreement he can only recover from the Trustees for what he has done for them. It was argued that it was an advantage for the Trustees to employ the same attorney; that may be so, but it is not a ground for implying such a contract as is contended for. The learned Judge was, in my opinion, right in the conclusion he came to, and there is no ground for saying that the Trustees have made themselves liable for the whole of the costs.

SARGENT, J.:—I entirely concur. It is admitted that there was no express promise; if the Trustees are liable, it is only a liability to be inferred from their conduct. That conduct was to allow Mr. Shámráv Pándurang to continue the suit, and, in my opinion, it would be going too far to say that from that alone the law will imply a contract to pay all the back costs. The liability to do so is put upon the ground that the Trustees have adopted the contract entered into between the original plaintiff and his solicitor. If the contract had been one that could not be determined, there might be something to be said in favour of such a contention; but it is considered to be a determinable employment. The remarks of Lord Chief Justice Tindal, in 9 Bing. 407 (*Vansandau* v. *Brown*), "Suppose the employer to become insolvent while the attorney is engaged in a long and difficult suit, it would be hard if he could not recede—resile—from such an engagement," show that the mere fact of a man's becoming insolvent would entitle the solicitor to determine the contract, and sue for his costs: if the Trustees afterwards go on with the suit, the mere fact of doing so is not an adoption of the former contract; on the contrary, there is reason to suppose that the Trustees never intended to make themselves liable for the former costs. The solicitor was engaged by them in what must in fact be regarded as

a new suit. The summons, then, in my opinion, was properly dismissed.

1868.
SHA'MRAV PA'NDURANG v. TRUSTEES OF BHAGVA'NDA'S PURSHOTAMDA'S.

Appeal dismissed, with costs to be paid out of the estate of B. P.

Attorney for the appellant: *Shámráv Pándurang.*

Attorneys for the respondents: *Hearn, Cleveland, and Peile.*

Appeal No. 150.

Dec. 19.

THE LIQUIDATORS OF THE INDIAN PENINSULA, LONDON, AND CHINA BANK (LIMITED) ...*Appellants.*
J. L. SCOTT, Trustee of the estate of Kharsedji Fardunji .....*Respondent.*

Purchase of Shares in a Company by Directors—Ultra vires—*Breach of Trust—Debts proveable under Act XXVIII. of* 1865.

A claim against the Directors of a Joint Stock Company to make good funds of the company expended by them, on behalf of the company, in transactions that the company was forbidden by its Articles of Association to engage in, is proveable under Act XXVIII. of 1865.

THIS was an appeal from an order of Arnould, J., made in chambers on the 5th of October 1868, by which he ordered that the Trustees of the estate of Kharsedji Fardunji should be at liberty to distribute the assets among the creditors who had proved their claims, without reference to the claim of the Indian Peninsula, London, and China Bank (Limited) in liquidation.

The facts upon which the above claim was founded appeared from affidavits made respectively by Mr. Scott, Trustee under Act XXVIII. of 1865 of the estate of Kharsedji Fardunji, and Mr. Punnett, one of the Liquidators of the Indian Peninsula, London, and China Bank (Limited), and were as follow:—

Kharsedji Fardunji had been a Director of the I. P. L. & C. Bank.

In May 1866, at a meeting of his creditors, it was resolved that his estate should be wound up under Act XXVIII. of