1870. Feb. 16.

Special Appeal No. 121 *of* 1869.

PESTANJI MANCHARJI WA'DIA' ....*Appellant.*
JOSEPH MATCHETT and THOMAS NOWELL...*Respondents.*

Power coupled with an Interest not revocable—Debt due good consideration for such a Power—Stamp—Act X. of 1862, *Sch. A, cl.* 43*—Joinder of new Parties—Civ. Proc. Code, Sec.* 73.

Joseph Matchett executed in favour of Pestanji an instrument (authorising Pestanji to recover, by suit or otherwise, from Messrs. Windle and Nowell, a sum of Rs. 22,500 or thereabouts) which contained this clause:— "From whatever sum Pestanji may recover from Messrs. Windle and Nowell, he is to pay himself the sum of Rs. 8,640, *which is due to himself*, and also the expenses he may incur in making recovery, and he is to hand over the surplus to me."

Held that the above instrument was made upon a good consideration; that it was irrevocable; and that, operating as a power of attorney, and not as an assignment, it was properly stamped, under Act X. of 1862, with a stamp of Rs. 4.

Matchett, ignoring the above instrument, sued Nowell for the Rupees 22,500 mentioned in it. Pestanji thereupon applied to be made a party to the suit, under Sec. 73 of the Code. His application was granted, and he was joined as a co-plaintiff.

Held that Pestanji was properly made a party, but, as the validity of the instrument was disputed by Matchett, that Pestanji should rather have been joined as a defendant than as a plaintiff.

THIS was a Special Appeal from the decision of A. Lyon, Acting Judge of the District of Tháṇá, in Appeal Suit No. 220, amending the decree of the Principal Ṣadr Amín of Tháṇá.

The suit was brought by Joseph Matchett against Thomas Nowell to recover Rs. 25,593-8-0, due for work done by Matchett for the defendant on the Great Indian Peninsula Railway, the defendant having taken a contract from the Great Indian Peninsula Railway Company for the performance of certain work on that line.

Pestanji Mancharji was joined as a co-plaintiff, under the provisions of Sec. 73 of the Civil Procedure Code, at his own request. He founded his claim to be joined as a co-plaintiff upon a document in the following terms:—

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"I do hereby authorise Pestanji Mancharji Wádiá to recover from Messrs. Nowell and Windle the sum of Rupees 22,500 or thereabouts, due by them for certain works done by me in the years 1865 and 1866, for them and on their account, on the railway line between Atgám and Kardi.

"The said Pestanji Mancharji Wádiá is to be at liberty to take any legal steps he may deem necessary to recover this claim from Messrs. Nowell and Windle, and also to settle or compromise and give discharges for the same, either privately or in any court of justice, as he may think proper, and the same shall be as valid as if I myself, personally present, would have done. And I do hereby undertake to ratify and confirm everything that the said Pestanji Mancharji Wádiá may do in respect of this claim, and shall sign any paper or papers that may require my signature and which he may want me to sign in respect of this claim.

"From whatever sum Mr. Pestanji Mancharji Wáḍiá may recover or get from Messrs. Nowell and Windle, he is first to pay himself, or deduct therefrom, the sum of Rupees 8,640 which is due to himself, as also the expenses which he may incur in making the said recovery, and hand over the surplus to me. Bombay, (dated) 13th September 1866.

(Signed) JOSEPH MATCHETT."

The above instrument bore a stamp of Rs. 4.

The defendant answered that the amount payable for the work done by Matchett amounted to Rs. 7,095-12-0, of which sum Rs. 722-3-0 had been paid to Matchett; the defendant offered to pay the balance, Rs. 6,373-9-0, on settling the accounts.

The Principal Ṣadr Amín awarded the claim to the amount of Rs. 14,341-4-0, including interest, out of which sum he ordered Rs. 8,000 to be paid to the plaintiff, Pestanji Mancharji Wádiá.

The defendant appealed from this decision to the District Judge of Tháṇá. At the hearing of the appeal, Matchett, under Sec. 348 of the Civil Procedure Code, objected that the Principal Ṣadr Amín was in error in joining Pestanji Mancharji Wáḍiá as a plaintiff in the suit.

The following is an extract from the judgment of the Acting District Judge on this point:—

"In this suit the first question raised is, whether the co-plaintiff, Pestanji, has been properly joined as a plaintiff. I consider that he was improperly made a plaintiff, and that

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his claim must be dismissed with costs. The document on which he rests his claim, if it is intended to operate as an assignment to Pestanji Mancharji of the right to the Rs. 8,640 therein mentioned, is improperly stamped. This objection has been taken in the court below, and also in this court. The lower court came to no decision as to the stamp, but appears to have admitted the document in evidence. On permission being given by me to the co-plaintiff to pay the difference of stamp duty, he declined. Under the circumstances, I should be justified in refusing to receive the document in evidence. Without, however, basing my decision on this ground, I am of opinion that, even though it is admitted, Pestanji is not entitled to appear in this suit under Sec. 73 of the Code of Civil Procedure.

"I cannot do better, I think, with reference to this point, than quote the language used by Peacock, C.J., in a case in which a similar point arose (*a*): 'Although the intervenor claimed a portion of the subject-matter of the suit, he was not likely to be affected by the result of the suit, because, claiming adversely to the title both of the plaintiff and of the defendant, and not being a party to the suit, he would have not been bound by the decision.'

"In this case, the intervenor, Pestanji, is in this position. He claims adversely to the plaintiff as well as to the defendant, and both take objection to his being allowed to appear. Indeed, the principal objections are taken by the original plaintiff, such as that the document was improperly stamped; that the grantor of the power of attorney was entitled to revoke the authority, especially by reason of the lâches of the intervenor in not using the power, thereby preventing the grantor from recovering his just debts.

"None of these objections have been decided by the Principal Ṣadr Amín, and I think he was right in not deciding them, as they form the grounds of a separate suit between the plaintiff and the intervenor, and the only issues that

(*a*) *Jay Gobind Doss* v. *Goureeproshad* and others, 7 Calc. W. Rep., Civ. R. 202.

should be raised in this case are those between the plaintiff and the defendant, and not those which may arise between the plaintiffs themselves.

"The document in question must have either of two effects. It must either give the intervenor a title to sue the defendant for the debt, independently of any proceedings that may be taken by the plaintiff, or it is useless as revoked by the conduct of himself, or by the action taken by the plaintiff, or, otherwise, from its never having conveyed any title at all. In short, at the date on which the intervenor made his application, the document on which he relied was either still in force and gave him a right to sue, or it did not. In neither case is it possible that the result of the suit would affect him. In the first case his right to sue would still remain, and in the second he would have no right to sue at all, and could not, therefore, be injured by the loss of a right which he never had."

The District Judge amended the decree of the Principal Ṣadr Amín by directing that the claim of Pestanji Mancharji should be dismissed with costs, and that Matchett should recover from the defendant Rs. 7,095-12-0 with interest. He allowed no costs to the plaintiff.

From this decision Pestanji Mancharji Wáḍiá appealed, and the appeal was argued on the 19th of January before COUCH, C.J., and MELVILL, J.

Shántárám Náráyaṇ, for the appellant:—The document is not insufficiently stamped, as a power of attorney, with a stamp of four rupees. Special powers of attorney require less, but none require more, than a four-rupees stamp. It is a power of attorney coupled with an interest, and is therefore irrevocable. As such, Art. 9 of the Stamp Act (1862) schedule applies, and not Art. 23.

The present case is distinguishable from the Calcutta case, referred to by the District Judge. Here Pestanji does not claim adversely to both parties, but claims through one of them.

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Marriott (with him *Dhirajlál Mathurádás*), for the respondent:—If the document operated as an authority to sue, Pestanji could only sue in Matchett's name, and should not be joined as co-plaintiff. If it operates as an assignment, it is insufficiently stamped, under Art. 25, Sched. A of Act X. of 1862. The objection is not taken too late: *A. Adinarayana* v. *Minchin* (b).

Branson appeared for Nowell, the defendant below.

Shántárám Nárāyan in reply.

Cur. adv. vult.

February 16th. COUCH, C.J.:—Two questions are raised in this appeal:—(1) whether exhibit No. 15 is properly stamped as a power of attorney; and (2) whether the special appellant was entitled to appear in the suit. It is not material to the merits whether he should have been allowed to do so as a co-plaintiff or in some other way; but as Joseph Matchett sought to recover the entire debt, and disputed the right of the special appellant to receive it, Pestanji would more properly have been made a defendant.

It will be convenient to consider the latter of the two questions first. Exhibit No. 15 was given by the original plaintiff, Matchett, to the special appellant, Pestanji, and it purports to authorise the latter to recover from Messrs. Nowell and Windle (the former of whom is the defendant in this suit) Rs. 22,500 or thereabouts, due by them for contract work done by Matchett on the railway between Atgám and Kardi; the special appellant to be at liberty to take any legal steps he may deem necessary to recover the claim, and also to settle or compromise and give a discharge. From whatever sum the appellant may recover, he is first to pay himself or deduct 8,640 rupees, due to himself, as also the expenses which he may incur in making the recovery, and hand over the surplus to Matchett.

Now, where an authority or power is given for a valuable consideration or is part of a security, unless there is an express stipulation that it shall be revocable, it is, from its own nature

(b) 3 Mad. H. C. R. 297.

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and character, in contemplation of law irrevocable, whether it is expressed to be so on the face of the instrument creating the authority or not. This rule has been acted upon in many reported cases, of which it will be sufficient to mention the following. In *Gaussen* v. *Morton* (c), A being indebted to B, in order to discharge the debt, executed to B a power of attorney authorising him to sell certain lands belonging to him, A. It was held that the authority could not be revoked. In *Bromley* v. *Holland* (d) Lord Eldon said that, where a power of attorney is executed for a valuable consideration, the Court of Chancery would not permit it to be revoked. And in *Walker* v. *Rostron* (e) Lord Abinger, in giving judgment, said, "The existence of a debt, although it be not due instanter, is a good consideration; and so it is to take lawful and proper means to provide for payment, even though they be conditional. If we were to hold otherwise, you might deny the consideration for a collateral security for any debt which might not be due at the moment, although it is a very common thing to require and obtain such security."

In this case the authority was given as a security for the debt of 8,640 rupees, admitted to be due; and if any new consideration was necessary, a proviso by the appellant not to sue Matchett, and to resort to the security for payment, might be implied. In *Gaussen* v. *Morton* it does not seem to have been considered that any new consideration was necessary, nor by Lord Abinger in the judgment we have quoted. In the *Alliance Bank* v. *Broom* (f) Vice Chancellor Kindersley took the same view of a transaction of this description. The ground of the doctrine, to use the language of Mr. Justice Story, is that "a party shall not be at liberty to violate his own solemn engagement or to vacate his own security by his own wrongful act, for that would be to allow him to perpetrate a fraud upon innocent persons who have placed implicit confidence in him, which is against the clearest principles of justice and equity" (Story on Agency, para. 477).

(c) 10 B. & C. 731. (d) 7 Ves. 28. (e) 9 M. & W. 411, 420.
(f) 34 L. J. Ch. 256.

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The decree of Mr. Lyon, the Acting Judge, in this case, by which, amending the decree of the Principal Sadr Amín, he dismissed the claim of the appellant with costs, and directed that Matchett should recover from the defendant the sum which he found to be due from him, really enables Matchett to perpetrate a fraud; and the appellant, who justly sought to prevent this, is saddled with costs.

It is difficult to see how the Acting Judge was able to arrive at the conclusion "that it was not possible that the result of the suit would affect the appellant," when the result of his decree was that the appellant, instead of receiving the money which he was entitled to, was left to obtain it by a suit against Matchett, who might be insolvent or leave India as soon as he received the money. That the appellant might sue the defendant, and that the defendant might be made to pay the debt twice, is an opinion which cannot have been seriously entertained by the Acting Judge. The judgment of Sir Barnes Peacock which he quotes has no application to such a case as the present, and we feel compelled to say we think a slight study of the case would have shown that it has not. There was no inconsistency between the title of the appellant to receive the debt, and the liability of Nowell to pay for the work which had been done. If the exhibit No. 15 can be admitted in evidence, the decree of the Acting Judge cannot be allowed to stand.

This document is in its terms a letter or power of attorney for the recovery of the debt. It could not operate as an assignment or conveyance of the debt, because, although irrevocable by Matchett, it would be revoked by his death: Story on Agency, paras. 488, 489.

It need not, therefore, be stamped as an assignment or conveyance. An instrument stating that goods had been deposited as a security for money lent, and authorising the lender to sell them, and out of the proceeds to pay the expenses of the sale and retain the debt and interest, was held not to require a mortgage stamp under the English Stamp Act: *In re Attenborough and the Commissioners of Inland*

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Revenue (g). We think exhibit No. 15 is properly stamped, as a letter or power of attorney, with a stamp of four rupees, as the value of the property to be dealt with exceeded Rs. 500.

The decree of the Acting Judge, therefore, cannot be supported. We have, therefore, to consider what decree this court should make. The Acting Judge has decreed that the plaintiff, Joseph Matchett, should recover from the defendant Rs. 7,095-12-0 and interest at nine per cent. per annum from the date of the plaint. The appellant has stated, by his pleader, that he is willing to take what has been so found due, and that he does not desire to have the case remanded that he may be heard on the question of what is due. The Principal Ṣadr Amín awarded him Rs. 8,000, and he did not appeal against that. The decree of the Acting Judge should be amended, by striking out the part which dismisses the appellant's claim with costs, and adding after "from the date of the plaint till payment" the words "and it is ordered that out of the said sum so awarded there be paid to Pestanji Rs. 8,000 and interest at nine per cent. per annum from the 21st of April 1868, and that the residue, if any, be paid to the plaintiff Matchett; and if the sum awarded shall not be sufficient to satisfy the Rs. 8,000 and interest, the whole of it shall be paid to Pestanji Mancharji Wáḍiá."

MELVILL, J., concurred.

Decree reversed with costs.

(g) 11 Exch. 461.

Referred Case.

March 1.

KA'SHIRA'M valad KRISHNA ....*Plaintiff.*

BHADU' BA'PU'JI..............................*Defendant.*

Suit between Hindús—Verbal Abuse—Slander—Damages.

In a suit between Hindús in the Bombay Mofussil damages may be recovered for mere verbal abuse, without proof of actual damage resulting therefrom to the plaintiff.

CASE referred for the opinion of the High Court by the Honorable G. A. Hobart, District Judge of Khándesh, under Sec. 28 of Act XXIII. of 1861.