consideration as being "ready money received." For these reasons the Court reverses the decree of the Acting District Judge, and remands the case for a new judgment. Costs to follow the final decision.

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Order accordingly.

ORIGNAL CIVIL.

(37)

Before Mr. Justice Green.

RUSTOMJI BURJORJI AND OTHERS, PLAINTIFFS, *v.* KESSOWJI NAIK AND ANOTHER, DEFENDANTS.*

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July 29.
August 13.

Practice and procedure in suits pending at date of enactement of Civil Procedure Code, 1877—*Power of Commissioner for taking accounts to grants certificates—Appeal from decision of Commissioner—Decree, meaning of—Civil Procedure Code (Act VIII) of* 1859, *Section* 181—*Civil Procedure Code (Act X) of* 1877 *Section* 2, 3, 394, 395—*Supreme Court Rules (Equity),* 371 *and* 456.

The effect of the proviso to Section 3 of the Civil Procedure Code of 1877 taken in connection with the definition of the word 'decree' in section 2 is, that in all suits pending when that Code came into force the practice and procedure to be followed down to the final result of such suits (*i. e.*, when nothing remians to be done but to execute the decree or to appeal from it) are the same as previously existed, but that in all subsequent proceedings in execution of the decree or in appeal from it the practice and procedure provided by the Civil Procedure Code of 1877 are to be observed.

The word 'decree' in section 3 of the Civil Procedure Code, 1877, means an order final in its nature, and does not include an interlocutory order, such as an order of reference to take accounts, although such order may, in general, be properly termed a 'decree,' and, therefore, a suit which has been referred by the Court to the commissioner to take accounts is still in a stage "prior to decree" within the meaning of section 3 of the Civil Procedure Code of 1877.

Hirji Jina v. *Narran Mulji*(1) distinguished.

The general nature of a certificate or report—whether general or separate—by the Commissioner for taking accounts, is, that it should, in the case of a general certficate, comprise the result of all the proceedings under the decree or order of reference, or, in the case of a separate certificate or report, that it should comprise the result of some or one of such proceedings, and the Court is not bound to consider a certificate granted by the Commissioner unless he has certified what may be regarded as the *result* either of the whole inquiry referred to him or of some branch or part of it.

The power of the Commissinor to grant certificates, and of the Court to deal with motions made with reference thereto, considered.

*Suit No. 461 of 1869.

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Quære—whether, where a suit has been referred to the Commissioner for the purpose of have accounts taken, such accounts, in the absence of any direction in the decree or order of reference that stated or settled account are not to be disturbed, should not be taken without regard to any previous accounts stated or settled between the parties.

THE plaintiffs in this suit prayed that an account should be taken of the transactions between them and the defendants who had been their agents at Hongkong in China, and that the defendants should be ordered to pay such sum as should be found due by them to the plaintiffs.

On the 23rd March 1870, by an order of the Court, the suit was referred to the Commissioner for taking accounts" to take the account between the parties as prayed for in the plaint and written statement respectively, and to ascertain and report what balance, if any, was due from or by either of them to the other." In the inquiry before the Commissioner the defendants alleged that the accounts between them and the plaintiffs had been adjusted in November 1860 and November 1861. The plaintiffs denied that any such adjustments had been made, and evidence was taken on the point. One of the plaintiffs' witnesses had been in the defendants' service in China in 1862. In the course of his examination he produced a presscopy letter-book containing copies of letters, which, as he alleged, he had written from China to the defendants in Bombay. He had left the service of the defendants in 1863 or 1884, but had retained possession of this letter-book. The defendants did not admit that this book was genuine, or that they had received the letters of which it purported to contain copies. The plaintiffs tendered in evidence the copy of one these letters, dated 10th June 1862. The defendants objected to its admissiblility, on the ground that it related to transactions which had taken place in 1862, and that it was irrelevant to the question then under inquiry, viz., whether or not an adjustment had taken place in 1860, and 1861. The Assistant Commissioner admitted this letter in evidence, and at the defendants' request granted a certificate under rules 371 (Supreme Court Rules).(1)

(1) The following is the rule referred to:— "In all the matters referred to him the Master shall be at liberty, upon the application of any party interested, to make a separate report or reports from time to time, as to him shall seem expedient; the costs of such separate reports to be in the discretion of the Court."

The case now came before the Court on motion by the defendants, to overrule the above decision of the Assistant Commissioner, and for a declaration that the said letter of 10th June 1862 was inadmissible in evidence.

Inverarity in support of the motion.

Pigot, contra. He contended, *inter alia*, that the motion was irregular, and that no certificate ought to have been granted by the Assistant Commissioner.

GREEN, J.—The question for determination here arises on a notice, dated the 27th July last and given on behalf of the defendants to the plaintiffs, of an application to be made by the defendants to the Court for an order overruling the decision of the Assistant Commissioner, referred to in his separate certificate of the 25th day of July then instant, and for a declaration that a certain letter dated Hongkong the 10th June 1862, in the said certificate referred to, was and is inadmissible in evidence, for the following amongs other reasons, viz., that the said letter is irrelevant to the inquiry now proceeding before the said Assistant Commissioner in this suit and upon which the defendant seek his decision, namely whether or not there was an adjustment of accounts between the plaintiffs, firm and the defendant's firm at Hongkong in the month of November 1860 and again in the month of November 1861 as alleged by the defendants, and in proof of which allegation they have adduced evidence before the said Assistant Commissioner and also before the Commissioner, Mr. C. E. Fox, and for such other order as the said Court shall pleased to make in the premises.

The suit was by the plaintiffs, as alleged principals, against the defendants' firm of Nursey Kessowji & Co., as alleged agents, for an account in respect of certain purchases of tea alleged to have been made in China by the defendants' firm on account of the plaintiffs, and the consignment of the same to English and its sale there. The defendants by their written statement admit the fact of dealings of the kind alleged and are willing that an account of the same should be taken under the direction of the Court. They allege that on such account being taken the plaintiffs would be found indebted to them, and they do not make any allegation of

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any adjustment or settlement of account having taken place between the parties.

By a decree or order of the Court, dated the 19th March 1870, it was ordered that it should be referred to the Commissioner to take the account between the parties as prayed for in the plaint and in the defendants' written statement, and the said Commissioner was to ascertain and report to the Court what balance (if any) was due from or by either of them, the plaintiffs or defendants, to the other of them after making all just allowances. Then follow the ordinary directions in a decree for an account. Further directions and costs were reserved until the said Commissioner should have made his report.

It will thus be seen that neither by the plaint, written statement, or the decree or order of reference, is any question of adjustment or settlement of account raised or mentioned. The Commissioner was directed to take the account between the parties as prayed by the plaint and written statement, and the pleadings treat all the accounts as open and unadjusted. I do not on the materials before me quite understand how the question of an adjusted or stated account was allowed to be raised. According to the practice of the Court of Chancery in English, accounts taken under a decree or order for taking accounts are taken—where there is no direction in the decree that stated or settled accounts are not to be disturbed—without regard to any settled account, except in the case of administration accounts. The letter, however, of the 10th June 1862 was, it is contended on the part of the defendants, wrongly admitted in evidence by the Assistant Commissioner, for the reason that it was irrelevant to the question on which the notice of motion alleges the defendants were seeking his decision, viz., whether there had been the adjustment mentioned in the notice of motion. But it appears to me, so far as I can judge, that the question with regard to which the said letter is contended to be irrelevant, viz., whether there had been, in fact, the adjustments alleged, was itself irrelevant and without the scope of the inquiry and accounts directed by the decree or order of the 19th March 1870. I say, however, *so far as I can judge*, for I have not the materials before me to form any opinion, still less to

give any decision, whether or not the Assistant Commissioner was right, or otherwise, in entertaining the question of alleged adjustments of accounts in November 1860 and November 1861, and I only mention the point for the purpose of saying that I have a difficulty in seeing how the question with reference to which it is sought to have a decision of the Court, viz. whether the letter of 10th June 1862 be relevant or not, should ever have arisen.

The only question, however, now before the Court arises on the objection taken *in limine* to the application or notion, the terms of which are contained in the notice of the 27th July last, viz., that it is irregular and contrary to the practice of the Court. The first point for consideration appears to be whether the case is governed by the practice and procedure followed by the Court previously to the 1st October 1877, or by the practice and procedure in force since that date under Act X of 1877 and the rules and orders of the Court of the 1st October 1877 so far as they differ from such previous practice and procedure. If the present proceedings in the suit are proceedings "prior to decree" within the proviso of sec. 3 of the Civil Procedure Code (Act X of 1877), the former practice and procedure would apply ; but if not, then the former rules and orders are (under the orders of 1st October 1877) in force only so far as they are not inconsistent with the Code of Civil Procedure, (Act X of 1877). The meaning of the words "prior to decree" in sec. 363 of Act VIII of 1859 was considered by the Appellate Court in the case of *Hirji Jina* v. *Narran Mulji*(1) with reference to the question whether a certain order of a division Court reversing a decision of the Commissioner for taking accounts in a matter which was before him under as order of reference, and which decision had been embodied by the Commissioner in a separate certificate granted by him, was or was not an appealable order, and the Court held that it was not, being prior to decree. The Chief Justice is there reported to have held that an order referring accounts to the Commissioner as well as the order of the Judge reversing a decision of the Commissioner was a "decree" within sec. 363 of Act VIII of 1859. It is, however, to be noted that albeit in the general use of the term the word 'decree' is properly applied to an order of reference, yet the word by Act X of 1877 (see sec. 2) has had imposed upon it a precise definition so far as that Act is

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concerned. A decree is, according to that section, "the formal order of the Court in which the result of the decision of the suit or other judicial proceeding is embodied." I cannot find that there was any such definition in Act VIII of 1859, but that Act left the words "prior to decree" in sec. 363 to be interpreted with reference to the ordinary acceptation of the word decree, and with regard also to the circumstance that the words occurred in a section of the Code concerned with the subject of admitting or excluding an appeal. But in the present Code we have a legislative interpretation of the word 'decree.' I have great difficulty in understanding how an ordinary order of reference of accounts can be correctly described as embodying "the result of the decision of the suit." The general object of excluding (as is done by the proviso to sec. 3) from the operation of the new Code, proceedings prior to decree in suits pending on the 1st October 1877 was, it may I think be supposed, the avoidance of confusion and difficulty arising from the clashing of two Procedure Codes possibly varying in their provisions from one another which might have occurred if applied to one and the same suit. But this confusion and difficulty would be, if not in every conceivable case yet in almost every case, avoided, by giving to the word "decree" in sec. 3 of the new Code its strict meaning according to the interpretation clause, and the effect of the proviso to sec. 3 would be simply this, viz., that in all pending suits down to their final result, *i. e.* when nothing remains to be done but to execute the decree or to appeal from it, the practice and procedure which would have been followed apart from the new Code are to be observed ; but that for purposes of all subsequent proceedings in execution of the decree, or in appeal from it, the new Code is to apply. So that a consideration of the scope and object of the proviso to sec. 3, as applied to pending suits, furnishes to my mind, of itself, and apart from the legislative interpretation of the word 'decree,' a strong reason for holding that the word 'decree' in that section means a decree final in its nature and not an order of an interlocutory nature, such as an order of reference to take accounts, though such order in a general way may be properly termed a 'decree.' I am, therefore, of opinion that, under Act X of 1877, the present suit is still in a stage 'prior to decree,' and that the practice and

procedure of the Court, as they stood previous to the 1st October 1877, apply to the present case.

The point does not seem, however, after all, to be very important, so far as the present case is concerned, as the provisions of section 181 of Act VIII of 1859 as to reference to the Commissioner are, so far as I can see, substantially, though with same change of wording, re-enacted in sections 394 and 395 of the new Code. If this be so, and taking as an authority the judgment in *Hirji Jina* v. *Narran Mulji*(1) that the Equity rule No. 371 was not inconsistent with section 181 of the former Procedure Code, it seems to follow that it is not inconsistent with sections 394 and 395 of the new Code, and is, therefore, still in force under the rules of this Court of the 1st October 1877. This Equity rule No. 371 states that "in all matters referred to him the Master shall be at liberty, upon the application of any party interested, to make a separate report or reports from time to time as to him shall seem expedient; the costs of such separate reports to be in the discretion of the Court." I do not wish to say anything restricting the application of this rule, but I cannot consider that because in the present case the Commissioner has though proper or expedient to certify that he has admitted a certain letter in evidence, that the Court is, therefore, bound either to uphold or reverse his decision or to consider it in any way till he has arrived at and certified some thing that can be called a result, either of the whole inquiry before him or of some part or branch of it. No doubt there have been cases where, whether by consent of both parties or not, a particular item in a long account has been selected as a test item, and the Master or Commissioner has certified or reported his decision on such item before proceeding with the inquiry as to items, *in consimili casu*, for the purpose of having a decision of the Court upon such certificate or report. So, where doubts arise at to the meaning of the decree or order of reference, it would be very proper for the Commissioner to apply to the Court making the decree for more detailed instructions. But the general nature of a certificate or report, whether general or separate, is that it should in the case of a general certificate comprise the *result* of all the proceedings under the decree or order of reference, or, in the case of a

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separate certificate or report, that it should comprise the result of some or one of such proceedings. The cases which rule 371 is mainly intended to meet are, for instance, cases in which where debts of a testator are unpaid and it is desirable, for the purpose of having them at once paid, to take an inquiry with reference to such debts first, or as a separate branch of the inquiry, and to have the result of it embodied in a separate certificate for the purpose of obtaining an order of the Court upon it. Other instances would be those in which a separate certificate is granted stating what legacies had been left, and whether they have been paid, or stating who are the next of kin of a deceased person, or who are the members of a class beneficially entitled to a particular fund. In these cases the certificate embodies a *result*, though not possibly of the whole matter referred, and, in fact, the Equity rule No. 372 expressly recognizes debts and legacies as forming the proper subject-matter of a separte report.(1) In the case of *Hirji Jina* v. *Narran Mulji*,(2) in which the Commissioner granted a certificate a question had arisen as to the right construction of the order of reference. The Commissioner putting one constrution upon it had decided not to allow the defendant credit for a certain class of items mentioned in a surcharge filed by him, but to allow the plaintiff to appropriate those items to the discharge of earlier items claimed by him, which, having regard to the Limitation Act, were not embraced in the order of reference. So that the certificate embodied a result, not indeed of the whole reference, but, at any rate, of the chief or a chief branch of it. In fact, so far as I can judge from the report, the question whether or not the defendant was to be allowed credit for these items, was the only question really being contested by the parties before the Commissioner. But that is far from forming a precedent for the present proceedings, which seems to involve this, that whenever the Commissioner may think fit to give a certificate of his decision of any point whatever arising before him, important or unimportant, the Court is bound to entertain, at the instance of any party, the question whether such

(1) Equity rule No. 372 :—" Where the Master shall make a separate report of debt or legacies, then the Master shall be at liberty to make such certificate as he thinks fit with respect to the state of the assets : and every person interested, shall thereupon be at liberty to apply to the Court as he sha be advised."

(2) 12 Bom. H. C. Rep. 129.

decision was right and wrong. No doubt the discretion of the Commissioner of the Court in granting a certificate or not, may be trusted; but I cannot see why the Court is not also to have a discretion in the matter, and on the ground that a matter certified is not, in its opinion, a proper matter for a certified, decline to interfere in the matter. There is, however, another of the old Equity rules which was not referred to in the argument, which it is necessary to mention, and which, it appear to me, gives the Court a discretion to deal or not to deal with any question brought before it on a Master or Commissioner's certificate. This is rule 456. By this rule, "This Master, if he thinks fit, shall make a special report concerning any matter or thing arising in or about he matter referred to him, in order that the opinion of the Court may be taken therein or with respect thereto, and such special report shall be brought before the Court by such parties as the Master shall direct by a motion or (qy. "on") notice that such special report may be confirmed, discharged or varied by order of the Court, or that any directions may be given thereon; and on the hearing of such motion the same shall be confirmed, discharged or varied, as the Court shall deem just, or such directions shall be given as shall appear to be necessary or expedient in that behalf." This rule, no doubt, appears wider and more precise than aule No. 371; but, even in the case of a certificate conforming in all respects to the conditions mentioned in the rule, the court has also a very wide power, substantially an unlimited one, as to the mode of dealing with any motion made with reference to such certificate. In a case, for instance, where a question of the admissibility or non-admissibility of certain evidence has arisen before the Commissioner, and where on the decison of such question depends his decision as to a class of items in an account or on some distinct branch of an inquiry being held by him, if he were to certify that his decision on such class of items or on a test one was or must be wholly or principally based on the admission or non-admission of the evidence in question and that he desired to have the opinion of the Court on the point, I by no means wish to be understood to say that such a certificate would be irregular or improper, or that the Court would or ought to decline to consider the question where his certificate is brought before the Court by one of the

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parties under the Commissioner's direction. In the present case however, all that is certified is that the Commissioner has decided to admit in evidence a certain press-copy of a letter. The certificate does not show, on the fact of it, how the question is important, or how it affects the inquiry being held, nor does the Commissioner state that he has any doubt as to the construction of the order of reference or as to the correctness of his decision admitting the press-copy letter, or, in fact, that he at all desires the opinion of the Court on the question decided by him. Whether the Commissioner exercised his direction properly or not in yielding to the request of the defendants' attorneys to grant the separate certificate, it is not necessary to consider. He does not state that he granted it for the purpose of bringing the matter before the Court. For all that appears, the certificate may have been asked for and granted for the purpose of preserving a formal record of his decision, in order that hereafter, in case of any objection being taken to his report embodying the result of the reference, there may be no room for doubt as to what he in fact did decide. The application being, in my opinion, irregular and not in accordance with the practice and procedure of the Court, must be refused and with cost, but this order is to be without prejudice to any right the defendants may have at any subsequent stage of the suit to object to the decision of the Commissioner as certified by his certificate of the 25th July 1877.

Motion refused.

The defendants appealed. At the hearing of the appeal it was contended by the plaintiffs that the order made by Mr. Just Green was not appealable. The point, however, was not decided by the Appellate Court, as the appellants, after some discussion as to the merits of the case, asked for and obtained leave to withdraw the appeal.

Attorneys for plaintiffs.—*Messrs. Lynch and Tobin.*

Attorneys for defendants.—*Messrs. Rimington, Hor and Conroy.*