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Act, of making general rules which will be a guide to executors in this matter, and I intend to call the attention of the Chief Justice and my colleagues to the necessity, as shown by the present case, of at once framing such rules.

For the foregoing reasons, and chiefly having regard to the fact that the circumstances, by reason of which the rules in question have been imposed on executors and trustees in England, have not existed in India, I feel so much difficulty in the absence of any precedent, in declaring them applicable in the present case, that I must refuse the motion to vary the Commissioner's certificate, and do confirm the same. It is not, in my opinion, a proper case to make an order as to costs of the motion, except that the parties respectively do bear their own.

[APPELLATE CIVIL JURISDICTION.]

July 8.

Application under Extraordinary Jurisdiction.

VARAJLA'L SHIVLA'L...(*Original Plaintiff*) *Applicant.*

DALSUKH VARAJLA'L...(*Original Defendant*) *Opponent.*

Contract—Consideration—Compromise.

When a claim is once compromised, and a new contract entered into, the promisor is estopped from pleading illegality or absence of consideration for the new contract, the real consideration for it being the withdrawal of the claim itself, irrespective of the possibility of its being prosecuted to a successful issue. The new contract can only be questioned on the ground of fraud, such as want of good faith in making the claim compromised.

THIS was an application for the exercise of the High Court's extraordinary jurisdiction. The plaintiff's claim was rejected by the Subordinate Judge of Kapadwanj, and on appeal to the District Judge this decree was confirmed.

The application was heard by KEMBALL and LARPENT, JJ.

Nagindás Tulsidás for the applicant.

Gokaldás Kahándás for the opponent.

The facts fully appear from the following judgment of the Court delivered by

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KEMBALL, J. :—This is an application for the exercise of the Court's extraordinary jurisdiction, there being no special appeal, as the amount of the suit was less than Rs. 500.

The facts are short and simple, though the question submitted for our consideration is one of some importance.

The plaintiff in the present suit, it appears, brought an action, in 1867, on the original side of the High Court, to recover, from the present defendant, moneys alleged to have been paid for him at his request. Subsequent to the institution of the action a compromise was entered into between the parties, the defendant promising, in consideration of the withdrawal of the claim from Court, to pay to the plaintiff a sum of Rs. 901 by instalments. Certain of these instalments having remained unpaid in 1873, the plaintiff brought this action to recover the amount due with interest. The defendant, in answer, admitted execution of the deed of compromise, but objected that the consideration was not legal, as the deed passed was for sums supposed to have been paid to persons in Bombay on *sattá* or gambling transactions, that he did not know whether the sums had really been paid, and that if he must pay, he could not pay the whole at once. The Subordinate Judge rejected the claim, holding that the deed sued on evidenced a contract by way of security for the performance of wagering agreements, and could not be enforced under Bombay Act III. of 1865, presuming this from the fact of the plaintiff having failed, without satisfactory excuse, to produce his account books called for at the instance of the defendant. In appeal, however, the District Judge held that, as the transactions, which were the foundation of the action in the High Court, were ended before the passing of Act III. of 1865, they "were at that time such as to give rise to a legal consideration, although the bond was not passed until 1867;" but he added "But there is another ground on which, I think, the decree may be upheld. The defendant, while admitting the deed, pleaded that he did not know whether the plaintiff had made the payments which constituted the consideration; and one of the issues laid

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down by the Subordinate Judge, was whether consideration had been paid. The defendant, as he questioned it, was bound to show that it had not. He called for the accounts of the plaintiff; but it was answered that they had been produced in the High Court, and since that time the plaintiff did not know what had become of them. I agree with the Subordinate Judge in thinking this a very unsatisfactory answer. Entire account books do not get mislaid as a single document might, and the defendant was deprived of the principal means of making good his plea by their non-production, and this is, I consider, a sufficient reason for rejecting the claim under Section 170 of the Civil Procedure Code." And further on: "The bond was, it is true, passed after a suit had been filed in Court; but the Subordinate Judge rightly remarks that there is no proof that the suit was one which would have succeeded, as a defendant might be intimidated into passing a compromise bond by the fear of expense and trouble and the chances of law."

Both the lower Courts, it will thus be seen, have based their rejection of the plaintiff's claim on his failure to produce his books, each presuming therefrom that he had no claim which he could have prosecuted by legal proceedings to a successful issue. The Courts below, however, appear to us to have mistaken the point in the case, namely, the real consideration for the defendant's promise, and the plaintiff has thereby been seriously prejudiced. Assuming that the plaintiff would have been defeated had he prosecuted his original claim, that in itself would not, as observed by Cockburn, C.J., in *Callisher* v. *Bischoffsheim* (*a*), "vitiate the contract and destroy the validity of what is alleged as the consideration." It was held in that case as settled law that, if an agreement is made to compromise a disputed claim, forbearance to sue in respect of that claim is a good consideration, one of the authorities referred to being the case of *Cook* v. *Wright* (*b*), where the question is fully discussed. It was not contended in the present case, in the Courts below,

(*a*) L. R. 5 Q. B. 449. (*b*) 30 L. J. Q. B. 321. S. C. 1 B. and S. 559.

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that the plaintiff knew that he had no real claim against the defendant when he brought his action in the High Court (a very different plea to that relied on by the District Judge). We must, therefore, assume that his claim was honest, and that the compromise was made *bonâ fide*. The agreement was a perfectly reasonable one; the plaintiff consented to forbear prosecuting what he considered to be a good claim, and the defendant obtained the advantage of escaping from the annoyances attending a law-suit. The plaintiff's forbearance to continue his suit constituted a good consideration; in the absence, then, of any allegation, in the written statement, that the plaintiff did not *bonâ fide* believe, in his first suit, that he had a fair chance of success,—in other words, that his claim was fraudulent,—it was immaterial in the suit now before us whether that claim was good or bad. Therefore, assuming that the plaintiff did contumaciously refuse to give evidence—a point on which we express no opinion—it was clearly not on a material fact in the case, and we must hold that it was a wrong exercise of the discretion given to Courts under Section 170 of the Code of Civil Procedure to reject on that ground the plaintiff's claim. We, accordingly, reverse the decrees of the lower Courts, and award the claim in full with costs throughout on the respondent.

Decree reversed and claim awarded.

[ORIGINAL CIVIL JURISDICTION.]

Suit No. 348 *of* 1875.

July 19.

HORMASJI KARSETJI and others .....*Plaintiffs.*

W. G. PEDDER, Municipal Commissioner, and another .....*Defendants.*

Injunction—Bombay Act III. of 1872—*Town duty*—"*Spirits*"—*Toddy.*

Quære—Whether the Court ought to interfere by way of injunction with the exercise of a right, or alleged right, of officers of a municipal body to levy taxes and dues.

Toddy-juice, whether in a fermented or unfermented state, is not "spirits" within the meaning of Bombay Act III. of 1872, and is, therefore, not liable,