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(X of 1877), which sections are analogous to s. 246 of the Civil Procedure Code (VIII of 1859). By that art. 11 the institution of such suits is limited to one year from the date of that order.

For these reasons we hold this suit to be barred barty. 15 of sch. II of Act IX of 1871. We, therefore, must reverse the order of the District Judge, and restore that of the Subordinate Judge.

The plaintiffs are to pay to the defendants their costs of the suit and of both appeals, in so far as the defendants, respectively, have incurred such costs.

We do not desire, by anything which we have said in this case to impair the authority of *Lalchand Ambaidas* v. *Sakharam* (1) it being a case in which the plaintiffs had not intervened under s. 246.

Order reversed.

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4 B. 619.

[619] ORIGINAL CIVIL.

Before Mr. Justice West.

THE LONDON, BOMBAY AND MEDITERRANEAN BANK, (*Plaintiff*) *v.* MAHOMED IBRAHIM PARKAR (*Defendant.*)*

[13th April, 1880.]

Practice—Expenses of witness—Service of summons on the wrong person—Erroneous description of defendant in plaint—Dismissal of suit.

A witness is entitled to be paid his expenses by the party at whose instance he has been summoned, although he has applied for them before giving his evidence.

In a suit brought by the plaintiffs against A, the summons was by mistake served upon B, who thereupon filed a written statement denying his liability and alleging that he was erroneously described in the title to the plaint. On the day of the hearing of the case the plaintiffs' agent saw B for the first time, and ascertained that he was not the real defendant in the suit.

Held, that B having done nothing to mislead the plaintiffs as to his identity, was entitled to his costs of suit.

Held, also that the case having come on for hearing, and there being nothing to show that the plaintiffs had been in any way deceived by B, the proper order to be made was for the dismissal of the suit.

[R., 28 B. 647=6 Bom. L. R. 1025.]

SUIT to recover Rs. 2,000 from the defendant as a contributory of the plaintiffs' bank.

In this case the summons, addressed to the defendant, Mahomed Ibrahim Parkar, had been served, not upon the defendant, but upon one Mahomed Ibrahim Parkar valad Lootfooddeen Parkar, by affixing a copy on the door of his house. He thereupon filed a written statement denying his liability, and alleging that he had never held shares in the plaintiffs' bank. In the last clause of the written statement he stated that "the description given of him in the title of the plaint was altogether wrong and erroneous." The written statement was signed by him in full in the usual manner.

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* Suit No. 518 of 1876.

(1) 5 B.H.C.R.A.C.J. 139.

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The case came on for hearing on the 13 h March 1880, as a short cause, and on that day was transferred, on the application of the plaintiffs, to the long-cause list. The plaintiffs' agent, who was acquainted with the real defendant, not seeing him in Court, [620] had his suspicions aroused, and on the following day the plaintiffs' solicitor wrote to the solicitor of Mahomed Ibrahim valad Lootfooddeen Parkar, requiring them to produce him for identification. An appointment was accordingly made for the 29th March, but on that day he was not in Bombay. Two other appointments were subsequently made, *viz.*, for the 10th and 12th April, but on both those days the plaintiffs' agent was unable to attend, being necessarily absent from Bombay. He did not return until the evening of the 12th April, and on the 13th the case came on for hearing. On that day the plaintiffs' agent saw Mahomed Ibrahim valad Lootfooddeen Parkar, and then became aware that he was not the real defendant in the suit.

Counsel for the plaintiffs at once communicated the fact to the Court, and stated that the plaintiffs had no claim against Mahomed Ibrahim valad Lootfooddeen Parkar, and had never intended to proceed against him. It was further alleged that the summons had not been served upon him.

Evidence was thereupon given as to the service of summons, and the Court found that the summons had been posted on the house of Mahomed Ibrahim valad Lootfooddeen Parkar, and ordered the plaintiffs to pay his costs and was about to dismiss the suit: whereupon

Starling (with him *Farran*), for the plaintiffs, objected to the dismissal of the suit.

The right order would to be to set aside the service of summons and all subsequent proceedings. A suit can only be dismissed against a real defendant. If the plaintiffs had been purposely misled, they ought not to be deprived of their remedy against the proper defendant Mere service of summons does not make a person a defendant: *Walley* v. *McConnell* (1). Counsel also referred to Archbold's Practice (13 ed.), pp. 232, 233, 236; *Richards* v. *Hanley* (2); *Walker* v. *Medland* (3): *Kelly* v. *Lawrence* (4).

JUDGMENT.

19th April, WEST, J.—Before dealing with this case on its merits I will dispose of the question, raised yesterday, as to the expense of the witness Sakharam, who applied to the Court, after he had [621] given his evidence, for the amount of his travelling charges and maintenance. It seemed to me a matter of course, as being a matter of common justice, that a witness should be paid his expenses by the party at whose instance he had been summoned; but Mr. Starling, for the plaintiffs, relying on para. 2 of Chap. V of the Rules of the High Court, objected that the witness, not having made his claim before giving his evidence, could now recover any sum due to him only by a suit. No order such as I proposed to make, it was contended, had ever been made at this side of the Court. The assertion seems not to have been altogether warranted. On inquiring from the Chief Justice I learn that he has frequently made orders for the payment of witnesses' expenses after they had given their depositions. The case, indeed, is exactly covered by No. 188 of the Rules of the late Supreme Court, which says: "Witnesses in civil suits, who have been not paid such reasonable sum for their expenses as the Court

(1) 13 Q. B. 903.
(2) 10 Jur. (Q. B.) 1057.
(3) 1 Dow. & L. 152.
(4) 33 L. J. Ex. 197.

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shall think fit, may apply to the Court at any time in person to enforce the payment of such sum as may be awarded to them."

The object of the rule cited by Mr. Starling is to provide witnesses with an additional security that they shall not be placed in a worse position for having readily discharged their duty. Once sworn, a witness must give his evidence, even though his expenses have not been paid; but he does not cease, on that account, to be under the protection of the Court which has commanded his attendance. The plaintiff must, therefore, pay the reasonable expenses of the witness Sakharam. His attorney will see that this is done. In case of dispute, the Prothonotary may settle what is reasonable, subject, if necessary, to the further order of the Court. The Prothonotary may apply to the payment of the witness's reasonable expenses, as thus ascertained, such funds as he may have in his hands belonging to the plaintiff and on account of this suit.

There is another witness, Narayan Kalidas, subpœnaed by the plaintiff, but not examined, whose expenses must similarly be provided for by the plaintiff.

The case between the parties now before me is a curious one, but one that turns upon a very simple issue. Mahomed Ibrahim valad Lootfooddeen Parkar says he was summoned as defendant, [622] and claims his costs. For the plaintiff it is answered that this man never was summoned, that he has been put forward by another person who was summoned, and that he has wilfully endeavoured to prevent the plaintiffs' agent from recognizing him in good time so as to repudiate any claim against him, and to bring the intended defendant before the Court.

[His Lordship, after discussing the evidence which had been given with reference to the service of the summons and the conduct of the ostensible defendant, was of opinion that the summons had been served upon him, and continued:—]

The ostensible defendant Mahomed Ibrahim valad Lootfooddeen being thus *prima facie* entitled to his costs, I do not find anything in his conduct here to deprive him of that right. He said from the first who he was, and that he was not answerable. Mr. Stead (the plaintiffs' agent) attached no weight to his signature or his denial of responsibility; but for that Mahomed Ibrahim is not responsible. There was no obvious avoidance of recognition on his part or misleading of the plaintiff or his attorneys. The professional correspondence is simply of the usual type and implies no misconduct on one side or the other beyond a certain waste of paper and accumulation of expenses.

Mahomed Ibrahim valad Lootfooddeen must, therefore, have his costs of this suit.

The next point for decision is whether the order now to be made should be one dismissing the suit or an order merely setting aside the service of the summons on the ostensible defendant and all proceedings subsequent to such service. I am of opinion that the suit should be dismissed.

Generally the person served with a summons is defendant. If the summons is plainly directed to some one else, this is not so; but in the present case the person served bore the name mentioned in the summons. A decree obtained in his absence would have been executed against him in spite of any assertions, on his part, of a mistake having been made. Having no reason to raise a plea of misnomer, the person served put in his written statement denying the claim. No notice was given to him of abandonment of the claim. On the application of the plaintiff the suit was

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[623] placed on the long-cause list, and it is only now, when it comes on for hearing, that the plaintiffs say they have been mistaken as to the person. No doubt they have; but still they have made the person they have summoned defendant, and the case having reached this stage the proper order appears to be one for dismissing the suit. The English cases cited do not seem opposed to this literal adherence to the Code of Civil Procedure. In the case most relied on, *viz.*, *Walker* v. *Medland* (1), a person not really sued, or of the name of the person sued, voluntarily put himself forward, and persisted, in spite of notice, in signing judgment of *non pros.* The judgment, as obtained by a trick, was set aside. Here there has been no trick. *Richards* v. *Hanley* (2) rested on the defendant's having taken steps towards a judgment of *non pros*, when he knew that he was not the person sued, and apparently had falsely assumed the defendant's name. The wrong description in this case would not have saved the defendant, whose name and present address had been sufficiently given. By appearing, the defendant summoned acquiesces in being sued in the name used to summon him, and when the case then comes to a hearing, there having been no fraudulent trick which the Court should defeat, the proper order is for the dismissal of the suit, which is the order that I must make.

Suit dismissed.

Attorneys for the plaintiff.—Messrs. *Tobin and Roughton.*
Attorneys for the defendant. —Mr. *Mansukhlal Munshi.*

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4 B. 624.

[624] ORIGINAL CIVIL.

Before Mr. Justice West.

TULSIDAS DHUNJEE *Plaintiff v.* VIRBUSSAPA AND ANOTHER, *Defendants.** [28th August, 1880.]

Dekkhan Agriculturists Relief Act (XVII of 1879), s. 2, cl. (w); s. 11—Agriculturist.

The Dekkhan Agriculturists Relief Act (XVII of 1879) is not limited in its application to suits for sums not exceeding Rs. 500.

The effect of the reference, in s. 11 of the Dekkhan Agriculturists' Relief Act, to cl. (*w*) of s. 2 is to make all suits of the kinds therein described when brought against an agriculturist cognizable by the local Courts and by them only.

Section 11 extends to the whole of British India as to suits brought against agriculturists of the description given in s. 2.

In a suit against defendants, whowere residents at Sholapur, for Rs. 1,947, the price of goods sold and delivered, the defendants moved for a postponement of the hearing, in order that a commission might issue to take evidence at Sholapur, alleging that by the evidence thus obtained they would be proved to be agriculturists within the meaning of the Dekkhan Agriculturists Act, and consequently under s. 11 could only be sued at Sholapur. The Court granted the commission, holding that if the defendants established that they were *bona fide* agriculturists, they were exempt from the jurisdiction of the High Court.

A man must have gained his livelihood by farming, for at least one full agricultural season, to have acquired the condition of an agriculturist under the Act.

[F., 14 B. 387 (389); 13 Ind. Cas. 223=5 S.L.R. 179; R., 13 B. 600 (625); 15 B. 30; 16 Ind. Cas. 449 (452)=8 N.L.R. 107; 17 Ind. Cas. 621=8 N.L.R. 169.]

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* Suit No. 338 of 1880.

(1) 1 D. & L. 159.

(2) 10 Jur. (Q.B.) 1057.