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prosperity repress sinful proceedings which are unauthorized by moral law"; and the Hindu commentator quoted by Colebrooke defines "sinful proceedings" as "acts not productive of good." See Colebrooke's Digest, *sloka* 27, vol. II, p. 301.

It is not necessary for me to decide the other legal questions which were raised at the hearing, nor is it necessary for me to go into the facts. My judgment is for the defendants, with costs, although it may be useful to add that the evidence clearly shows that the amount claimed, Rs. 3,149 of the claim, even if legal, ought to be reduced by at least Rs. 2,200.

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Before Mr. Justice Scott.

KARMALI RAHIMBHOY AND OTHERS (*Plaintiffs*) *v.* RAHIMBHOY HABIBHOY AND OTHERS (*Defendants*). * [27th July, 1888.]

Minor—Suit on behalf of minor—Compromise without sanction of Court—Right of minor on attaining majority to impeach decree—Practice—Procedure.

One Rahimbhoy Dharamsey as father and guardian of the present plaintiffs (K., I., and M.) filed this suit in 1870 to recover from the defendants, as executors of Khan Mahomed Habibbhoy, the arrears of a monthly allowance which they claimed under his will. By a decretal order, dated 6th November, 1871, the suit was referred to the Commissioner to take accounts of the administration of the estate by the defendants. Accounts were duly brought in by the defendants, and objections and surcharges to these accounts were filed on behalf of the plaintiffs in June, 1874. In November, 1875, Rahimbhoy Dharamsey died, and in April, 1876, his mother Kajbai, (grandmother of the infants), was appointed guardian *ad litem* of his infant children (the plaintiffs). The Commissioner made his report in March, 1884, which was confirmed by the Court in 1885. The two elder children [138] (K. and I.) attained their majority and made no objection to the report, but M., the third plaintiff and the youngest of the three brothers, on attaining his majority in December, 1887, at once instituted proceedings, and obtained a rule calling on the defendants to show cause why the proceedings in the suit subsequent to August 1876, should not be set aside, and why he should not be at liberty to proceed with the accounts filed in the office of the Commissioner. He alleged that the inquiry before the Commissioner had not been conducted in the interest of the infants, but had been improperly compromised by withdrawing objections which had been lodged to the accounts brought in by the defendants, and that this compromise had not been sanctioned by the Court.

Held, that there had been, in effect, a waiver of the infants' claim under an agreement of withdrawal between the parties; and that for such waiver and withdrawal the Court's sanction on behalf of the infants was necessary; and that as such sanction had not been obtained, the plaintiff would be entitled to impeach the decree and re-open the accounts if he had proceeded in the proper manner by an application for review or by an original suit, but that the present procedure was wrong, and that the rule must be discharged.

[R., 20 A. 370 (374); 23 B. 620 (622); 36 B. 77 = 13 Bom. L.R. 573 = 11 Ind. Cas. 563; 29 C. 735 (737); 27 M. 377 = 14 M.L.J. 159; 3 C.L.J. 119 (125); 10 C.L.J. 420 = 13 C.W.N. 1197 (1210); 16 Ind. Cas. 543; 6 O.C. 175 (182); 37 P.R. 1903.]

RULE taken out by the third plaintiff (Mirali Rahimbhoy) calling on the defendants to show cause why the proceedings in this suit subsequent to August, 1876, should not be set aside, and why the said plaintiff Miralli Rahimbhoy should not be at liberty to proceed with the accounts filed in the office of the Commissioner for taking Accounts, &c.

This suit was originally filed by one Rahimbhoy Dharamsey as father and guardian of the plaintiffs now on the record, *viz.*, Karmali, Ibrahim,

* Suit No. 370 of 1870.

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and Mirali, to recover from the defendants, as executors of the will of one Khan Mahomed Habibbhoy, the arrears of a certain monthly allowance which they claimed under the said will. By a decretal order dated the 6th November, 1871, the suit was referred to the Commissioner to take accounts of the administration of the estate by the defendants. Accounts were duly filed by the defendants in February, 1874, and in June, 1874, objections and surcharges to the said accounts were filed on behalf of the plaintiffs. In November, 1875, Rahimbhoy Dharamsey died, and on the 4th April, 1876, his mother Kajbai, (grandmother of the infants), was appointed guardian *ad litem* of his infant children (the plaintiffs). By an order dated 23rd Augnst, 1870, the defendants had been directed *pendente lite* to pay Rs. 600 a month to the guardian of the infant plaintiffs, and to invest Rs. 400 a month on their behalf in Government securities, [139] and this *interim* provision was continued during the inquiry before the Commissioner.

The Commissioner made his report on the 31st March, 1884, which was confirmed by the Court in 1885. The two elder children (Karmali and Ibrahim) attained their majority and made no objection to the report; but Mirali, the third plaintiff and the youngest of the three brothers, on attaining his majority in December, 1887, at once instituted the present proceedings, and on the 15th March, 1888, obtained the above rule, on the ground that the enquiry before the Commissioner had not been conducted in the interest of the infants, but had been compromised by the parties by withdrawing the objections which had been lodged to the defendants' accounts, and that the said compromise had never been sanctioned by the Court. He contended that the proceedings before the Commissioner had been a sham, and that his grandmother and guardian Kajbai had been frightened and induced to give up her opposition to the defendants' case.

The rule now came on for argument.

Latham (Advocate General), for the defendants, showed cause against the rule.—The plaintiff, who has lately come of age, has changed his attorneys, and now wishes to open up all the proceedings. He charges fraud against the attorneys who acted for him. If he can prove his allegations, he is of course entitled to set aside all that has been done in the suit. But this is not the right procedure. He must bring a suit and set aside the decree that has been made—Simpson on Infants, p. 474 ; *Davenport* v. *Stafford* (1) ; *In re Hoghton* ; *Hoghton* v. *Fiddey* (2); *Richmond* v. *Tayleur* (3) ; *Flower* v. *Lloyd* (4) ; *Brooke* v. *Lord Mostyn* (5). On the merits, counsel relied on the affidavits filed in the matter and on the evidence of Mr. Janardhan Gopal, who had been the former attorney for the plaintiff and who was examined orally.

Starling appeared for Kajbai, formerly the guardian of the plaintiff. He claimed to be heard on her behalf, citing Daniell's [140] Chancery Practice, pp. 1006, 1037 ; *Day* v. *Croft* (6); *Thomas* v. *Jones*. (7)

The main charge made by the plaintiff is one of fraud. That is a charge that must be clearly and conclusively proved. The affidavits before the Court do not prove it. The information and belief of the plaintiff are not enough. Distinct acts of fraud must be proved by some

(1) 8 Beav. 503. (2) L.R. 18 Eq. 573. (3) 1 P. Wm. 734.
(4) L.R. 6 Ch. Div. 297. (5) 2 De G., J. & S. 373.
(6) 14 Bea. 29. (7) Dr. & Sm. 134.

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one who has personal knowledge of them—*Balkishen Das* v. *Run Bahadur Singh* (1); *Baboo Lekraj Roy* v. *Baboo Mahtab Chand* (2).

Jardine, for the plaintiff, in support of the rule.—Kajbai, the guardian of the infant, was a *purdah* lady, and was unable to resist the pressure brought upon her by the defendants, and so the interests of the infants were sacrificed. He relied on the affidavits.

JUDGMENT.

SCOTT, J.—This is an application in suit No. 370 of 1870 in the form of a rule to set aside all proceedings in that suit subsequent to the month of August, 1876.

One Rahimbhoy Dharamsey had filed a suit for himself and his children against Ahmedbhoy and Rahimbhoy Habibbhoy, the executors of the will, dated 4th September, 1864, of their brother Khan Mahomed Habibbhoy, for payment of the arrears of a monthly allowance of Rs. 1,000 to the plaintiff's children, to whose mother, Lillbai, that allowance had been given by the will. In 1871 the suit was referred to the Commissioner for an account of the defendant's administration of the estate. In February, 1874, the defendants filed eight accounts in accordance with the decretal order of the Court, and in June, 1874, objections and surcharges were filed amounting to five *lakhs*.

The father and original plaintiff died in November, 1875, and on the 4th April, 1876, his mother Kajbai was appointed guardian *ad litem* to his infant children. The claims of the infants had been provisionally recognized by an order of Green, J., on the 23rd August, 1870, ordering the defendants *pendente lite* to pay Rs. 600 a month to their guardian, and to invest Rs. 400 on their behalf monthly in Government securities. This *interim* [141] provision was continued during the inquiry before the Commissioner. Thus the property of the infants was the subject-matter of suit. Their guardian *ad litem* was the plaintiff, whilst the defendants were their trustees as the executors of the will by which they received the property.

The Commissioner made his report on the 31st March, 1884, and the report was confirmed by this Court in 1885. The two elder children attained their majority without raising any objection to the report; but Mirali Rahimbhoy, the youngest of the three sons, on attaining his majority in December, 1887, at once instituted the present proceedings, on the ground that the inquiry before the Commissioner was not conducted in the interest of the infants, but was practically compromised by the parties by the withdrawal of the objections and surcharges, and that the compromise was never sanctioned by the Court.

The rule was opposed on various grounds. It was first argued that the proper course of procedure had not been followed. Authorities were cited to show that there are only two courses by which an erroneous decree may be impeached—to wit, by a review or by an original bill. In the case of *Morison* v. *Morison* (3) Lord Cottenham at p. 228 says: As regards orders obtained under circumstances similar to the present, "I do not enter into any consideration of the facts submitted to the Court as the ground for these orders; but I must observe that the orders themselves, whatever those facts may have been, were in the highest degree irregular. If a decree be obtained under such circumstances as may justify the Court in considering it as a nullity, it may, in some cases, be got rid of by motion or petition; but if the decree be regular in itself, no error it may contain

(1) 10 C. 305. (2) 14 M.I.A. 393 (398, 396). (3) 4 My. & Cr. 215 (228).

can be set right in that manner; and even if it were obtained by fraud, it can only be set aside by a bill. Nevertheless these orders, upon the ground of fraud or error upon accounts settled by a report which had been confirmed five years before, set aside a decree made upon such report." Other authorities lay down the same rule. The infant may impeach a decree on the ground of fraud or collusion either by a bill of review—*Richmond* v. *Tayleur* (1) or supplemental bill **[142]** in the nature of a bill of review, or by an original bill, which is the usual course—Chambers on Jurisdiction over Infants, p. 797. The case of *Flower* v. *Lloyd* (2) is in point. There an application was made for rehearing, on the ground of a fraudulent concealment of facts, and the Court held it had no jurisdiction, and that the remedy was by original suit to set aside the decree as obtained by fraud: see Jessel, M.R., p. 299. When the application is made after the lapse of years, it seems to me especially desirous that the matter should not be dealt with as an interlocutory application, and decided on affidavits: see Macpherson on Infants, p. 430. This view is strongly supported by the observations of the Master of the Rolls in *Pritt* v. *Clay* (3), where he is clearly of opinion that an original bill is the proper course, unless the application is made immediately: see also Simpson on Infants; Daniell's Chancery Practice. Mr. Jardine cited *Eshan Chundra Safooi* v. *Nundamoni Dassee* (4) in support of the present form of procedure. In that case, Garth, C. J., lays down three modes by which a minor plaintiff may relieve himself from the consequences of fraud: 1st, by an application to the Court in which the withdrawal took place; 2ndly, by a regular suit to set aside the judgment founded upon the withdrawal; 3rdly, by bringing a fresh suit for the same cause. The learned Judge does not state the particular kind of application he had in his mind. I cannot think he meant such an application as the present one, but an application for the review or rehearing of the suit, which would be, in the present case, a review of the decree confirming the master's report.

I am of opinion that the course adopted is not the course sanctioned by precedent or authority; but as the matter is one of importance, and as the Court of Appeal may decide this point of procedure differently, I have carefully examined all the affidavits, documents and evidence, with a view to determine the case on its merits, if that course is thought admissible. The plaintiff practically stands alone in his application. His two brothers do not oppose him, but they do not lend him an active support. Still that does not deprive him of his right, if he can make out **[143]** a case. The burden of proof is on the plaintiff. The presumption to be drawn from the Commissioner's report and the decree confirming that report is that this account was properly taken. It is a well-established rule that the law will presume in favour of honesty and against fraud. It is for the plaintiff to prove there was fraud or collusion or an unauthorized compromise of the infants' claims. His own statement of the facts is founded on hearsay, but he relies on (1) an affidavit of his grandmother Kajbai, the guardian *ad litem*, and her brother Mahommedbhoy Jussa; (2) on the circumstances that the parties—plaintiff and defendants respectively—placed an identical case before counsel asking whether it would not be better to compromise the case on the ground of expense, delay and difficulty of proving the surcharges; (3) on two letters written by plaintiffs' attorney, one on 22nd June, 1887, offering a

(1) 1 P. Wm. 734.
(2) 6 Ch. Div. 297.
(3) 6 Bea. 505.
(4) 10 C. 357.

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compromise, and then in 1884 stating they had withdrawn the surcharge by agreement;(4) that most of the surcharges were, as a matter of fact, abandoned; and (5) that the agreement to compromise never received the sanction of the Court. The defendants deny the allegations of Kajbai *in toto*. They say the negotiation for settlement fell through, and that the enquiry was conducted in the ordinary way,—Mr. Janardhan, the plaintiff's solicitor, at the date supporting every surcharge that was sustainable down to the close of the enquiry.

I will now examine Kajbai's allegations. In the first place, she states that the defendants pressed her not to proceed with the objections and surcharges, and offered her an increase of the allowance as a bribe. In the second place, she says that when she refused, they gave her notice that they would charge her with misappropriation, and deprive her of the receipt of the allowance. In consequence of this persecution she says she gave way and consented not to press the surcharges, and so instructed Mr. Mervanji, Mr. Janardhan's managing clerk. Mr. Mervanji denies that statement altogether, so far as he is concerned. Kajbai is confirmed by her brother Mahommedbhoy Jussa as to the threats and promises and her consent. Her statement is also supported by a formal notice, in writing, sent by the defendant's attorney to her attorney, that they would apply for a reduction [144] of the allowance to Rs. 200 a month. The defendants say the notice was given, because Kajbai was not applying the allowance to proper uses. This allegation was never proved; the notice was not followed by any application.

So much for Kajbai's testimony. It is in favour of the plaintiff: still it would not, standing alone, satisfy us. 2. There is no doubt as to the two cases for counsel, and they are identical in terms. The defendants say they were part of the negotiations which fell through. Mr. Pigot's advice was certainly not taken; but the opinion of Mr. Mayhew, before whom the other case was laid, seems to have guided Mr. Janardhan in his subsequent action. 3. Next we come to Mr. Janardhan's two letters. He acted throughout as the solicitor to the plaintiff, and his statements are of the highest importance. On the 22nd June, 1877,—the date is about the time when Kajbai says she told her attorney to withdraw the charges,—Janardhan wrote proposing that the accounts should be passed subject to the admission of three or four items of such charge; that the Commissioner should then make his report, that the property should be sold, and that the costs should come out of the estate. With this letter must be read the Commissioner's notes of the meeting of the 20th August, 1887, which are as follows:—"Mr. Janardhan states that he abandons all the items of surcharge to account No. 1, except three," and also the notes of the meeting of September 4, 1878, when on consideration of all the accounts, one to eight, it was admitted by the solicitor that "all accounts may be taken as passed," and express reference was made to Janardhan's abovementioned letter of the 28th June, 1877. Next comes the letter written on the 25th June, 1884 (Ex. 1) by Janardhan, in which he states that "on the understanding come between the parties . . . . . I, as attorney for the plaintiffs, withdrew the numerous objections and surcharges to the account, &c. Except when the Commissioner desired for proof, all the accounts were passed by consent." This statement was denied by the defendants on the 10th July, 1884, and they point to the Commissioner's note as proof of its inaccuracy. But I am of opinion the notes support the understanding. The Commissioner records something so like an understanding between the parties

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[145] that it corroborates Mr. Janardhan's letter. But Mr. Janardhan gave oral evidence also. He says, as regards the withdrawal—

"It is not accurate as to all being abandoned, several items were admitted, none were abandoned, that would have succeeded, there was no evidence, and my client was unable to establish them. We acted on Mr. Mayhew's opinion (which advised compromise and settlement); we did not take consent decree, because we thought all items should be brought to consent of Commissioner. Before submitting the case to counsel I had not personally inspected the accounts. What I stated in it was at the instance of Kajbai, who was, it must be remembered, an old *purdah* woman. I did abandon all objections and surcharges. I acted on Mr. Mayhew's advice. When they were abandoned I had an understanding with Mr. Lynch about their abandonment. I never inspected the books. Except when the Commissioner asked for proofs, there was no examination; after the understanding there was no serious opposition. The statements in my letter are accurate. Nothing was waived that could have been insisted upon. The course I took was the best for my client."

Mr. Janardhan's final reply was, "as regards my proposal to abandon surcharges, we were left to take our own course." It is impossible, after consideration of his two letters, his oral evidence, and the notes of proceedings before the Commissioner to come to any other conclusion but one. Acting on the instructions of Kajbai he entered into a sort of understanding not to press the surcharges. I do not mean to say he did not act, as he thought, in the best interests of his client. But it is clear that he did not examine the accounts, and he did not obtain the Court's sanction to what was, in effect, a waiver of the infants' claims. It may very likely be as he states, that the claims could not be supported with sufficient evidence, but that was clearly not the sole ground. He withdrew because of an agreement of withdrawal with the other side. Even if the want of evidence was the ground, the withdrawal required the Court's sanction on behalf of the infants.

The law of the case is quite clear. A suit relating to the estate or person of an infant and for his benefit has the effect of making him a ward of Court, and the Court alone has the power [146] to sanction a compromise made on the infant's behalf. "In all cases where an infant is a ward of Court, no act can be done affecting the person, or property, or state of the minor, unless under the express or implied direction of the Court itself"—Story's Equity Jurisprudence, 1353; and see *Johnstone* v. *Beattie* (1). Neither the infant nor his guardian *ad litem* can compromise such a suit. The Court alone has authority to sanction the arrangement, however beneficial it may be to the infant. This general principle has since 1877 been expressly applied in India, and now by the Civil Procedure Code, s. 462, the Court must expressly approve of a compromise on behalf of an infant. Without such express approval by the Court the compromise will not bind the infant, and the decree passed in accordance therewith will be set aside at his instance—*Sharat Chunder Ghose* v. *Kartik Chunder Mitter* (2); *Rajagopal Takkaya Naiker* v. *Muttupalem Chetti* (3). Consequently, as I hold that an arrangement was made to withdraw from opposition which was never laid before the Court, I am of opinion the plaintiff would be entitled to impeach the decree, and re-open the account if he had proceeded in the proper manner by an application

(1) 10 Cl. & Fin. 42, 84, 85. (2) 9 C. 810. (3) 3 M. 103.

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for a review, or by an original suit. But sitting as Judge in the first instance I think I am precluded by authority from such a decision on account of the irregularity of his present procedure.

I must, therefore, discharge this rule. I may add, that I delayed this matter in order that notice should be given to the plaintiffs in suit No. 963-68, and that they should intervene if they wish to do so; but they have not done so. As regards the costs, the applicant must, of course, pay his own. As the application has failed, the costs of the executors on the usual scale, so far as they were necessary for the rejection, the application in its present form must be also paid by him, and he must pay Kajbai's costs of the present application of the same extent—I think one day's hearing and one affidavit each sufficiently cover these costs.

Rule discharged.

Attorneys for the plaintiff:—Messrs. *Payne, Gilbert, and Sayani.*
Attorneys for the defendants:—Messrs. *Tobin and Roughton.*

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[147] APPELLATE CRIMINAL.

Before Mr. Justice Birdwood and Mr. Justice Parsons.

QUEEN-EMPRESS *v.* DAYA BHIMA AND OTHERS.*
[5th July, 1888.]

Criminal Procedure Code (Act X of 1882), s. 188—Liability of native Indian subjects for offences committed out of British India.

The accused were charged under s. 407 of the Indian Penal Code (Act XLV of 1860) with committing criminal breach of trust in respect of certain property entrusted to them as carriers. They were all native Indian subjects of Her Majesty. The offence was alleged to have been committed in Portuguese territory, and they were found in a place in British territory.

Held, that under s. 188 of the Criminal Procedure Code (Act X of 1882) the accused could be tried in the place where they were found.

[R., 24 B. 287=1 Bom. L.R. 678 (680); 14 Cr. L. J. 298=19 Ind. Cas. 954=6 S. L. R. 260 (264); Rat. Unr. Cr. Cas. 773 (774).]

THIS was an appeal by the Government of Bombay against an order of acquittal passed by G. Jacob, Joint Sessions Judge of Ahmedabad.

The accused were all residents of the Gogha Taluka in the Ahmedabad district. They were *khalasis* (or sailors) serving on board a native *pattimari*. On 17th April, 1887, they were entrusted with 150 bales of cotton belonging to Messrs. Gaddum, Bythell & Co., for conveyance from Bhavnagar to Bombay. On the voyage they were alleged to have touched at the Portuguese Settlement at Daman, and there sold the bales of cotton and appropriated the sale proceeds to their own use. They then absconded, and were afterwards found in a place in the Ahmedabad district.

Thereupon accused Nos. 1, 2 and 3 were charged, under s. 407 of the Indian Penal Code, with committing criminal breach of trust in respect of the 150 bales of cotton, and accused Nos. 4 and 5 with abetment of the said offence.

* Criminal Appeal, No. 59 of 1888.