ORIGINAL CIVIL.

Before Mr. Justice Bayley.

AHMEDBHOY HUBIBHOY, PLAINTIFF, *v.* VULLEEBHOY CA'SSUMBHOY AND OTHERS, DEFENDANTS. 1884 *March* 20, *May* 5.

HASSANBHOY VISRA'M, APPLICANT.*

Civil Procedure Code (Act XIV) of 1882, *Secs.* 32 *and* 372—*Parties—Adding a party defendant— Mortgagee added as party—Purchaser pendente lite—Mortgage before suit of defendant's interest—Sale of equity of redemption pendente lite—Champerty.*

A. sued V. and S. to establish his right to attach a certain house in execution of a decree obtained by him in a previous suit. In their written statement the defendants alleged that A. had obtained the decree in question by fraud. Shortly before the present suit, V. had mortgaged the house to H. for Rs. 33,000. About three weeks after the suit had been filed, H. advanced a further sum of Rs. 5,000 to V. on the same security, and on the same day (12th December, 1881,) entered into an agreement with V. by which he agreed to buy the house for Rs. 45,000, the sale to be completed immediately after the decision of the present suit. The agreement provided that V. should defend the suit; but, if the result of the suit should be to establish the plaintiff's right to seize the house in execution, then that H. should be at liberty to cancel the contract of sale. Subsequently V. wrote to H., declaring his intention of abandoning his defence. H. thereupon applied to be made a defendant to the suit, in order to protect the house from the plaintiff.

Held that H. was entitled to be made a party under sections 32 and 372 of the Civil Procedure Code (Act XIV of 1882).

Held, also, that the agreement of 12th December amounted to an absolute sale, by V. to H., of the equity of redemption of the house in question, and that it was not champertous.

RULE to show cause why the applicant Hassanbhoy Visrám should not be made a party defendant to Suit No. 486 of 1881 in which the plaintiff sought to establish his right to attach a certain house in execution of a decree which he had obtained in previous suit (No. 401 of 1876).

In that suit (No. 401 of 1876) the plaintiff sued Fázulbhoy Cássumbhoy, as administrator with the will annexed of the estate of his father Cássumbhoy Nathubhoy, and on the 29th August, 1876, obtained a decree for Rs. 17,243-9-7 against the estate. In the execution of that decree a house, No. 28, Shámji Hussáji Street

* Suit No. 486 of 1881.

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in Bombay, was attached in 1880 as belonging to the estate of the testator. The first and second defendants took out a summons for the removal of the attachment upon the ground (among others) that the said house had been made over to and distributed among the persons interested in the residuary estate of the said Cássumbhoy Nathubhoy; that the first defendant Vulleebhoy Cássumbhoy had at the date of the attachment become solely entitled to the said house subject to the life-interest in a one-third share thereof of the defendant Sátbái; and that the defendants Vulleebhoy and Sátbái were then in possession of the said house. It was thereupon ordered that the plaintiff might, if so advised, bring a suit to establish his right to attach the said house in execution. The plaintiff accordingly filed this suit on the 21st of November, 1881, praying *(inter alia)* that it might be declared that the said house was liable for, and chargeable with, the payment of the amount of the decree in Suit No. 401 of 1876.

The first and second defendants filed written statements, in which *(inter alia)* they alleged that the debt, in respect of which the plaintiff had obtained his decree in Suit No. 401 of 1876, was not a debt due from the estate of Cássumbhoy Nathubhoy, but was a private debt due to the plaintiff by the administrator Fázulbhoy (the third defendant), and that the said decree had been obtained by the plaintiff against the estate by fraud and in collusion with the said Fázulbhoy.

Some months prior to the present suit the first defendant Vulleebhoy mortgaged the house, (subject to the life-interest of the second defendant Sátbái in a one-third portion of it,) to the applicant for a sum of Rs. 33,000 advanced to him, and executed a mortgage-deed, dated the 2nd of February, 1881, in English in the usual form, the date for redeeming the property being the 21st of February, 1882.

On the 12th of December, 1881—*i.e.*, about three weeks after the filing of the present suit—the applicant advanced to Vulleebhoy a further sum of Rs. 5,000, including which the mortgage-debt with the interest thereon amounted to the sum of Rs. 45,500. On the same day the applicant and Vulleebhoy entered into an agreement, whereby Vulleebhoy agreed to sell to the applicant the whole of

the said house, subject to the second defendant's (Sátbái's) interest therein, absolutely free from all incumbrances, save the life-interest in a one-third portion thereof of the said Sátbái. The following, so far as they are material for the purposes of this decision, are the clauses of that agreement:—

"1. The said Vulleebhoy Cássumbhoy hereby agrees to sell and the said Hassanbhoy Visrám agrees to purchase the hereditaments and premises described in the schedule hereunder written absolutely free from all incumbrances, save the life-interest in a portion of the same of Sátbái, widow of the late Cássumbhoy Nathubhoy, for the sum of Rs. 45,500.

"2. The sale shall be completed on and immediately after the decision, by the High Court on its Original and Appellate Jurisdiction (if appealed), of the Suit No. 486 of 1881 brought by Ahmedbhoy Hubibhoy against the said Vulleebhoy Cássumbhoy, Sátbái, widow of the late Cássumbhoy Nathubhoy, and Fázulbhoy Cássumbhoy, claiming that the house No. 28 be decreed and declared to be now liable for, and chargeable with, the payment of the amount of the decree dated 29th August, 1876 and for other relief.

"3. The said hereditaments and premises, with the exception of the said life-interest of Sátbái, have been mortgaged by the said Vulleebhoy Cássumbhoy to the said Hassanbhoy Visrám by an indenture of mortgage bearing date the second day of February, 1881. And the said Hassanbhoy Visrám shall be at liberty to deduct from the purchase-money of Rs. 45,500, and pay himself all the moneys which shall be found due to the said Hassanbhoy Visrám at foot of the said indenture, and any other sums of money to be advanced as hereinafter referred to, or which shall be found due by the said Vulleebhoy Cássumbhoy to the said Hassanbhoy Visrám on or any account whatever.

"4. If the result of the said suit shall be that by the order of the Court the said Ahmedbhoy Hubibhoy shall be allowed to execute his said decree against the said hereditaments and premises, and if the sum for which the said Ahmedbhoy Hubibhoy is allowed to execute such decree against the same premises shall exceed in amount the difference between the said sum of Rs. 45,500 and the amount that the said Hassanbhoy Visrám shall

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be entitled to deduct from the said purchase-money as provided in the third clause hereof, then and in that case *the said Hassanbhoy Visrám shall be at liberty to cancel the contract of purchase* hereinbefore contained in the first clause hereof, and the said Hassanbhoy Visrám shall be at liberty to take such proceedings as he may be advised to recover from the said Vulleebhoy Cássumbhoy the moneys due to him at foot of the said indenture of mortgage, and the said or any other moneys due to him by the said Vulleebhoy Cássumbhoy.

"5. The said Vulleebhoy Cássumbhoy shall, immediately on the execution hereof, put the said Hassanbhoy Visrám into the possession of the whole of the said hereditaments and premises, a portion of which is already in the occupation of the said Hassanbhoy Visrám as tenant of the said Vulleebhoy Cássumbhoy and Sátbái; and such proportion of the whole rent (such rent, if any, being agreed from time to time between the said Sátbái and Hassanbhoy Visrám) which the said Hassanbhoy Visrám hath hitherto paid, and as is payable to the said Sátbái, shall be continued to be paid to her by the said Hassanbhoy Visrám.

"6. The said Vulleebhoy Cássumbhoy shall defend the said suit brought by Ahmedbhoy Hubibhoy through Messrs. Payne and Gilbert at his own costs, and the said Hassanbhoy Visrám shall from time to time until the purchase is completed, or until he shall have cancelled the purchase as hereinbefore provided, pay to the said Vulleebhoy Cássumbhoy on account of the said purchase-money of Rs. 45,500, sums not exceeding in the aggregate the sum of Rs. 1,500 to enable the said Vulleebhoy Cássumbhoy to pay his private debts and to use the same for other his private purchases. The said hereditaments and premises are and shall be further charged with the payment of the said sum of Rs. 1,500, or so much thereof as shall be advanced to the said Vulleebhoy Cássumbhoy by the said Hassanbhoy Visrám; and such other sums not secured by the said indenture of mortgage as the said Vulleebhoy Cássumbhoy is already indebted to the said Hassanbhoy Visrám, or which shall hereafter become due by the said Vulleebhoy Cássumbhoy, will, at any time on demand

by the said Hassanbhoy Visrám, execute in favour of the said Hassanbhoy Visrám such deed or deeds of further charge or other deed or deeds for effectually further charging the said premises as the said Hassanbhoy Visrám may reasonably require."

On the 25th of January, 1884, Vulleebhoy's attorney forwarded to the applicant a letter, stating the defendant's intention to withdraw his defence of the suit. The letter was as follows:—

"Under the circumstances which have occurred since (*i.e.*, since the agreement of the 12th of December, 1881), it is not possible for my client with any chance of success to continue his defence in Suit No. 486 of 1881; my client, therefore, intends to withdraw his defence of the said suit, which, if conducted, he is afraid would expose him to considerable personal risk and jeopardy. My client has, therefore, determined to carry out his intention, and will do so without any further reference to you. Of course, my client does not for a moment dispute your claim for the money you have already advanced to him, and he will try his utmost to meet his liability on your furnishing to him a statement of account."

On the 1st of February, 1884, the applicant obtained a rule against the plaintiff and defendants, requiring them to show cause why he should not be made a party defendant to the suit, and in the meantime all further proceedings were stayed.

Hon. *F. L. Latham* (Advocate General) and *Starling* for plaintiff.

Farran for first defendant Vulleebhoy.

Inverarity for the applicant Hassanbhoy Visrám.

Kirkpatrick for the second defendant Sátbái.

Latham (with *Starling*) showed cause.—We object to the applicant being made a party, and if he withdraws his application we are willing to admit his mortgage of 2nd February, 1881, which preceded the suit. But the so-called agreement for sale was made pending the litigation, and as against the plaintiff is a nullity. It does not amount to an assignment out-and-out, but is, in effect, an executory contract to be performed only after the suit is determined, and also in the event of its being determined in Vulleebhoy's favor. The applicant cannot become an assignee

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until after the decision of the suit. Such an agreement, if not a nullity, ought to be looked by the Court with great disfavour as champertous. Section 372 of the Code of Civil Procedure (Act XIV of 1882) leaves it to the Court's discretion to add a party or not; and such a discretion ought to be exercised against the applicant, especially as he attempts to come in after all the original parties have agreed to settle, or at least to put an end to the suit. The agreement can only bind those who are immediate parties to it; but as to the plaintiff, it must be regarded as a nullity without regard to the circumstance whether he has had notice of it or not. The doctrine of *lis pendens* has nothing whatsoever to do with notice with which the affidavits mostly deal—1 Story's Equity Jurisprudence, sec. 405; *Bálájí Ganesh* v. *Khushálji*(1); *Gulábchand Mánikchand* v. *Dhondi*(2); *The Bishop of Winchester* v. *Paine*(3); *Metcalfe* v. *Pulvertoft*(4); *Bellamy* v. *Savage*(5). In *Moreshwar Bápuji* v. *Kushába Shankroji*(6) West, J., refused to allow a purchaser from a party to a suit to carry on the litigation in appeal, and the case he contemplated at page 251 of the report is exactly the present case.

Farran for the defendant Vulleebhoy.—The applicant ought not to be made a party. At the date of our agreement with him we thought we had a good *bonâ-fide* defence to the suit; but subsequently, finding that it was not well-founded as to the charges of fraud which would not be substantiated, unless at great cost and difficulty, we thought it advisable to withdraw our defence. Though we originally agreed with the applicant to defend the suit, we should not now be compelled against our will to continue our defence; we prefer running the risk, if any, of being sued by the applicant in a fresh suit for breach of our agreement, to the risk of proving fraud in the present one, with the certain result of failure and liability for costs. Unless we are struck out, we shall be liable to the plaintiff for past and future costs.

Inverarity for the applicant in support of the rule.—The applicant has a two-fold right to be made a party under section 372 and section 32 of the Civil Procedure Code. He was a mortgagee

(1) 11 Bom. H. C. Rep., 24.
(2) 11 Bom. H. C. Rep., 64.
(3) 11 Ves., 194.
(4) 2 V. & B., 200.
(5) De G. & J., 566.
(6) I. L. R., 2 Bom., 248.

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before the suit under the deed of February, 1881, and he is also an assignee, *pendente lite*, under the agreement for sale of the 12th December. Vulleebhoy has no right to redeem the mortgage, because he has parted with his equity of redemption under the agreement. That agreement is not champertous. Moreover, champerty law is not in force in India—*Rámkuvar* v. *Chander*(1). The agreement amounts to an absolute sale, by Vulleebhoy, of his interest in the property in dispute. It gives to the purchaser alone an option to give up his right to the property in a certain event. The seller retains no option whatsoever to cancel the sale, and, so far as his right is concerned, it is a complete and binding purchase. Both as legal mortgagees and as owners of the equity of redemption we are interested in defending the property from the plaintiff's attack upon it, and the more, so as since our purchase the property has increased in value. There is nothing illegal, fraudulent, or improper in buying property *pendente lite*; and even where the vendor is willing to continue the suit, the purchaser is often allowed to be added as a party to the suit. *Seear* v. *Lawson*(2) decides that though a purchaser *pendente lite* is not a necessary party, he ought to be made one the moment his interest is in jeopardy. In *Kino* v. *Rudkin*(3) it was deemed reasonable to add as a party an assignee *pendente lite*, though the assignor was fighting the suit, and had not given up his right in the suit. These cases were decided under the old Order L, Rule 3 (corresponding to the new Order XVII, Rule 3) of the English Judicature Acts, from which section 372 of the Civil Procedure Code seems to have been taken—*Náráini Kuar* v. *Durjan Kuar*(4). The English Order contains the expression "assignment, creation or devolution of any *estate* or *title*." The words of section 372 are much wider. They speak of "*any interest*". Before the Judicature Acts the old English practice was to allow the assignee to bring in a supplemental bill—*Powell* v. *Wright*(5); I Daniell's Chancery Practice, page 243. Under the new rules it is only necessary to amend the title of the suit. If the

(1) L. R., 2 App. Cas., 186.
(2) 16 Ch. Div., 121.
(3) L. R., 6 Ch. Div., 160.
(4) I. L. R., 2 All., 741. *Per* Straight, J.
(5) 7 Beav., 444.

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agreement is not an assignment, there is in it a creation of some interest in the property. The cases of *Bellamy* v. *Savage*(1), *Gulábchand Mánikchand* v. *Dhondi*(2), and *Moreshwar* v. *Kushába*(3) were cases in which purchasers applied to be made parties *after* the decree. The last case was also decided under section 73 of the Act VIII of 1859, which contained no provision similar to section 372 of the present Code. See the Reporter's note to that case at page 252 and also O'Kinealy's note to section 372 in his work on the Code of Civil Procedure, both of which show that the new section was enacted to meet such cases. Under proper circumstances the Courts in England and India have made purchasers *after* decree parties to the suit, as in *Campbell* v. *Holyland*(4) after a decree for foreclosure absolute, and in two unreported decisions of this Court—*Limji N. Banáji* v. *Mithibái*(5) and *Rustomji Barjorji* v. *Keshavji Náik*(6)—in which parties were added *after* the decrees for reference and account to the Master had been made. Here the applicant intervenes *before* the decree. In *Vakatchand Lakmichand* v. *The Advocate General*(7) a mortgagee was made a party against his will. In the unreported case of *Ashábái* v. *Rustomji Dosábhái*(8), which was decided under section 32, Sargent, C. J., made a specific legatee a co-defendant with the executors who were actively defending the suit. In *Johnson* v. *Thomas*(9), where the plaintiff had transferred his interest *pendente lite*, the transferee was held to be the real party, and the plaintiff a mere "shadow". In *Solomon* v. *Solomon*(10) the mortgagees *pendente lite* were held to be necessary parties. In *Sháshee Bhoosun* v. *Mudden Mohun*(11) the purchaser *pendente lite* was made a party, and the plaintiff vendor struck out. The Court held, however, that he ought to have been retained. In *Rám Coomár* v. *Chunder Canto*(12) the respondent had purchased, *pendente lite*, the property which was the subject-matter of certain suits brought against the appellants by other parties to whom the respondent had advanced money. The respondent

(1) 1 De G. & J., 566.
(2) 11 Bom. H. C. Rep., 64.
(3) I. L. R., 2 Bom., 248.
(4) L. R., 7 Ch. Div., 166.
(5) Suit No. 877 of 1870.
(6) Suit No. 461 of 1869.
(7) 8 Bom. H. C. Rep., 96.
(8) Suit No. 616 of 1879.
(9) 11 Beav., 501.
Sim., 516.
(11) 2 Calc. L. R., 297.
L. R. 2 App. Cas., 186.

was not a party to those suits which, in appeal, were dismissed with costs by the Privy Council. The appellants then sued the respondent to recover the costs of those suits, alleging that he had instigated and been the real mover of those suits. The Privy Council held that the suit could not be maintained, and dismissed the appeal, but refused to give the respondent his costs, on the ground that he ought to have come forward in the previous suits.

On three grounds the Court ought to exercise its discretion in favour of the applicant in this case. (1).—We being privies to Vulleebhoy if he acts *bonâ fide* in his defence and fails, or if he colludes with the plaintiff, any decree which may be made for the plaintiff in the case estop us —*Ahmedbhoy Hubibhoy* v. *Vulleebhoy Cássumbhoy* (1). The alienee *pendente lite* is barred by proceedings, unless made a party—Story's Equity Pleadings, sec. 351. (2).—The plaintiff has made an unrighteous claim on the property, which the applicant ought to be permitted to prove, especially when Vulleebhoy is unwilling to do so. The plaintiff obtained the decree against the administrator in respect of moneys advanced to him personally as his private debt. There was no loan to the estate, and, therefore, no right to levy an attachment upon it. The administrator had also parted with the property to the devisees under the will, and the creditor could not follow it, unless he showed that there were no other assets with the administrator. The plaintiff's attachment could be got rid of, at least *pro tanto*, to the extent of the assets in the administrator's hands. There was, moreover, laches on the part of the plaintiff in not taking steps against the property from 1876 to 1881, during which period the position of the parties had changed. (3).—There is no compromise or adjustment of the suit between the plaintiff and Vulleebhoy, but a mere agreement to abandon the defence, which, considered in connexion with the case of the applicant, would go to show that there is collusion between them to shut out the applicant from the suit. For these reasons the Court ought to exercise the discretion vested in it by section 32 of the Code as well as section 372 in favour

(1) I. L. R., 6 Bom., at p. 712.

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of the applicant—*Vydianáda* v. *Sitáráma*[1]; *Lingammál* v. *Venkatmal*[2]. If an order is made refusing to make the applicant a party, there is no appeal under section 588 of the Code; but if the application is granted, the plaintiff can appeal. We undertake to be bound by all previous proceedings in Court, and to pay the plaintiff's costs in the event of his success, both past and future.

Kirkpatrick for defendant Sátbái.—We as defendants have naturally a common interest with the applicant in defeating the plaintiff's right to attach the property. But without actively supporting either side we submit to the Court's discretion the merits of the applicant's claim to be made a party. We have no objection to his being made a party. We claim a life-interest in a third part of the house under the testator's will, and, therefore, have a strong interest in defending the suit.

Latham in reply.—There is a distinction between the present case and the cases cited in support of the rule. The latter are all cases of actual assignment. This is a case of an executory contract which cannot at this stage of the suit be specifically performed. It is also a contract to carry on litigation. See Williams on Executors, Vol. II, p. 1778.

Cur. adv. vult.

BAYLEY, J.—In the year 1876 the plaintiff sued Fázulbhoy Cássumbhoy (the third defendant in the present suit) as administrator with the will annexed of the estate of his father Cássumbhoy Nathubhoy, and obtained a decree for the sum of Rs. 17,243-9-7 against the estate. In 1880 he attached a house situate in Shámji Hassáji Street in execution of his decree, whereupon the first and second defendants in the present suit (Vulleebhoy Cássumbhoy and Sátbái), who claimed the house, took out a summons for the removal of the attachment. After argument the attachment was raised, and liberty was given to the plaintiff to bring a suit to establish his right to attach the house in execution. The plaintiff accordingly filed the present suit.

The first and second defendants have put in written statements in which they allege that the decree obtained by the plaintiff in

(1) I. L. R., 5 Mad., 52. (2) I. L. R., 6 Mad., 227.

Suit No. 401 of 1876 was fraudulently obtained by him; that the debt which he alleged to be due to him from the estate of Cássumbhoy Nathubhoy was really a private debt due to him by the administrator Fázulbhoy, and that Fázulbhoy had colluded with him for the purpose of making the estate liable.

It appears that, before the present suit was filed, the first defendant Vulleebhoy mortgaged the house in question (subject to the life-interest of the second defendant Sátbái) to the applicant Hassanbhoy Visrám for a sum of Rs. 33,000. This mortgage was effected in February, 1881, and the present suit was filed in the month of November of the same year. On the 12th December, 1881, the applicant advanced a further sum of Rs. 5,000 to Vulleebhoy, and on the same day an agreement was entered into between them to the following effect:—[His Lordship read the agreement above set forth.]

On the 25th January in the present year Vulleebhoy through his solicitors wrote a letter to the applicant, stating that, under the circumstances which had occurred since the date of the agreement of the 12th December, 1881, it was not possible for him with any chance of success to continue his defence of this suit; that he was unwilling to incur any further risk in the matter, and that it was, therefore, his intention to withdraw his defence. Thereupon the applicant took out the present rule against the plaintiff and the defendants, calling upon them to show cause why he should not be made a party defendant. At the hearing the plaintiff and Vulleebhoy resisted the application, and have shown cause against the rule; while the defendant Sátbái, who is interested in resisting the plaintiff's claim to the house in question, is desirous that the application should be granted.

On the part of the plaintiff it has been contended by the Advocate General that the claim of Hassanbhoy is champertous,—the agreement of the 12th December, 1881, being, in effect, an executory contract in which all that was sold, was the chance of success or failure in the suit. Mr. Farran for the vendor Vulleebhoy supported the same contention, and further argued that though, at the date of the said agreement, Vulleebhoy believed he had a good defence to the suit, he had since reconsidered carefully

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the nature of the evidence he was able to produce, and had been advised that it was insufficient, in law, to defeat the plaintiff's claim. At one time, no doubt acting with imperfect knowledge as to the effect of his evidence but in perfect good faith, he had bound himself absolutely to prosecute his defence; but it would now be hard if he was compelled to defend a suit in which he was certain to be the loser. For these reasons it was contended by both the plaintiff and the assignor Vulleebhoy that the suit should not be allowed to proceed further, and that it was not a case in which the Court would exercise the discretion given to it by section 372 of the Civil Procedure Code in favour of the applicant, and add as a party the assignee who is anxious to fight out the suit and prolong unnecessary litigation.

I will consider these two objections to Hassanbhoy's claim to be made a party at this stage of the suit in their order. First, as to the champertous nature of the claim. Assuming it to be champertous, is that a reason for holding that Hassanbhoy should not be made a party? The law of champerty as it prevails in England differs in various respects from the law of champerty in India; and the distinction is pointedly brought out in an exhaustive judgment recently delivered by the Privy Council in the case of *Rám Coomár Coondoo* v. *Chunder Canto Mookerjee*[1]. In the report of that case the Judicial Committee say (p. 203) that the champerty laws have no specific force in India, and ought not to be held generally applicable to that country (p. 209). That case follows a very early case, also decided by the Privy Council, *The Mayor of Lyons* v. *The East India Company*[2], in which it was held that, unless contracts of this character are made under circumstances that render them contrary to public policy, they are not necessarily invalid. It seems to follow, from the principles laid down in these two cases, that where an agreement respecting a property, the subject-matter of a suit, is fairly made between the parties, it is not, so far as the law of India is concerned, necessarily champertous.

In the present case I am of opinion that the agreement of the 12th December, 1881, amounts, in effect, to an absolute sale

(1) L. R., 2 App. Cas., 186. (2) 1 Moo. Ind. App., 176.

of the equity of redemption in the house in Shámji Hassáji Sstreet to Hassanbhoy for the sum of Rs. 45,000, subject to a power conferred on the purchaser to annul or cancel the sale in a certain event. That event is this: [His Lordship read clauses 4 and 5 of the agreement.]

The success or failure of the defence by the defendant Vulleebhoy does not affect his sale of the property. He cannot back out of it. But the success or failure of the defence is simply a circumstance upon which the purchaser has to exercise his choice, whether he will, in the event which has happened, confirm or cancel his purchase. I do not see that there is anything unconscientious or contrary to public policy, or illegal in such an arrangement.

The sale, then, not being invalid, I proceed now to consider the other objection, *viz.*, whether, having regard to all the circumstances, Hassanbhoy has acquired such an interest in the property that the Court would exercise a proper discretion by holding him entitled to be made a party to this suit. I may mention here, in passing, a circumstance which, I think, shows that, apart altogether from the agreement of the 12th December, 1881, Hassanbhoy ought to be a party to this suit, and, moreover, ought to have been made a party to it by the plaintiff when he instituted it. It appears from the affidavit of the applicant Hassanbhoy, declared on the 16th of February, 1884, that when the house was advertised for sale before the Commissioner, in pursuance of the plaintiff's decree in the old suit No. 401 of 1876, Hassanbhoy made an affidavit in that suit on the 13th of April, 1881, in which he set forth his claim on the house as a mortgagee of Vulleebhoy for Rs. 33,000. That being so, the plaintiff must be deemed to have been fully aware of Hassanbhoy's claim at the commencement of this suit, and as the mortgage was still in force, Hassanbhoy ought to have been made a party defendant in respect of his mortgage claim.

But, independently of this circumstance, I hold that, by reason of the agreement of 12th December, 1881, he is entitled to be made a party under sections 32 and 372 of the Civil Procedure Code (XIV of 1882). The latter section is taken from, and

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is substantially the same as, Order 50, Rule 4, made under the English Judicature Acts. The English Rule, which is in the new Orders made in 1883 re-enacted as Order XVII, Rules 3 and 4, run thus :—

"3. In case of an assignment, creation, or devolution of any estate or title *pendente lite*, the cause or matter may be continued by or against the person to or upon whom such estate or title has devolved.

"(4) Where by reason of marriage, death, or bankruptcy, or any other event occurring after the commencement of a cause or matter, and causing a change or transmission of interest or liability, or by reason of any person interested coming into existence after the commencement of the cause or matter, it becomes necessary or desirable that a person not already a party should be made a party, or that any person already a party should be made a party in another capacity, an order that the proceedings shall be carried on between the continuing parties and such new party or parties may be obtained *ex parte* on application to the Court or a Judge upon an allegation of such change or transmission of interest or liablity, or of such person interested having come into existence."

The cases decided on the construction of these words are conclusive as to the propriety of adding as parties persons who are assignees *pendente lite* of the subject-matter of a suit. I need only cite two of the latest cases on the subject—*Kino* v. *Rudkin*[1] and *Campbell* v. *Holyland*[2]—which show that the practice in England under the Judicature Acts has been to admit, as parties to the suit, all persons whose interest might in any way be affected. In this Court the practice has been the same. In the reported case of *Lakmidás* v. *The Advocate General*[3], after consulting the late Chief Justice, I ordered a summons to be issued on the application of Abdul Rahman, who claimed an interest in the suit as assignee after the institution of it, to show cause why he should not be made a party. In the unreported case of *Ashábái* v. *Rustamji Dosábhoy*[4] the plaintiff sued to recover certain

(1) 6 Ch. D., 160.
(2) 7 Ch. D., 166.
(3) 8 Bom. H. C. Rep., 96.
(4) No. 616 of 1879.

ornaments which she alleged to be her property, but which had been in the possession of her father-in-law at the time of his death. The defendants were the father-in-law's executors who represented his estate. The present Chief Justice, however, on the application of a person who claimed the ornaments in question as specific legatee under the father-in law's will, ordered him to be made a party defendant to the suit. In another unreported case of *Mithibái* v. *Limji Navroji Banáji*[1], known as the Poway case, I ordered, after argument on a summons, that Harrivullubdás Calliandás should be made a party-defendant, he having purchased the interest of one of the defendants in the estate of the late Frámji Cowasji, subsequently to the decree directing the sale of the property and the taking of accounts.

The practice being in this country, as well as in England, to admit assignees *pendente lite* as parties to the suit, it is now necessary to consider whether in this case the circumstances are such that the Court ought to exercise its discretion in favour of Hassanbhoy. If he be not added, the suit will in all probability not be proceeded with, the principal parties to it having virtually come to a settlement by agreeing that the plaintiff shall be allowed to obtain an uncontested decree. Hassanbhoy has made out a *primâ-facie* case on the affidavits which has not been shaken by the plaintiff or by Vulleebhoy, that there is a good defence to the suit; and that in justice and equity the plaintiff has no right to attach the property of the testator in payment of a debt due by the administrator personally. There is also a good deal to be said upon the point as to whether the plaintiff, after so long a delay with all the knowledge that he has now, ought to be allowed to attach the property. Vulleebhoy has practically no interest in the case now, he having under the agreement of 12th December, 1881, parted with the little that he had to Hassanbhoy. If the Court, therefore, was to hesitate to enforce that agreement, or to prevent Hassanbhoy from defending the suit, the grossest possible injustice might be the result. Having regard to the intentions of Vulleebhoy expressed in his affidavits, in which he states that he is desirous of withdrawing his defence, I think this is peculiarly a case in which the Court

(1) Suit No. 877 of 1870.

1884

AHMEDBHOY HUBIBHOY v. VULLEEBHOY CASSUMBHOY.

would be exercising a wise discretion in adding the applicant as a party defendant to the suit. The rule, therefore, must be made absolute on the applicant's consenting to be bound by all the previous proceedings in this suit in Court and in chambers and by any order the Court may make in future as to the costs of these previous proceedings.

Rule made absolute.

Attorneys for the applicant.—Messrs. *Payne, Gilbert and Sayáni.*

Attorneys for the plaintiff.—Messrs. *Jefferson, Bháishanker and Dinshá.*

Attorneys for the defendants.—Messrs. *Tobin and Roughton* and Messrs. *Ardesir and Hormasji.*

REVISIONAL CRIMINAL.

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

February 31. QUEEN EMPRESS *v.* JOTI RA'JNA'K AND OTHERS.*

The Code of Criminal Procedure Act X of 1882, *Sec.* 523—*The Code of Criminal Procedure,* 1872, *Secs.* 415 *and* 416—*Delivery of property seized or stolen—Inquiry into ownership.*

The provisions of section 523 of the new Code of Criminal Procedure Act X of 1882, are wider than the corresponding provisions of the Code of 1872 (secs. 415 and 416), and they enable the Magistrate to inquire into the ownership of property seized by the police, and deliver it to the person entitled to it, instead of to the person from whom it is taken.

In re Annápurnábái (1) distinguished.

THIS was a reference by J. King, Magistrate of the district of Sátára, under section 438 of the Code of Criminal Procedure. He stated the case as follows:—

"Joti Rájnák and six others were accused before the Third Class Magistrate of Pátan of having committed theft by having cut and removed from the forest of Chafal, an alienated village, teakwood worth Rs. 25 without the consent of the owner. The

* Criminal Reference, No. 9 of 1884.

(1) I. L. R., 1 Bom., 630.