## APPELLATE CIVIL.

*Before Mr. Justice West and Mr. Justice Nándbhái Haridás.*

1883 *December* 6.

KEVAL BHAGVA'N GUJAR, PLAINTIFF, *v.* GANPATI NA'RA'YAN, A MINOR, BY HIS GUARDIAN *AD LITEM* PARSHRA'M, NÁZIR OF THE MA'HA'D COURT, DEFENDANT.*

*Hindu law—Inheritance—Minor—Liability of son for father's debts—Bombay Act VII of* 1866.

In the Presidency of Bombay under the provisions of Bombay Act VII of 1866, where a Hindu dies intestate, leaving property, his son is liable to his (the father's) creditors to the extent of the value of the property, although the property may not have come into the son's possession, but remains in the hands of third persons. The father having left property, the son may recover it if it has been taken against his assent, and he ought to do so to enable him to discharge the first duty of a Hindu to his deceased father. So long as he takes no steps it is to be presumed that the property is held with his assent. He may reclaim it if he will and thus it is held to his use within the meaning of section 2 of Bombay Act VII. of 1866.

THIS was a reference by Ráv Sáheb Sakhárám M. Chitale, Subordinate Judge of Máhád, under section 617 of the Code of Civil Procedure (Act XIV of 1882).

He stated the case thus :—

"The plaintiff sues to recover from the estate of the deceased Náráyan Rs. 9, and 8 maunds of rice in husk, or Rs. 9 as its price, together with the costs of this suit on a bond dated the 12th of June, 1878.

"The guardian of the minor has not appeared.

"The points for decision are :—

"1. Has the bond been executed to the plaintiff by the deceased Náráyan ?

"2. Has the minor Ganpati taken the estate of his father Náráyan ?

"3. If not, is the plaintiff entitled to sue Ganpati ?

"The plaintiff had joined Vithu Dáji and Tái, widow of Dáji, as guardians of the minor. They both expressed their unwillingness to be appointed guardians of the minor for the purposes of this suit.

* Civil Reference, No. 45 of 1883.

"The execution of the bond by Náráyan has been proved But the plaintiff has not proved that the minor has taken property of his father Náráyan. It appears that Vithu has taken Náráyan's property. But Vithu is not a party to this suit. It has not also been shown that Vithu has taken the property on behalf of, and for the minor Ganpati. I have, therefore, held that the minor Ganpati has not inherited any property from his father Náráyan.

"The third point, therefore, requires consideration. The pleader for the plaintiff has argued that the mere fact that the minor is the son of Náráyan entitles the plaintiff to sue him for recovering the debt due by the deceased father. The pleader has cited the case of *Bápuji Auditrám* v. *Umedbhái*[1]. In the judgment given in that case the Judges say: 'It appears to us that this was an unnecessary and irregular proceeding, and that a decree ought to have been given against Bhojilál, as representative of his father whether he had inherited any property or not. If he had no property, the only result would have been that the decree could not have been executed against him.' This is, no doubt, an authority in favour of the plaintiff's contention. But section 1 of Bombay Act VII of 1866 provides that no son or grandson of a deceased Hindu shall, merely by reason of his being such son or grandson be liable to be sued for any of the debts of such deceased Hindu. Then section 2 of the Act provides the cases in which an heir who has taken the property can be held liable—(*a*) personally, and (*b*) as merely a representative. From this it appears to me that no heir who has not taken property of a deceased debtor can be sued for a debt due by the deceased. An heir who has not taken property is not a representative of the deceased. The plaintiff, in a case like the present, must, in my opinion, allege and prove that the son and grandson has taken the property of his deceased debtor before he can be entitled to sue such son or grandson. In the case cited by the plaintiff's pleader, the provision of section 1 of Bombay Act VII of 1866 does not appear to have been discussed. I, therefore, entertain a doubt as to the following question, which I, therefore, refer, under section 617

(1) Bom. H. C. Rep., A. C. J., 245.

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of the Civil Procedure Code, 1882, for the opinion of the Honourable High Court, *viz.*,

"Whether a plaintiff suing the son of his deceased debtor to recover a debt due by him must allege and prove that the former has taken property of the latter in order to entitle himself to sue such son.

"I am of opinion that the plaintiff must allege and prove this fact, and that, if he does not do this, he is not entitled to sue the heir.

"I have, therefore, rejected the plaintiff's claim with costs,—subject, of course, to the opinion of the Honourable High Court on the point hereby referred."

There was no appearance on behalf of either party.

The judgment of the Court was delivered by

WEST, J.—The case here is that a Hindu has died intestate, leaving property which, in law, became on his death the property of his son. The son is a minor, and the property has been taken possession of by a third person. In these circumstances a creditor of the father sues the son to recover his debt, and the question is, whether the son is liable. Merely as son he clearly is not. Section 1 of Bombay Act VII of 1866 is express on that point. But as the father left property, the son may recover it if it has been taken against his assent, and he ought to do so to enable him to discharge the first duty of a Hindu to his deceased father. So long as he takes no steps, it is to be presumed that the property is held with his assent. He may reclaim it when he will, and thus it is held to his use within the meaning of section 2 of the Act lately referred to. Where *A.* and *B.* wrongly took money belonging to *C.*, it was held that *C.* might waive his right to sue for the wrong, and proceed to recover the money as had and received to his use—*Neat* v. *Harding*[1]. Similarly, in the present case the son suing by his next friend or guardian, may either recover from the third party damages for the wrong, or obtain a restoration of the property. He is bound in honesty to do this, and the property meanwhile is held to his use, and

(1) 20 L. J. Ex., 250.

serves to make him liable to the extent of its value for his father's debt. He may deny the existence of property while the creditor asserts it. In that case the creditor may properly be awarded relief to the *primâ facie* extent of the property existing and recoverable, subject only to a limitation of execution to the amount that proves actually available. And, having obtained his decree, the creditor may, should he be further obstructed, properly claim the aid of the Court to enable him to sue, or get a suit brought on behalf of the minor, in order that the estate may be realized for the satisfaction of his claim. The usual official administrator would generally be the proper one to appoint under Act XX of 1864 should the relatives of the minor refuse the office, or be distrusted by the District Court.

## APPELLATE CRIMINAL.

*Before Mr. Justice West and Mr. Justice Nánábhái Haridás.*

QUEEN EMPRESS *v.* NUR MAHOMED.* *December 6.*

*Counterfeit coin.—Evidence—Confession—Indian Penal Code (XLV of 1860), Sec. 239.*

Evidence of the possession and attempted disposal of coins of unusual kind is relevant on a charge of uttering such coins soon afterwards when the *factum* of uttering is denied.

*A.* and *B.* were tried together, under section 239 of the Indian Penal Code (XLV of 1860), on a charge of delivering to another counterfeit coins, knowing the same to be counterfeit at the time they became possessed of them. *A.* confessed that he had got the coins from *B.* and had passed them to several persons at his request.

*Held* that the confession of *A.* was relevant against *B.* When two persons are accused of an offence of the same definition arising out of a single transaction, the confession of the one may be used against the other, though it inculpates himself through acts separable from those ascribed to his accomplice, and capable, therefore, of constituting a separate offence from that of the accomplice.

*Reg.* v. *Purbhudás Ambárám* (1) distinguished.

THIS was an appeal from the decision of W. H. Crowe, Session Judge of Poona.

* Criminal Appeal No. 143 of 1883.

(1) 11 Bom. H. C. Rep., 90.