

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

*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.*

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SHÁMRÁV
PÁNDURANG
TRUSTEES OF
BHAGVÁNDA'S
PUSHOTAM-
DA'S.

Appeal No. 150.

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

Dec. 19.

*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

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1865. By a Judge's order dated 17th May 1867, it was directed that the creditors to the estate should send in their claims before the 20th of June 1867. In August 1866 the Manager of the I. P. L. & C. Bank had sent in a claim, founded on a promissory note, on the estate of Kharsedji Fardunji for Rs. 2,41,916, which claim was admitted, and dividends were received upon it in due course.

On the 22nd of May 1868 Mr. Scott received a letter in the following terms from the Liquidators of the I. P. L. & C. Bank :—

“ TO THE TRUSTEES OF THE ESTATE OF KHARSEDJI FARDUNJI.

“ DEAR SIRS,

“ In addition to the admitted claim of this bank, upon which the dividends already declared have been duly received, we have now to give you notice of a claim amounting, exclusive of interest, and without prejudice to such increase as a further investigation of the affairs of the Bank may call for, to Rs. 3,26,268, being the amount of money disbursed by the Directors of this bank during the time Mr. Kharsedji Fardunji was one of them, in contravention of the Articles of Association; Rs. 1,58,745, expended in the purchase of shares, Rs. 1,67,523, loss on sundry loans made on the security of shares in the bank.

“ We have to request to be informed, at your earliest convenience, whether you are prepared to pay to us the dividends on the amount claimed which have already been declared, and to give you notice, should you decline to do so, that immediate application will be made to the Court in the matter.

(Signed) P. E. BENDIR,

for self & T. F. Punnett, Liquidators.”

This claim the Trustee of the estate of Kharsedji Fardunji refused to admit, as not being proveable under Act XXVIII. of 1865, and as being too late in point of time. He accordingly, on the 29th of September 1868, applied to Sir Joseph Arnould to be allowed to wind up the estate without reference to it, stating that he was in a position finally to

liquidate the estate in fourteen days, but that if the liquidation were to be kept open until a suit to establish such claim should be decided, more than a year must elapse before the estate could be finally closed.

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The I. P. L. & C. Bank went into liquidation in March 1867.

Mr. Punnett made an affidavit in reply, in which he explained how the delay in making the claim arose (the delay, however, was not insisted upon at the hearing of the appeal), and set out in detail the circumstances under which the loans were granted, and the purchases of shares made, by the Directors, and stated that he was about to file complaints against all the Directors of the bank who were implicated in the purchase of the bank's shares and the loans upon them.

Art. XIV. :—"No share in the Company shall be purchased by or on behalf of the Company, and no advance of money or security for money shall be made by or on behalf of the Company to any person on the security of any such share."

The Appeal was argued before COUCH, C. J., and SARGENT, J., on the 12th of November 1868.

Pigot and Marriott, for the appellants :—As no question with respect to the delay of the appellants in making their claim is raised by the respondent, the only point before the Court is, whether a claim can be proved in bankruptcy (and under Act XXVIII. of 1865) for a debt incurred by a bankrupt by breach of trust of his duties as Director of a bank. It is submitted that such a claim is proveable. The specific breaches of trust we complain of are—(1) dealing in the shares of the bank ; (2) lending money on the security of such shares : for such acts Directors are liable to be sued : *Jehangir Rastamji Modi v. Shámji Ladhá* (a). The only question is as to the amount of loss, and that is not a claim sounding in damages. The suit is in fact to recover back the money wrongfully appropriated, and resembles claims upon the estate of a bankrupt for money embezzled by him, or obtained by forgery, which are proveable : *Ex parte Jones* (b) ; *Dudley and West Bromwich Banking Co. v. Spittle* (c) ;

(a) 4 Bom. H. C. Rep. ; O. C. J. 185.

(b) 2 Mon. & Ayr. 193 ; 3 Dea & Ch. 525. (c) 1 John & Hem. 14.

1868. *Mavor v. Davenport (d)*. A debt incurred by a breach of trust is a simple contract debt, and, therefore, proveable: LIQUIDATORS OF IND. PEN. & C. BANK v. *Cox v. Bateman (e)*; *Harch v. Russell (f)*; Lewin on J. L. SCOTT. Trusts, 158, 590.

McCulloch (with him *White*) for the respondent.

Cur. adv. vult.

Dec. 19. COUCH, C.J.:—In this case a summons was taken out before Sir Joseph Arnould, by which, upon reading the affidavit of Mr. Scott, sworn on the 29th of September 1868, it was 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, unless good cause were shown to the contrary by the Liquidator of the Indian Peninsula, London, and China Bank (Limited); and in accordance with that summons the Liquidator appeared to show cause. The cause which he showed was stated in his affidavit, and in substance was, that there had been a claim made by him against the estate of Kharsedji Fardunji in respect of transactions and dealings by him, as Director of the company, with the property of the company, contrary to the Memorandum and Articles of Association, which amounted to a breach of trust. That is set out in the 11th, 12th, and following paragraphs of the Affidavit of Mr. Punnett. In the 18th paragraph it is put shortly in these words: "I have been advised, and believe, that the withdrawal of the said bank funds for the purpose of purchasing shares in the said bank, and the advancing money to shareholders upon the security of the shares of the said bank is contrary to the Articles of Association of the said bank, and is particularly prohibited by Article 14 of the Articles of Association."

Upon the summons being heard, Sir Joseph Arnould made an order absolute, by which he directed that the Trustee of the said estate 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; and the Liquidator of the bank has appealed to this Court against that order.

It was admitted that the only point was, whether the claim was proveable under Act XXVIII. of 1865, and that there was no difference in this respect between that Act and the Insolvent Act, Sec. 40 of which enacts: "That all such debts, dues, and claims as might be proved under a fiat of bankruptcy bearing even date with the insolvent's petition, or the adjudication (as the case may be), according to the provisions of 6 Geo. IV., c. 16, or any other statute or statutes now in force, or hereafter to be passed, relating to bankrupts, may also be proved as hereinbefore mentioned, in the same manner * * * as in the said statutes are or may be set forth and prescribed." The question then resolves itself into this, whether the claim is such as could be proved in bankruptcy in England; and we are of opinion that it is. The nature of the liability of the Directors of a company was determined in the case of *Jehāngir Rastamji Modi v. Shāmji Ladhá* (*suprà*), where the learned Judge held that a shareholder in a Joint Stock Company could maintain a suit against the Directors to compel them to restore to the company funds of the company that had been made use of by them in transactions that the Directors had no authority to enter into, without making the company a party to the suit. That judgment was founded on a series of decisions of the courts in England; and the principle that Directors who neglect the rules of a company are liable to make good to the shareholders any loss occasioned thereby, and that their liability in this respect does not differ from that of ordinary trustees, has been recently affirmed by the Master of the Rolls in England, in the case of *Turquand v. Marshall* (*g*). Such being the nature of the liability of Directors, and the breach of their duty rendering them liable as trustees, the claim is in respect of a breach of trust, which is a claim proveable in bankruptcy: *Ex parte Richardson, re Hodgson* (*h*); *Ex parte Heaton, re Mowon* (*i*); *Ex parte Vine, re Hooper* (*j*); *Ex parte Watson* (*k*).

The authorities clearly establish that such a claim as this is proveable; but even if there were no authorities to guide us we should have considered that it was so; for the claim is

(*g*) Law Rep. 6 Eq. 112. (*h*) Buck's Bkcty. Ca. 202, 421.
 (*i*) *Ibid.* 386. (*j*) 1 Deac. & Ch. 357. (*k*) 2 Vcs. & B. 414.

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really that the trustee shall be made liable for the money that he has improperly taken, and the money is to be considered as if it still belonged to the Association. It is money of the bank which is in the hands of the trustee, who cannot be allowed to say that he has made use of it in breach of his trust.

The order of the learned Judge must be reversed; the Trustees of the estate of Kharsedji Fardunji must be prohibited from parting with all the assets until this claim is decided, and the costs of the Liquidators must be paid out of the estate of Kharsedji Fardunji.

Order reversed.

Attorney for the appellant: *J. S. Hurrell.*

Attorneys for the respondent: *Keir, Prescott, and Winter.*



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JOAO MARIANO LOPES *Plaintiff.*
FRANCISCO LOPES *Defendant.*

Portuguese Law—Primogeniture amongst Portuguese Inhabitants of Bombay—Cession of Bombay to the English—English Law introduced into Bombay.

The Portuguese inhabitants of the Town and Island of Bombay, not having had their laws, and usages having the force of laws, preserved to them by the Treaty by which Bombay was (A.D. 1661) ceded to the English, are subject to English law, so far as the same has been introduced into Bombay, and has not since been varied by legislation.

Where a Portuguese inhabitant of Bombay being entitled to certain immoveable estate in perpetuity died intestate before the 1st of January 1866 (on which day the Indian Succession Act, 1865, came into force), leaving two nephews by a sister as his next of kin, it was held that the elder of them, as heir at law of the intestate, was entitled to succeed solely to such immoveable estate.

THE facts of this case sufficiently appear in the judgment of the Court. The arguments of counsel, and the examination of witnesses, extended over ten days.

Edward Howard (with whom was *Scoble*), for the plaintiff, cited or commented on *Doc d. De Silveira v. Teixeira (a)*; *Campbell v. Hall (b)*; *Calvin's Case (c)*; *The Attorney General v. Stewart (d)*; *The Mayor of Lyons v. The East India Company (e)*; *Anonymous (f)*; *The Indian Chief (g)*; 2 Bruce's Annals,

(a) 2 Mor. Dig. 247. (b) Cowper 204. (c) 4 Rep. 2a, 17b.

(d) 2 Meriv. 143, 158. (e) 1 Moo. Ind. App. 175, 271, 274.

(f) 2 P. Wms. 75. (g) 3 C. Rob. 22.