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The difficulty we have had in dealing with this case, and which seems to be inherent in the law as it now stands, is one that, in our opinion, calls for the action of the Legislature.

Order accordingly.

Note.—In conformity with this ruling, the following offences were held not compoundable :—

(*a*) Criminal Breach of Trust, *Reg.* v. *Lakshman Shenan Gabaji*, 24th February 1876.

(*b*) Cheating. *Reg.* v. *Lakhu Sadashiv*, 24th February 1876.

(*c*) Defamation. *Reg.* v. *Nutty*, 8th March 1876.

(*d*) Enticing away a woman, *Reg.* v. *Jethá Chatru*, 30th March 1876.

In addition to the authorities cited in the present case, *Reg.* v. *Mudan Mohun* (6 N. W. P. H. C. R. 302.) may be referred to, in which it was held that the offence of voluntarily causing grievous hurt was not compoundable. See also the ruling 7 Mad. H. C. Rep. XXXIV. in which it is laid down that dishonest misappropriation of property is not compoundable.

[ORIGINAL CIVIL JURISDICTION.]

Suit No. 1018 *of* 1867.

Appeal No. 290.

March 4.

SUMA'R AHMED AND OTHERS (ORIGINAL DEFENDANTS) APPELLANTS *v.* HA'JI ISMA'IL HA'JI HABIB (ORIGINAL PLAINTIFF) RESPONDENT.

Practice—Account—Commissioner's Report—Motion to discharge or vary—Affidavit—Memorandum of objections—Decree—Construction—Notes of judgment in Deputy Registrar's Book.

In moving to discharge or vary the report of the Commissioner for taking accounts, the right practice is to move on a memorandum of objections filed in the Prothonotary's office, and upon the evidence taken by, and the proceedings before, the Commissioner, and not on affidavits made for the purpose of the motion. In such a motion, affidavits should only be filed (*a*) when ordered by the Court, if it desire fresh evidence ; or (*b*) by special leave of the Court for the purpose of advancing a fact which does not appear on the face of the proceedings before the Commissioner.

A note of the judgment of the Court taken by a Deputy Registrar cannot be consulted for the purpose of explaining or aiding in the construction of a decree. Where, therefore, a decree was, on the face of it, an ordinary decree in a partnership suit, for the taking of the accounts between the partners in the usual way, the Court

refused to allow the respondent to show, by reference to such a note, that what the decree meant was that he was to be credited and his partners debited with certain payments *in toto*, and not with their respective shares only.

THE plaintiff and defendants were members of two partnerships: one, known as "the office account partnership", to carry on the business of guarantee-brokers; the other, known as "the *Jethá* partnership", for the purpose of dealing in shares. In 1867 the plaintiff filed a suit to take a general partnership account of both partnerships. The suit was heard by Arnould, J., who on 14th September 1868 passed a decree referring it to C. E. Fox as Commissioner to take an account of all the several co-partnership dealings and transactions respectively between the plaintiff and the defendants in respect of the two partnerships—as to the office account partnership from 20th October 1865; as to the *Jetha* partnership from 30th October 1864—and the Commissioner was ordered to report with all convenient despatch what balance, if any, was due from either of them the plaintiff or defendants to the others of them after making all just allowances. From this decree the defendants appealed, and the Appellate Court varied the decree of the Court of first instance in several particulars not necessary to be noticed here, and by directing that as to the accounts of the office account partnership, the same should be taken from 18th November 1866, with liberty for the appellants to show that a sum of Rs. 58,950-3-58, being the sum found due as of the last-mentioned date on adjusting as between the appellants and the respondent the accounts between the partnership and the firm of Messrs. Blackwell & Co., did not include the indent account of the partnership with Messrs. Blackwell & Co., and with liberty for the respondent to prove any payments made by him in respect of the debts or liabilities of the office account partnership since 18th November 1866, and which said payments were to be allowed to the respondent in taking the last-mentioned account.

Both the appellants and the respondents had, subsequently to 18th November 1866, made certain payments in full satisfaction of certain claims against the office account partnership. At the taking of the accounts before the Commissioner the respondent alleged that the appellants at the date of the adjustment had undertaken to make all these payments, and that the proper con-

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struction of the decree of the Appellate Court was that, as regards the payments made by the respondent, he was to be allowed credit for the full amount paid by him, and not only for the amount paid in excess of his share in the liabilities of the partnership, while that, as regards the payments made by the appellants, they were entitled to no credit at all as against the respondent. The Commissioner, to assist him in construing the decree, read a note of the judgment of the Appellate Court, said by the respondent to have been taken by a Deputy Registrar at the time judgment was delivered, and also a fuller note, written on the opposite page of the same book, by a clerk in the Prothonotary's office, and said by the respondent to have been compiled from the original notes of Sir R. Couch, the Senior Judge of the Appellate Court; the original notes of Sir R. Couch, however, were not forthcoming. After so reading the notes in the Deputy Registrar's book, the Commissioner decided that the respondent's contention was correct, and ultimately made his report, in accordance with such decision, on 21st December 1874.

The appellants thereupon obtained a rule *nisi* to discharge or vary the report of the Commissioner. At the argument of the rule before Bayley, J., the learned Judge held that the notes in the Deputy Registrar's book might be read for the purpose of construing the decree of the Appellate Court, and having read them, held that the Commissioner's decision was right, and by his order of 1st May 1875 disallowed all the appellants' objections on this point.

The appellants appealed from this order, and the appeal was heard by WESTROPP, C.J., and GREEN, J., on 3rd and 4th March 1876.

At the hearing of the appeal it appeared that a practice had, of late years, sprung up that, when a party desired to discharge or vary the report of the Commissioner, he obtained a rule *nisi* for this purpose, supported by affidavits stating the grounds of his objection to the report. Other affidavits in reply and rejoinder were then filed on either side, which were used at the final argument of the rule.

[WESTROPP, C.J.:—The practice is quite irregular. Such affidavits ought not to be filed without the leave of the Court. The

objections to the report ought to be decided by the Court on the same evidence as was before the Commissioner. If the affidavits contain any fresh evidence regarding the items in the account, which was not adduced before the Commissioner, the Court should not look at them. If, on the other hand, the affidavits contain no fresh evidence, but only repeat that which has already been taken by the Commissioner, they are unnecessary. Of course, if the Court requires any fresh evidence, it can, if it see fit so to do, examine witnesses or call for an affidavit; or, if the parties wish to advance a fact, which does not appear on the face of the proceedings before the Commissioner, they may, on showing proper grounds, obtain the leave of the Court to file an affidavit for that purpose; but otherwise, under ordinary circumstances, the parties should move to vary the Commissioner's report on a memorandum of objections filed in the Prothonotary's office, and upon the evidence which was before the Commissioner. Ordinarily, affidavits would be only a useless addition to the expense of the proceedings. The application to vary the report should be made within the twenty days required by Rule VI. of Chapter VI. at p. 52 of the High Court Rules.]

Inverarity and *Hart* for the appellants:—The Commissioner and the learned Judge whose order is now appealed against, were wrong in looking at the notes in the Deputy Registrar's book for the purpose of construing the decree. They were not even the notes of a Judge, and there is nothing to show that they were correct, or that any part of them was written at the time that the judgment was delivered. The decree ought to be construed according to its terms. It is, on the face of it, an ordinary decree for the taking of a partnership account, and the Court will not, unless constrained to do so by the clear and express words of the decree itself, put so extraordinary a construction on it as that for which the respondent contends. There is nothing in the decree of Arnould, J., or of the Appellate Court, to show that the appellants ever undertook to pay the whole of the partnership liabilities; but, had either Court found that there was such an undertaking, it would infallibly have inserted in its decree some provision binding the appellants to that extent. There is, however, nothing in either decree to deprive the appellants of their position as partners. They are, therefore, entitled to debit the respondent with his share of the payments made

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by them, and to be themselves debited with only their own shares of the payments made by him.

Marriott, Advocate-General (Acting), and *Latham*, for the respondent:—The notes on which we rely, are not only those of the Deputy Registrar, a sworn officer of the Court, presumably taken by him, in discharge of his ordinary duty, in Court at the time of the delivery of the judgment, but also a copy of the notes of Sir R. Couch himself. The fact of the adjustment of accounts at which the appellants undertook all the liabilities of the partnership has never been disputed to this day, but only its effect in law. If the account is to be taken as an ordinary partnership account, the provision in the decree as to allowing the respondent the payments made by him is meaningless. On the other hand there is no direction that the appellants are to be allowed any credit for the payments made by them.

WESTROPP, C. J.:—It is not alleged on behalf of the respondent that there is a substantial error in the decree of the Appellate Court. If there be such an error occasioned by the fault of the officer in drawing up the decree, the proper remedy, after the decree has been sealed, is review. But it is said that by comparing that decree with the notes of the Deputy Registrar, or with an alleged copy of, or extract from, the notes of Sir R. Couch, we shall perceive that the decree means something more than it now appears to us to do. That something more, however, is, in fact, a most important variation from the decree now before us. We think we cannot look at the notes of the Deputy Registrar, or those said but not proved to have been taken from the book of Sir R. Couch for the purpose of construing the decree of the Appellate Court. That decree should be construed as it stands, without any reference to those notes. We do not say that we might not refer to such notes on a motion to amend a clerical error in the decree; but that is not what we are now asked to do, and we do not think that we can refer to them at all to explain or to aid us in construing the decree. In *Hirji Jina* v. *Naran Mulji* (1) we declined to be bound

(1) 1 Ind. L. R. (Bombay) 1. In that case the Court, for the purpose of rectifying a clerical error in the decree, referred to notes of the judgment taken by the Judge himself, by the counsel engaged in the cause, and by a short-hand writer.

by a Judge's explanation of his own decree, and held that we must construe the decree as we found it, and that if it were equally susceptible of two constructions, of which one rendered it in accordance with law, and the other did not, we should give it the former. These notes cannot stand upon higher ground than the explanation of the learned Judge himself. We must, therefore, refuse to look at the notes, and limit ourselves to the decree. Being so limited to the decree, we find it to be one for the taking of a partnership account in the ordinary way. The terms of the adjustment now relied on by the respondent are not set up by him in his plaint, nor is any mention of them made either in the decree of Arnould, J., or in that of the Appellate Court. What the respondent now contends for is, in fact, so complete a departure from the ordinary law of partnership that we cannot presume that to have been what the decree meant, unless it distinctly says so; but what the decree of the Appellate Court on the face of it orders, is the taking of an ordinary partnership account. The specific mention of the credit to be allowed to the respondent seems to us to be sufficiently accounted for from the fact that it was probable that he had paid a larger sum, under pressure of the law, than Rs. 58,950-3-58 when he paid in full the claims of certain creditors against the partnership, and it was to prevent any disputes on this ground that the specific direction as to the credit to be given to the respondent was inserted in the decree of the Appellate Court. The appellants are responsible for their shares only, under the terms of the partnership, in the sums paid by the respondent to the creditors of the partnership since 18th November 1866, and are to be credited with the respondent's share in the sums paid by them to the creditors of the partnership since the same date.
