13 B. 677.

1889
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APPELLATE CIVIL.

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Before Mr. Justice Nanabhai Haridas and Mr. Justice Parsons.

HARIDAS RAMDAS (*Original Defendant*), *Appellant v.* RAMDAS MATHURADAS (*Original Plaintiff*), *Respondent.** [13th March, 1889.]

13 B. 677.

Abatement—Civil Procedure Code (Act XIV of 1882), s. 361—Tort—Malicious prosecution, suit for—Cause of action, survival of, as against heir of a deceased wrong-doer—Act XII of 1855—"Actio personalis moritur cum persona," application of.

The plaintiff sued to recover damages from the defendant's father, Ramdas, for wrongful arrest and malicious prosecution. During the pendency of the suit Ramdas died, and the plaintiff substituted the defendant as his heir and representative. The defendant contended that the suit abated. Both the lower [678] Courts disallowed the defendant's contention, and awarded damages to the plaintiff, to be recovered from the estate of the deceased. On appeal by the defendant to the High Court.

Held, reversing the decision of the lower Courts, that the suit abated on the death of Ramdas, his estate having derived no benefit, but, on the other hand, suffered loss, in consequence of his wrong-doing.

It was contended for the plaintiff that Act XII of 1855 gave the plaintiff a right to continue his suit against the heir of Ramdas.

Held, that Act XII of 1855 did not apply to a suit, such as this, brought originally against the wrong-doer himself, and only subsequently sought to be continued against his heir.

Phillips v. *Homfray* (1) referred to and followed.

[F., 28 M. 487 (488); R., 16 C.P.L.R. 65 (69); 17 Ind. Cas. 226=23 M.L.J. 255=12 M.L.T. 383=(1912) M.W.N. 899; 8 M.L.J. 180 (181); D., 26 B. 597 (607).]

SECOND appeal from a decision of W. H. Horsely, Acting District Judge of Khandesh.

Suit to recover damages for wrongful arrest and malicious prosecution against the heir of a deceased wrong-doer.

The plaintiff complained that on the 10th November, 1883, Ramdas, the father of the defendant, had obtained a warrant of arrest against the plaintiff, charging him with criminal breach of trust; that in pursuance thereof the plaintiff was arrested and kept in jail for four days, after which he was released on bail; and that he was finally discharged by the trying Magistrate on the 23rd November, 1883.

On the 23rd November, 1884, the plaintiff filed his suit against Ramdas to recover from him Rs 950 as damages for malicious prosecution. Pending the suit, Ramdas died on the 10th May 1885, and the defendant was substituted on the record as his heir. On substitution of the defendant, the Subordinate Judge raised an additional issue, whether the suit could be continued against the defendant, or had abated on the death of Ramdas. This issue he decided in the affirmative, and awarded Rs. 500 from the estate of Ramdas to the plaintiff as damages.

The defendant appealed to the District Judge, who confirmed the lower Court's decision.

The defendant preferred a second appeal to the High Court.

Daji Abaji Khare, for the appellant:—This is a case which properly falls within the operation of the maxim *actio personalis* [679] *moritur cum*

* Second Appeal No. 414 of 1887.

(1) L.R. 24 Ch. D. 439.

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persona, and the suit abated on the death of Ramdas. The cause of action does not survive. He cited Addison on Torts, p. 57 (edn. 1887); Broom's Legal Maxims, p. 865 (6th edition). The lower Court's decision must be set aside.

Nagindas Tulsidas, for the respondent:—Under Act XII of 1855 the suit could be continued against the heir of Ramdas. The plaintiff has suffered damages which Ramdas would have been liable to pay if he had been alive. The estate of the deceased, therefore, as represented by the defendant was rightly held by the lower Courts liable to pay the damages.

JUDGMENT.

PARSONS, J.—In this case the plaintiff sued Ramdas to recover damages for wrongful arrest and malicious prosecution. He alleged that Ramdas on the 10th Novemder, 1883, obtained a warrant for his arrest on a charge of criminal breach of trust; that he was arrested on it on the 16th November, kept in jail until the 20th November, when he was released on bail, and that he was only discharged by the Magistrate on the 23rd November, 1883. The plaint was filed on the 23rd November, 1884, and Ramdas died on the 10th May, 1885. The question before us is whether on his death the right to sue survived, or whether the suit abated under s. 361 of the Civil Procedure Code. Act XII of 1855 has been cited to us as a special statute which gives the plaintiff the right to continue the suit against the heir of Ramdas. That Act, however, relates only to suits brought against the heirs of a deceased person for a wrong committed by the latter in his life-time. Such is not the present suit. As, therefore, this suit is not one to which the Act relates, and as it is not a suit commenced under the provisions of the Act, the Act cannot apply to it. It is clear that the heir of Ramdas would not have been liable to suit at the time of the death of Ramdas, since the wrong Ramdas is alleged to have committed was not committed within one year before his death. We must, therefore, see whether by the common law such a suit as the present can be pursued against the estate of the deceased person. There can be no doubt that actions for wrongful arrest, for false imprisonment and for malicious prosecution are personal actions. "It is a maxim of the common law that a personal action does not survive on the death, either of the person who did, or of the [680] person who sustained the wrong, and, in the absence of statutory provisions to the contrary, it still prevails unless the estate is affected by the tort" —Addison on Torts, 6th edn., p. 57. That the above-quoted statement is correct in law, is shown by the cases cited as the authorities therefor. The cases of *Phillips* v. *Homfray* (1) and *Peek* v *Gurney* (2) may also be referred to in support of the same proposition. In the former it is laid down (3) that "the only cases in which, apart from questions of breach of contract, express or implied, a remedy for a wrongful act can be pursued against the estate of deceased person who has done the act, appear to us to be those in which property, or the proceeds or value of property, belonging to another, have been appropriated by the deceased person and added to his own estate or moneys. * * * * Where there is nothing among the assets of the deceased that in law or in equity belongs to the plaintiff, and the damages which have been done to him are unliquidated and uncertain, the executors of a wrong-doer cannot be sued merely because it was worth the wrong-doer's while to commit the act which is complained of, and an indirect benefit may have

(1) L. R. 24 Ch. D. 439. (2) L. R. 6 H. L. 377. (3) At pp. 454, 455.

been reaped thereby." Applying these principles to the present case, in which the estate of the wrong-doer did not benefit, but actually suffered, in consequence of his wrong-doing, we hold that the suit abated on the death of Ramdas, and that no right to sue the representative of Ramdas survived. We, therefore, reverse the decrees of the Courts below, and order that the suit do abate. Under the circumstances we direct that each party bear his own costs throughout.

Decree reversed.

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13 B. 681.

[681] APPELLATE CRIMINAL.

Before Mr. Justice Scott and Mr. Justice Jardine.

QUEEN-EMPRESS *v.* NAROTTAMDAS MOTIRAM AND ANOTHER.*
[4th April, 1889.]

Bombay Act IV of 1887, *ss.* 3 *and* 4 – *Gaming—Common gaming-house—Rain betting—What constitutes gaming.*

The accused kept a shed where large numbers of people assembled for the purpose of betting on the quantity of rain which might fall in a given time. The instruments used for measuring the quantity of rainfall were two—a rain-gauge, and a gutter attached to the roof of the shed. The accused, who registered the quantity of rainfall, were entitled to a commission on each bet. They were charged, under s. 4. cls. (*b*) and (*c*), of Bombay Act IV of 1887, with keeping the shed for the purpose of a "common gaming-house."

Held, that Bombay Act IV of 1887 did not apply to betting. The shed in question was undoubtedly a common betting place, and the instruments used were instruments of betting, but there is no law in India which makes betting illegal. There is a distinction between betting and gaming. There must be a game before there is gaming; and to constitute a game, there must be a contest, and an active participation of certain persons is also necessary. In the present case there was no contest, no players, and no active part taken by the betters, who merely watched the falling of rain. Rain-betting is, therefore, not a *game* and the place where it was carried on not a "common gaming-house."

[R., 16 B. 283 (289, 291); 28 B 129 (144); 39 C. 968=16 C. L. J. 250=16 C. W. N. 858=13 Cr. L.J. 603=16 Ind. Cas. 171; **Doubted**, 31 C. 542 (548)=8 C.W.N. 458; **D.**, 31 C. 542 (547)=8 C.W.N. 458; 4 Bom. L.R. 297 (298).]

THIS was an appeal, by the Government of Bombay, against an order of acquittal passed by A. W. Crawley-Boevey, Acting Chief Presidency Magistrate, in the case, of *Queen-Empress* v. *Narottamdas Motiram and Hemraj Khimji.*

The accused were charged, under cls. (*b*) and (*c*) of s. 4 of Bombay Act IV of 1887, with keeping a certain shed for the purpose of a "common gaming-house"(1).

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* Criminal Appeal, No. 15 of 1889.

(1) Section 4 of Bombay Act IV of 1887 provides as follows:—

"Whoever:

"(*a*) being the owner or occupier or having the use of any house, room, or place, opens, keeps or uses the same for the purpose of a common-gaming-house,

"(*b*) being the owner or occupier of any such house, room, or place, knowingly or wilfully permits the same to be opened, occupied, kept or used by any other person for the purpose aforesaid,

"(*c*) has the care or management of, or in any manner assists in conducting, the business of any such house, room, or place, opened occupied, kept or used for the purpose aforesaid."