presumption that the mortgagee knew the fact of a previous mortgage having been made, which by the act in that case prevented his suing in ejectment. Here the plaintiff, although an hereditary public officer, [408] is not a trustee for the purposes of the Vatan Act; and it certainly cannot be presumed that the grantee knew that the plaintiff's guardian had not obtained the previous sanction of Government to the mortgage.

We think, therefore, that the circumstances do not justify a departure from the general rule, and that the plaintiff, who has been found by the Court below to be bound by the mortgage executed by his mother in his name, was estopped from saying that his grant was forbidden by the act. We confirm, the decree, with costs.

Decree confirmed.

---

14 B. 408.

ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice and Mr. Justice Bayley.

RAHMUBHOY HUBIBBHOY (*Original Defendant*), *Appellant v.* C. A. TURNER, OFFICIAL ASSIGNEE, AND ASSIGNEE OF THE ESTATE AND EFFECTS OF ALLADINBHOY HUBIBBOY, AN ADJUDGED INSOLVENT (*Original Plaintiff*), *Respondent.**

[24th, 30th, 31st January, 6th, 7th and 13th February, and 17th March, 1890.]

Limitation Act (*XV of* 1877), *s.* 18—*Fraud*—Res judicata—*Civil Procedure Code* (*Act XIV of* 1882), *s.* 13—*Party for purpose of discovery only*—*Civil Procedure Code* (*Act XIV of* 1882), s. 43—*Judgment against joint wrong-doer.*

Prior to, and in the year 1865 the defendant's brother Alladinbhoy carried on an extensive business in Bombay and in China. The defendant and another brother (Ahmedbhoy) carried on a separate business under the name of Ahmedbhoy Hubibhoy. In December, 1866, Alladinbhoy became insolvent, and his property vested in the Official Assignee, The present suit was brought in 1887 against the defendant by the Official Assignee to recover certain property which he alleged belonged to the insolvent, and ought to be distributed among his creditors. The plaintiff alleged that in 1865 the insolvent was possessed of a very large amount of property, and that, being unwilling to meet his liabilities, he and his son, and his two brothers, *viz.*, Ahmedbhoy and the defendant Rahmubhoy, fraudulently concealed his property from his creditors, and in September, 1866, he himself went to Daman, beyond British jurisdiction. In 1881 the plaintiff, having obtained information that some of the insolvent's property was in the possession of his brother Ahmedbhoy, filed a suit (No. 473 of 1881) against Ahmedbhoy to recover it. That suit was referred to arbitration, and the plaintiff obtained a decree for Rs. 3,60,000. The plaintiff now alleged that, shortly before the hearing of that suit and subsequently, he had obtained information which led him to [409] believe that the defendant had obtained some of the insolvent's property for which he was accountable. The defendant had been made a party to the former suit No. 473 of 1881, for the purpose of discovery only, and it was in the course of such discovery being given that some of the above information had been obtained. The plaint then set forth, in detail, the various items of claim in respect of which the plaintiff sought to make the defendant liable.

The defendant pleaded (1) that the claims were barred by limitation; (2) that the said claims had been in issue in the former suit (No. 473 of 1881), and were adjudicated upon and that this suit was, therefore, barred by s. 13 of the Civil Procedure Code (Act XIV of 1882); (3) that the plaintiff was barred by s. 43

* Suit No. 89 of 1887; Appeal No. 640.

1890
MARCH 17.

ORIGINAL CIVIL.

14 B. 408.

of the Civil Procedure Code (Act XIV of 1882), the plaintiff having omitted to include these claims in the former suit to which defendant was a party; (4) that the decree in the former suit (No. 473 of 1881) was (*inter alia*) in respect of the matters alleged in this suit, and that as, according to the plaintiff's allegation, the defendant in that suit was a joint wrong-doer with the defendant in this suit in respect of these matters, the said decree was a bar to this suit.

Held by SCOTT, J.—

(1) That the suit was not barred by limitation. There was sufficient evidence of fraud to bring the case under s. 18 of the Limitation Act (XV of 1877). The limitation only began to run from the time the fraud became fully known to the Official Assignee, which was not until December, 1885.

The knowledge required by s. 18 of the Limitation Act (XV of 1877) is not mere suspicion. It must be knowledge of such a character as will enable the person defrauded to seek his remedy in Court.

(2) That the suit was not barred, either by s. 13 or s. 43 of the Civil Procedure Code (Act XIV of 1882). The defendant was made a party to the former suit for certain limited purposes only. No relief was asked from him; no decree was made against him. He was merely a nominal defendant. He was not a party to the former suit in such a way as to bring the present suit within the section.

(3) That the rule of *King* v. *Hoare* (1) applies in India, *viz.*, that a judgment recovered against any one of several joint-debtors merges the remedy for the joint debt, and is a bar to an action against a co-debtor upon the joint liability; and, similarly, in a matter of *tort-feasance*, a judgment against one of several wrong-doers is a bar to an action on the same matter against the others. Such of the wrongs, therefore, alleged in the present suit as were of a joint character, and were adjudicated upon in the previous suit, were extinguished by the former judgment. Applying the above rule, the Judge disallowed some of the items of the plaintiff's claim, and allowed others, and directed an account in respect of the latter.

The Court of appeal confirmed the decree of first instance, except as to one of the allowed items, which it held to be barred by limitation.

[Confirmed, 17 B. 342; **R.**, 22 A. 307=20 A.W.N. 73; **D.**, 6 Bom. L.R. 697.]

THE defendant (appellant) was one of three brothers, *viz.*, Ahmedbhoy Hubibbhoy, Rahmubhoy Hubibbhoy (the defendant) **[410]** and Alladinbhoy Hubibbhoy. Alladinbhoy became insolvent in December, 1866, and his property then became vested in the Official Assignee. The said insolvent previously to his insolvency had carried on an extensive trading business, and his brother the defendant Rahmubhoy Hubibbhoy carried on business separately under the name of Ahmedbhoy Hubibbhoy.

The present suit was filed against the defendant Rahmubhoy by the plaintiff, as Official Assignee, to recover certain property of Alladinbhoy, the insolvent, for distribution among his creditors.

The plaint set forth that in 1865 Alladinbhoy was possessed of a very large amount of property; that, being unwilling to meet his liabilities, he, with the assistance of his brothers Ahmedbhoy and the defendant Rahmubhoy and with the assistance of his son Rahimbhoy Alladinbhoy, arranged divers schemes for the purpose of concealing his property and defrauding his creditors, and he himself in September, 1866, went to Daman, beyond British jurisdiction. As above stated, he became insolvent in December, 1866.

The plaintiff, having obtained information that some of the insolvent's property was in the possession of his brother Ahmedbhoy, filed a suit (No. 473 of 1881) in the High Court against Ahmedbhoy to recover it. That suit was, after some days' hearing, referred to arbitration, the result being that the plaintiff obtained a decree for Rs. 3,60,000.

(1) 13 M. & W. 494.

1890
MARCH 17.
ORIGINAL CIVIL.
14 B. 408.

The plaint then proceeded as follows:—

"3. The plaintiff shortly before the hearing of the said suit, and subsequently, obtained information which leads him to believe that the defendant assisted the said Alladinbhoy Hubibbhoy in the fraudulent scheme aforesaid for concealing his property from his creditors, and that the defendant has obtained moneys and property from his creditors, and that the defendant has obtained moneys and property that really belonged to the said Alladinbhoy Hubibbhoy or the plaintiff as his Official Assignee, and is otherwise accountable to the plaintiff, as Official Assignee as aforesaid, for his dealings with the moneys and property of the said Alladinbhoy Hubibbhoy.

"4. The plaintiff, as far as he is at present informed, says that the defendant is accountable to him for the matters hereinafter specifically mentioned, and he believes that, on full discovery being made by the defendant and full inspection being had of the books of account and papers under the control and in the possession [411] of the defendant, further matters will be discovered, in addition to those of which the plaintiff has at present information.

"5. The defendant was in or about the month of April, 1885, made a party to the said suit, No. 473 of 1881, for the purpose of discovery only, and it was in the course of such discovery being given that the plaintiff discovered some of the causes of action mentioned in this plaint."

The plaint then set forth, in detail, the various matters in respect of which the plaintiff now claimed to make the defendant liable. These items of claim were as follows:—

1st. A sum of Rs. 1,12,500. It was alleged that this money was the property of the insolvent; that shortly before the insolvent absconded to Daman, in September, 1866, the defendant deposited it with one Mahomed Dama in his own name; that it ought to have been handed over to the Official Assignee when Alladinbhoy was adjudged insolvent; but, instead of handing it over, the defendant, in March 1867, passed a writing whereby he acknowledged that the said sum of Rs. 1,12,500 then standing in his name with Mahomed Dama belonged to Rahimbhoy Alladinbhoy (the insolvent's son). The plaintiff now claimed the said sum, with interest at 6 *per cent.*, with annual rests, from the date of the insolvency, *viz.*, 7th January, 1867.

2nd. A cash balance of about Rs. 6,000, together with certain shares, title-deeds and outstandings in China which the defendant's firm received from the insolvent's China firm, in pursuance of the fraudulent scheme to conceal the insolvent's property. It was alleged that the defendant's firm had ever since been receiving the rents, dividends and profits of the said property.

3rd. Certain insurance money received by defendant's firm, in 1867, for certain bales of yarn belonging to the insolvent which had been destroyed by fire. The amount received was believed to be about Rs. 8,000. The plaintiff claimed this sum, with interest from the date of its payment.

4th. Half profits (estimated at about Rs. 16,000) due to the insolvent in respect of a certain consignment of goods to England in 1865 made by the insolvent and the defendant in partnership. It was alleged that the defendant received the insolvent's share.

[412] 5th. The value of thirty-one shares in the Imperial Cotton Press Company and six shares in the Akbar Press Company, which was

1890
MARCH 17.

ORIGINAL CIVIL.

14 B. 408.

the property of the insolvent, but was fraudulently retained by the defendant's firm.

6th. The value of sixty-four old and two hundred and twenty new shares in the Elphinstone Land Company which the insolvent had mortgaged, but which had been redeemed, and came into defendant's possession on account of the insolvent.

To the above claims the defendant pleaded :—

I. That they were barred by limitation.

II. That the said claims were directly and substantially in issue in the suit No. 473 of 1881, referred to in the plaint, and were adjudicated upon in the said suit, and that the plaintiff was, therefore, precluded from now obtaining any relief in respect thereof by the provisions of s. 13 of the Civil Procedure Code (Act XIV of 1882).

III. That the plaintiff omitted to claim the moneys in the former suit, No. 473 of 1881, in which defendant was a party, and that the plaintiff was now barred by s. 43 of the Civil Procedure Code (Act XIV of 1882).

IV. That the decree in the former suit (No. 473 of 1881) was *inter alia* in respect of the matters alleged in this suit, and that as, according to the plaintiff's allegation, the defendant (Ahmedbhoy Hubibbhoy) in that suit was a joint wrong-doer with the defendant in the present suit in respect of these matters, the said decree was a bar to this suit.

The defendant also denied the facts alleged by the plaintiff.

The case was heard by SCOTT, J.

Inverarity, *Jardine* and *Telang*, for plaintiff.

Latham, (Advocate-General) and *Starling*, for the defendant.

ORIGINAL JUDGMENT.

SCOTT, J.—This is a suit brought on behalf of the creditors of an insolvent, Alladinbhoy Hubibbhoy against the insolvent's brother. The insolvency occurred as long ago as 1867. The Official Assignee says, in his plaint, that before the adjudication in insolvency the insolvent arranged divers schemes with his brothers Ahmedbhoy and Rahmubhoy, and his son Rahimbhoy, [413] " for the purpose of concealing his property and defrauding his creditors." The fraud of the present defendant, he says, was only recently discovered. A suit was brought first against the other brother, Ahmedbhoy, (suit No. 473 of 1881) and on all matters in difference in that suit being referred to arbitration, the sum of about three and a half *lakhs* was awarded and paid by Ahmedbhoy. In the course of that suit, the present defendant was made a party defendant for purposes of discovery only, and the inspection that followed brought out facts which led to the institution of the present suit.

There are various items of claim. *First*, a sum of Rs. 1,12,500, part of the moneys of the insolvent, which, it is alleged, the defendant deposited with Mahomed Dama before the insolvent absconded to Daman in September, 1866. *Second*, a cash balance, together with certain shares, title-deeds, and outstandings, which the head clerk of the insolvent's firm in Hongkong transferred at the time of the insolvency to the defendant's firm. *Thirdly*, the insurance money received by the defendant's firm in 1867 for certain bales belonging to the insolvent. *Fourthly*, the half profits received by the defendant's firm on a joint venture of goods consigned to England in June, 1865. *Fifthly*, the value of thirty-one shares, Imperial Cotton Press Company, and six Akbar Press Company, retained by defendant's firm ; accounts against us. *Sixthly*, the value of sixty-four old

1890
MARCH 17.

ORIGINAL CIVIL.

14 B. 408.

Elphinstone shares and two hundred and twenty new, retained by defendant, which had been mortgaged by Alladinbhoy and partially paid off by him.

A double defence—one of law and one of fact—is raised to those various claims. The legal defences are :—

(1) Under the Limitation Act (XV of 1877) that the claims are barred by lapse of time ;

(2) under s. 13 of the Civil Procedure Code (Act XIV of 1882), that the matters have been in issue and finally decided between the same parties in a former suit ;

(3) under s. 43 of the Civil Procedure Code (Act XIV of 1882), that the plaintiff omitted to claim these moneys in the former suit in which the present defendant was a party ; and,

[414] (4) that the brothers Ahmedbhoy and Rahmubhoy were joint wrong-doers, and that judgment against one is a bar to a suit against the other.

The defences in *fact* are, that, as regards the *lakh*, the defendant had nothing to do with it ; that, as regards the moneys transferred in China, they belonged to the insolvent's son, against whom there is a large debit balance, and that even if they belonged to the insolvent, the balance of account is against him ; that, as regards the claim for insurance money, the goods were not insured, and that there is no proof they were bought with the insolvent's money ; that, as regards the half profits, they were swallowed up in the debit balance against the insolvent's accounts ; that, as regards the Akbar and Imperial shares, they were paid for by defendant's firm ; and that, as regards the Elphinstone shares, they were redeemed by defendant's firm, and all calls paid on them, so that the amount due on them exceeds their value.

I will first deal with the legal defences. Is the suit barred by limitation ? Such a suit under ordinary circumstances would be barred in three years from the date when the Official Assignee was entitled to sue for the moneys due to the insolvent, *i.e.*, January, 1867. But the Official Assignee says that the existence of this property has been fraudulently concealed from him by the insolvent's brothers, and that he is, therefore, entitled, under s. 18 of the Limitation Act (XV of 1877), to bring his suit, not within three years of his right to sue, but within three years of his knowledge of the fraud. He had, no doubt, some knowledge in 1881, when Ex. A. reached him and certain information concerning the *lakh* of rupees. He had the stitched book, and he examined Ahmedbhoy in the Insolvent Court. But he was refused inspection of the firm's books, and he got no information concerning the present defendant on which he could proceed. The knowledge required by s. 18 of the Limitation Act is not mere suspicion. It must be knowledge of such a character as will enable the person defrauded to seek his remedy in Court—*Natha Singh* v. *Jodha Singh* (1). The Official Assignee, on the strength of the information he got in 1881, wrote to the defendant charging **[415]** him with the *lakh* of rupees (Ex. 22), but the defendant's solicitors at once repudiated the charge altogether. The real information sufficient to enable him to sue was not obtained by the Official Assignee until 1885. All inspection of books was refused until the present defendant was made a party in the

(1) 6 A. 406.

1890
MARCH 17.
ORIGINAL CIVIL.
14 B. 408.

last suit for purposes of discovery, and inspection taken in December, 1885. Full knowledge of the circumstances, as regards the defendants, was not obtained till then. The information contained in the stitched book did not concern the present defendant. Thus, provided there was a fraudulent concealment, the suit is not barred. I think, on the evidence, there was such concealment as amounts to fraud. The *lakh* was never entered in the insolvent's schedule, nor were the other sums claimed; yet the insolvency was managed by the brothers after the insolvent absconded. The conduct of the brothers undoubtedly shows active concealment. The admissions extracted, after much prevarication, from the present defendant by Mr. Jardine show that the insolvent was hidden in Bombay by both brothers—by the present defendant as well as by Ahmedbhoy. Ahmedbhoy has been proved to have concealed the insolvent's property with full knowledge of the fact. The reply by the defendant to the charge about the *lakh* amounts to strong evidence of a similar interest to conceal on the part of the defendant. I think, on the whole, there is evidence of fraud enough to bring the case under s. 18 of the Limitation Act. The limitation, therefore, only began to run from the time the fraud became fully known to the Official Assignee, which was not till he obtained inspection in December, 1885. The partial knowledge he had before was prevented by the defendant and his brother from becoming full knowledge.

The next two legal defences—those which turn on the application of ss. 13 and 43 of the Civil Procedure Code (Act XIV of 1882) depend on the question, whether the admission of the present defendant on the record of the previous case as party for purposes of discovery made him a party for all purposes. If he was only a nominal party, there is no *res judicata* and no previous suit in which plaintiff ought to have advanced the whole of his claim. It was argued that a party for purpose of discovery is a person **[416]** not known to Indian law, and that a defendant must be held to be a defendant for all purposes. I cannot discuss that question in face of an order made by a judge, in due form, and not appealed against, by which the present defendant was placed on the record as a defendant for certain limited purposes only. I must hold that the defendant was rightly on the record as defendant for purposes of discovery only. No decree was made against him, no relief was asked from him: he was merely a nominal defendant. I do not think he was a party to the former suit in such a way as to bring the present suit within the application of the section cited.

The next defence, in law, is of a more serious character. From the following cases—*King* v. *Hoare* (1); *Buckland* v. *Johnson* (2); *Brinsmead* v. *Harrison* (3); *Kendall* v. *Hamilton* (4); *Cambefort* v. *Chapman* (5)—it appears to be settled law that a judgment recovered against any one of several joint debtors merges the remedy for the joint debt, and is a bar to an action against a co-debtor upon the joint liability, and, similarly, in a matter of *tort feasance*, a judgment against one of several wrong-doers is a bar to an action on the same matter against the others. *Brinsmead* v. *Harrison* (3) settled the point that, after recovering judgment against one wrong-doer, a plaintiff cannot sue the other for the same matter, even if the judgment in the first action remains unsatisfied. The most recent case—*Kendall* v. *Hamilton* (4)—carries the principle to the extent that an action and a

(1) 13 M. & W. 494. (2) 23 L.J.C.P. 204. (3) L.R. 6 C.P. 584.
(4) L.R. 4 App. Cas. 504. (5) L.R. 19 Q.B.D. 229.

1890
MARCH 17.

ORIGINAL CIVIL.

14 B. 408.

judgment against two persons who had borrowed money from the plaintiffs (though the judgment is unsatisfied) constitute a bar to another action brought by the plaintiffs against a third person, who is afterwards discovered to have been interested with the two debtors. In Bigelow on Estoppels (4th ed.), the principle is thoroughly discussed (pp. 104-110) and it appears that American law now follows *King* v. *Hoare* (1) in questions of joint debtors, although it holds joint wrong-doers to a joint and several liability. The rule of *King* v. *Hoare* (1) applies in both respects in India. [417] Section 43 of the Contract Act IX of 1872 is not perhaps quite clear whether a complete adoption from the English rule is intended. But the Calcutta Court (*Hemendro Coomar Mullick* v. *Rajendrolall Mookhee* (2)) has distinctly followed the English law, and I shall do the same, and hold that such of the wrongs alleged in this suit as were of a joint character and were adjudicated upon in the last suit were extinguished by the former judgment.

What, then, is the alleged wrong which constitutes the cause of action? It is the fraudulent concealment of the insolvent's property by the insolvent, the insolvent's son, and the insolvent's two brothers. Such is the general allegation in the present plaint. But a general allegation of fraud does not constitute a valid cause of action. (Kerr on Fraud, c. 8, p. 425, ed.) There must be particular charges, and particular charges are made in this case as to the details of the insolvent's property alleged to be the subject of the fraudulent concealment. They have already been stated, and I will examine them one by one, in order to decide, (1) whether all or any of them are of that joint character which would bring them under the rule of law just cited; and (2) whether they were claimed and adjudicated upon in the last suit.

First comes the Rs. 1,12,500. The oral evidence in this case given by the insolvent's son goes to show that this sum, if it existed at all, was handed by Ahmedbhoy to Rahmubhoy at the request of the insolvent in furtherance of the scheme of concealment. The strong piece of evidence in favour of this contention is that the money, or a similar sum, at the time was deposited with the firm of Mahomed Dama and in the name of the defendant. In any case, it seems clear there was a fraudulent concealment of such a sum, though the question, who effected the concealment, is doubtful, and the joint character of the concealment is not clearly proved. The sum was claimed in the opening speech of counsel in the previous suit, but the claim was withdrawn, and the right to renew the claimed reserved. Although that reservation was not made with leave of the Court, and could not perhaps be made the ground of a suit against the same defendant, still, as there was no judgment as regards that sum, [418] I do not think the rule in *King* v. *Hoare* (1) applies so as to extinguish the right of action against the defendant, even if I admit he was a joint wrong-doer in the matter. But, admitting it could be claimed from the present defendant, I am not satisfied, as I ought to be satisfied, on a grave charge of fraud, with the evidence that the money was deposited by the present defendant, or that he is responsible for it. The oral evidence given of it was not satisfactory, and the documentary evidence (A 4) shows rather that, although it was deposited in the name of the present defendant, it was not really his property. The insolvent's son in his

(1) 13 M. & W. 494. (2) 3 C. 353.

1890
MARCH 17.
ORIGINAL CIVIL.
14 B. 408.

affidavit, made in 1881 in the Insolvency Court (Ex. 4), never mentioned the present defendant as having received any of the defendant's money. (see also Ex. 5.) The statement in the stitched book, p. 12, Ex. 27, also shows that this *lakh* was in the control of the insolvent's son. Against this evidence I have only the statement of the insolvent's son and that of the *mehta* who confirmed the account of the transfer of the *lakh*, and I do not believe the story. The claim of Rs. 1,12,500, therefore, in my opinion, is not proved as against the present defendant, either personally or as a joint *tort-feasor*.

Next come the cash balances, shares, outstandings, &c., handed over in Hongkong. It is a matter of doubt whether this item is excluded by the rule in *King* v. *Hoare* (1). The moneys were received there by the defendant's firm. That firm consisted of the defendant in the present case and the defendant in the previous case. A claim was made in that case for Rs. 20,000—the moneys of insolvent received in China—and a similar sum is claimed under this case. It was stated that the claim for Rs. 20,000 was withdrawn in the first case, but not formally, as in the matter of the *lakh*. The Rs. 20,000 was distinctly claimed in the formal claim. (See sch. A.) But in the schedule of claim laid before the arbitrator it was not inserted. Consequently, there cannot have been a judgment upon this item of claim, as it was never brought to the notice of the arbitrator. On the whole, I do not think the claim is excluded by law. I do not believe the story that the account was an account of the insolvent's son, and not of the insolvent. It does not appear the [419] son had an independent business in China at that time. The substitution of his name for the insolvent's, in the cash book, was, in my opinion, fraudulent, and the date of the transfer, just before the adjudication, confirms the fraud. But, as a question of fact, the balance in the defendant's former books was apparently against the insolvent (p. 56 of the Red Book and Ex. 35), and all I can order is an account of what was due, if anything, to the insolvent at the date of the vesting order in insolvency.

Then comes a claim for the insurance money alleged to have been received on certain bales which were the property of the insolvent, and which were burnt together with other bales in the defendant's warehouse at Hongkong. There is no presumption of law which obliges me to assume these goods were insured. It was not, according to the evidence of the defendant, the custom of the firm to insure goods on shore, save on especial request. The evidence shows that the other bales, but not these, were insured. It was for the plaintiff to prove the insurance; he has now had the inspection of the China books, and as he has failed to prove the insurance, he cannot claim anything under this head.

Next comes a claim for a half share in certain profits made in a joint venture of insolvent and defendant's firm, which resulted in a considerable gain. The money was kept by defendant's firm, and the defence on the facts is that, although credit has been given for the insolvent's share, the balance is against him. It is not clear to me when the balance relied upon by the defence was struck, and what was included in the account. The Official Assignee is entitled to the credit balance, if any, at the date of the vesting order, *i.e.*, of the filing of the petition, 17th December, 1866. The money, when the vesting order was made, was received by both brothers jointly, but this claim has not been already advanced against the

(1) 13 M. & W. 494.

1890
MARCH 17.
ORIGINAL CIVIL.
14 B. 408.

defendant in the last suit. The money was claimable now, and the reply of the defendants as to the balance of account must be verified by an account.

Next follows a claim for the value of thiry-one shares, Imperial Cotton Press Company, and six shares Akbar Press Company. They were bought on the account of the insolvent [420] by Ahmedbhoy representing the defendant's firm (see Ex. 5), and finally divided at the time of their dissolution, one party retaining the shares, and the other—the present defendant—receiving Rs. 5,000 for his portion. (See Ex. A3, the agreement of dissolution of partnership, 3rd August, 1871.) An account might have been necessary also on this item as to the state of the insolvent's account at the time of the insolvency. But these shares were held jointly by the defendant's firm, and were expressly claimed in the last suit. The rule of law under the actual circumstances excludes this claim.

Lastly comes a claim for sixty-four old Elphinstone shares and two hundred and twenty new. They were not claimed in the last suit. They were apparently the property of one Cassum Chattu. At that time the Official Assignee told us he did not know that Cassum Chattu was merely the nominee of the insolvent. He only came to know that in the course of the last suit, when he obtained full inspection. It is necessary, therefore, to go into the history of these shares. In the first place, they were separate from the sixty-five new and sixty-five old Elphinstone shares, which appear in the first suit. These shares—sixty-four old and two hundred and twenty new—were deposited with the Imperial Bank as security for a loan of two *lakhs* made apparently to Cassum Chattu. It is now admitted that Cassum Chattu was another name for the insolvent. A large portion of the loan was paid off, and at the end of *Samvat* 1923 and 1924 (after calls had been paid by defendant's firm) only Rs. 96,000 was due on the shares. It does not appear that more than Rs. 400 *per* share was paid in calls on the new shares, and they were then taken over by the Government. The old shares were sold, but no evidence, satisfactory enough for me to act upon, has been given of the price realized, nor as to whether the insolvent or the defendant's firm paid the calls and expenses. The accountant Pestonji, however said that the sixty-four old shares were all sold at prices varying from Rs. 400 to Rs. 600. At Rs. 550, that would realize Rs. 35,200. The two hundred and twenty new shares, he says, were not sold, but were taken over by Government at Rs. 730, whilst Rs. 400 *per* share had been paid in calls. Without taking count of any dividends or interest, the shares at their valuation would [421] come to Rs. 73,200, which with Rs. 35,200 makes Rs. 1,08,400. The debit due from Cassum Chattu's account was only Rs. 96,000 at the end of *Samvat* 1923, so that the balance, apart from the question as to who paid the calls, seems to be considerably in favour of the Official Assignee. There must, however, be an account taken of these shares. The evidence does not enable me to decide the question of amount here.

Simple interest, at a commercial rate of 9 *per cent.* from the date of the vesting order in insolvency, must be calculated on any balance found to be due on the accounts I have referred to the Commissioner. Suit referred to the Commissioner to take the accounts mentioned. Costs reserved.

The defendant appealed, and the plaintiff filed cross objections to the decree.

Latham (Advocate-General), *Starling* and *Macpherson*, for appellant.
Lang, *Inverarity* and *Jardine*, for respondent.

1890
MARCH 17.
ORIGINAL CIVIL.
14 B. 408.

The following authorities were cited :—

As to the decree in the former suit being a bar to this suit, *King* v. *Hoare* (1) ; *Buckland* v. *Johnson* (2) ; *Brinsmead* v. *Harrison* (3) ; *Kendall* v. *Hamilton* (4); *Cambefort* v. *Chapman* (5); *Hemendro Coomar Mullick* v. *Rajendrolall Moonshee* (6).

As to the effect of not bringing a claim before an arbitrator, Russell on Awards, p. 499 (5th ed.) ; *Dunn* v. *Murray* (7) ; *Smith* v. *Johnson* (8); *Clegg* v. *Dearden* (9).

As to limitation, *In re Barr's Trusts* (10); *In re Mapleback, Ex-parte Caldecott* (11); *Markwick* v. *Hardingham* (12).

As to the want of knowledge, see Starling on Limitation, p. 47; *Granger* v. *George* (13); *Deane* v. *Thwaite* (14) ; *Rains* v. *Buxton* (15); *Azroal Sing* v. *Lalla Gopeenath* (16); *Petre* v. *Petre* (17).

[422] They also cited, 'Lindley on Partnership,' pp. 151, 157, 160 (5th ed.).

APPELLATE JUDGMENT.

17*th March*, 1890. SARGENT, C. J.—This suit by the Official Assignee arises out of the insolvency of Alladinbhoy Hubibbhoy which took place as far back as the close of 1866. The object of it is to recover for the insolvent estate moneys and other property which, it is alleged, that the defendant, either in his individual capacity or as a partner with his brother Ahmedbhoy Hubibbhoy, carrying on business in China under the name of Rahmubhoy Hubibbhoy, and in Bombay under the name of Ahmedbhoy Hubibbhoy, has obtained possession of, or is otherwise accountable for by reason, of divers schemes arranged by the insolvent with his brother, the defendant, and Ahmedbhoy Hubibbhoy and his son Rahimbhoy for concealing his property from, and defrauding his creditors. The several specific claims made by the plaintiff are : —

1. Rupees 1,12,000 moneys of insolvent said to have been deposited with the firm of Mahomed Dama in the name of the defendant.

2. Assets of the insolvent's China firm alleged to have been transferred to the defendant's firm in China and subsequently to the firm of Ahmedbhoy Hubibbhoy in Bombay.

3. Insurance money received by defendant in 1867 for bales belonging to insolvent.

4. The one-half profits received by defendant's firm on a joint venture with the insolvent in cotton.

5. Thirty-one shares of Imperial Cotton Press Company and six Akbar Press shares retained by defendant's firm.

6. The value of sixty-four old and two hundred and twenty new Elphinstone Land Company's shares which had been mortgaged by the insolvent with the Imperial Bank, and were finally redeemed, and came into the possession of defendant on account of the insolvent.

(1) 13 M. & W. 494 (504).
(2) 15 C.B. 145.
(3) L.R. 6 C.P. 584, on appeal 547.
(4) L.R. 4 App. Cas. 504 (515, 519).
(5) L.R. 19 Q.B.D. 229.
(6) 3 C. 353.
(7) 9 B. & C. 780.
(8) 15 East 213.
(9) L.R. 12 Q.B. 576.
(10) 4 K. & J. 219.
(11) L.R. 4 Ch. D. 150.
(12) L.R. 15 Ch. D. 339.
(13) 5 B. & C. 149.
(14) 21 Bea. 621.
(15) L.R. 14 Ch. D. 537.
(16) 8 W.R.C.R. 23.
(17) 1 Drew. 397.

1890
MARCH 17.
ORIGINAL CIVIL.
14 B. 408.

The first, third and fifth of these claims were disallowed by the Division Court, and as to the others the Court directed an account to be taken.

[423] The defendant has appealed against the decree, and the plaintiff has filed cross-objections. A preliminary objection has been taken by the defendant that the plaintiff is estopped from bringing his suit by ss. 13 and 43 of the Civil Procedure Code (Act XIV of 1882) having already brought a suit for the same purpose against Ahmedbhoy Hubibbhoy in 1881 to which the present defendant Rahmubhoy Hubibbhoy was made a party. It is to be remarked, however, that Rahmubhoy Hubibbhoy was only a party to that suit for the purpose of compelling him to produce certain books and documents, and that the only cause of action alleged against him in that suit was that he colluded with Ahmedbhoy Hubibbhoy in concealing them. It is obvious, therefore, that the present claims could not have been made in respect of the cause of action in that suit, and that s. 43 has, therefore, no application. Nor could the claims in this suit have been properly made ground of attack against Rahmubhoy Hubibbhoy in that suit as contemplated by s. 13, expl. II, as the suit was restricted, whether rightly or wrongly, by order of the Court to a claim for production of certain books and documents. The above objection is, therefore, in our opinion, unsustainable.

Passing to the first of the specific claims, the books of the firm of Mahomed Dama show that sums amounting to Rs. 1,25,600 were deposited in July and August, 1866, with that firm in the name of the defendant. The account given by Rahimbhoy Alladinbhoy, the son of the insolvent, is as follows. (His Lordship referred to the evidence upon this point, and continued :—) We agree with the Division Court that this evidence fails to show that defendent took any part in the transaction itself, or that he ever had in his possession or control the *lakh* so paid to Mahomed Dama, either before or after the transaction. That he may have been aware that his name had been used before March, 1867, when he passed the receipt to Rahimbhoy Alladinbhoy, is far from improbable, but this circumstance alone would not make Rahmubhoy Hubibbhoy responsible in a suit to recover the money as belonging to the insolvent's estate, which is not proved to have been ever in his possession or under his control. We **[424]** agree, therefore, with the Judge of the Division Court, that this claim has not been proved.

Passing next to the second item of claim, on account of the assets of the insolvent's China firm, the case made by the Official Assignee is that they were transferred to the defendant's firm in China after the insolvent had filed his petition, and were credited to Rahimbhoy Alladinbhoy in the books of that firm; that they were subsequently remitted to the firm of Ahmedbhoy Hubibbhoy in Bombay, and credited in the Bombay books in the same name; that this was done in order to conceal the assets from the Official Assignee with the fraudulent connivance of both Ahmedbhoy Hubibbhoy and Rahmubhoy Hubibbhoy. The sums claimed are in cash balance of Rs. 2,815—73 cents. mentioned in Ex. A. transferred on the last day of 1866, and the several items were subsequently placed to Rahimbhoy Alladinbhoy's account in the defendant's China book.

No serious attempt was made to dispute the allegation based upon the books that these entries relate to assets of the insolvent's China firm. What, then, was the nature of this transaction. We think that the Official Assignee has satisfactorily proved that there was a general scheme, to

1890
MARCH 17.
ORIGINAL CIVIL.
14 B. 408.

which the three brothers and the insolvent's son Rahimbhoy Alladinbhoy were parties, to defeat and delay creditors throughout the greater part of 1866. This is shown, we think, by a combination of circumstances which are either admitted or result clearly from the evidence. The three brothers, as admitted, by Rahmubhoy Hubibbhoy, were living on terms of intimacy in Bombay throughout 1866, however much estranged Ahmedbhoy and Rahimbhoy may have become since their partnerships were dissolved in 1871. Alladinbhoy was in serious financial difficulties earlier in 1866, and in the course of that year (as shown by the result of the suit brought by the Official Assignee in 1881 against Ahmedbhoy Hubibbhoy), large transfers of insolvent's property were made to the former and also to the firm of Mahomed Dama. To avoid execution of decrees, Alladinbhoy remained in hiding from his creditors in defendant's house on Malabar Hill until he absconded to Daman in September, 1866. The petition in insolvency was presented in December, 1866, [425] and on the last day of the year the cash balance of the insolvent's China firm, and subsequently, in 1867, the rest of the assets, were transferred to the books of the China firm of Rahmubhoy Hubibbhoy in the name of insolvent's son Rahimbhoy. It is true that the transaction was carried out by the *munims* of the China firms by whom the business of those firms was conducted. But Rahmubhoy and Ahmedbhoy were at once informed, as the correspondence shows, of what had been done, and therefore, even if we could believe that the transfers were orginally made without previous instructions having been given to the *munims*, the subsequent conduct of the two partners can leave no doubt that the action of the *munims* was at once adopted by them with the full knowledge that Alladinbhoy had filed his petition in insolvency.

Under all these circumstances it is impossible, we think, to come to any other conclusion than that the transfers were made to the firm of Rahmubhoy and Ahmedbhoy in furtherance of a scheme entered into by the three brothers far back in 1866 for defeating and delaying the creditors of Alladinbhoy. It was said, indeed, that Ahmedbhoy Hubibbhoy was the active member in the business carried on by himself and Rahmubhoy Hubibbhoy in China and Bombay, and that the latter was in bad health, which led to his going to Europe in March, 1867. There may be some truth in the statement. But, having regard to the close relations between the three brothers, it affords no sufficient reason for supposing that the defendant, who was the elder brother, in whose name the China firm was carried on, and who, it is not suggested was a sleeping partner in the concern, was not privy to what was going on; or that the transfers into the books of the firm made by the *munims* were not known to and adopted by him as fully as by Ahmedbhoy himself. The evidence, therefore, establishes, in our opinion, a fraudulent transaction as regards the creditors of the insolvent on the part of the China and Bombay firms of Rahmubhoy and Ahmedbhoy in complicity with the insolvent himself, and the partners are, therefore, jointly and severally liable to restore the property; Lindley on Partnership, p. 199 (5th ed.).

[426] But it was said that the partners being joint *tort-feasors*, the Official Assignee was precluded by the decree passed against Ahmedbhoy in suit No. 473 of 1881 from bringing the present suit against Rahmubhoy, according to the rule in *King* v. *Hoare* (1); *Brinsmead* v. *Harrison* (2). In that former suit the Official Assignee sought against

(1) 13 M. & W. 494. (2) L.R. 6 C. P. 584.

1890
MARCH 17.
ORIGINAL CIVIL.
14 B. 408.

Ahmedbhoy Hubibbhoy for a full discovery of the property of the insolvent which had come to his hands, and for a decree that he should account for the same, and pay what was found due. At the hearing of this suit all matters in difference in the suit were referred to arbitration. The transfer of the China assets to the firm of Rahmubhoy Hubibbhoy in China was mentioned by counsel for plaintiff in his opening speech, and the particular sum of Rs. 20,000, which was admittedly the cash balance of the insolvent's firm, was included in the schedule of items of claim annexed to the plaint. It was admitted before us that by arrangement between the arbitrator and the parties, written arguments, statements and accounts of sums claimed and objections taken by the parties should be put in before the arbitrators. The transfer of the China assets is alluded to in the arguments and statements, but neither the sum of Rs. 20,000, nor any other sum claimed in respect of the China assets was included in the detailed account of claims against the defendant Ahmedbhoy. We think, therefore, that it must be taken as a fact that the claim in respect of the China assets was not taken into consideration by the arbitrator in determining the sum which he awarded to the Official Assignee.

It was contended, on the authority of *Smith* v. *Johnson* (1), that the claim must nevertheless be deemed to have been disposed of by the award. In that case there was a reference of all matters in dispute to arbitration, and defendant kept back a part of his case, in order to use it afterwards as a set-off, and the Court held that could not be done. Lord Ellenborough said : "That where all matters in difference are referred, the party as to every matter included within the subject of such reference ought to come forward with the whole of his case." Bayley, J., said that, in order that the defendant should claim the set-off, he "should [427] have shown that it was not a matter in difference at the time of the reference, or that the arbitrators could not have taken it into their consideration." This was successfully done in *Ravee* v. *Farmer* (2) by calling the arbitrator as a witness. Here the proceedings before the arbitrator can, we think, leave no doubt that, as a fact, it was excluded from the arbitration, and, therefore, that it was not included in the decree passed on the award. If so, the rule in *King* v. *Hoare* (3) and *Brinsmead* v. *Harrison* (4), which is based on the circumstance of the joint cause of action having passed into matter of record, does not apply.

But it was said that the plaintiff's claim to recover these assets was barred by the statute of limitations. But, if it was a transaction of the nature we have ascribed to it, there was from the very commencement concealed fraud,—that is, (as explained by Kindersley, V. C., in *Petre* v. *Petre* (5) in discussing the 26th section of the English Statute of Limitations, 3 and 4, Will. IV), "designed fraud, by which a party, knowing to whom the right belongs, conceals the circumstances giving that right," *i.e.*, the title to the right to sue, according to the language of s. 18 of Act XV of 1877, until the Official Assignee obtained inspection of the China books in December, 1885. It was said, indeed, that Ahmedbhoy Hubibbhoy's affidavit of documents in 1882 taken with the second schedule to it gave the necessary information to the Official Assignee by the reference to the entries relating to the account of Alladinbhoy Hubibbhoy

(1) 15 East 214 (215). (2) 4 Term Rep. 146. (3) 13 M. & W. 494.
(4) L.R. 6 C. P. 584. (5) 1 Drewry 397 (398).

1890
MARCH 17.
ORIGINAL CIVIL.
14 B. 408.

in the books of the firm of Ahmedbhoy Hubibbhoy at Bombay and Rahmubhoy Hubibhhoy in China; but, as appears from Mr. Turner's evidence, it was not until he had inspection of those books that he knew what was the real nature of those entries. The defendant, therefore, is liable for the assets so transferred.

[His Lordships then discussed the evidence as to the third, fifth and sixth items of claim, and agreed with the decision of the Court below in respect to them. As to the fourth item, *viz.*, the claim for half profits, the Court of appeal (differing from Scott, J.) held that the plaintiff's claim was barred. As to that item His Lordship said:—]

[428] With respect to the one-half profits of the cotton trade carried on in partnership between the insolvent and the firm of Ahmedbhoy Hubibbhoy, the Official Assignee was entitled to the insolvent's credit balance at the date of filing of petition on the 17th September, 1866. Claims would be barred in three years from that date unless protected by s. 18 of the Statute. The trade, as appears from the books, had been going on in 1865, if not before, and there is no sufficient reason to suppose that the account had been originally kept in the books of Ahmedbhoy and Rahmubhoy as a part of any fraudulent scheme to defeat creditors, and there is no evidence to show that defendant Ahmedbhoy Hubibbhoy did anything to conceal this account from the Official Assignee after the insolvency of Alladinbhoy, or to put Mr. Turner off his guard, at any rate until the claim was barred, for it was not until 1881 that Mr. Turner made any enquiries into the affairs of the insolvent, or examined Ahmedbhoy Hubibbhoy on the matter, or asked Rahmubhoy Hubibbhoy to produce the books of their firm. We think, therefore, that s. 18 of the Limitation Act XV of 1877 is not applicable; this claim was barred when this suit was brought.

We must, therefore, confirm the decree (with a slight variation in cl. (1), except as to the claim for one-half profits. Parties to pay their own costs of this appeal.

Attorneys for the appellant:—Messrs. *Roughton and Byrne.*

Attorneys for the respondent:—Messrs. *Payne, Gilbert and Sayani.*

---

14 B. 428.

ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

RAHMUBHOY HUBIBBHOY (*Original Defendant*), *Appellant* v. C A. TURNER (*Original Plaintiff*), *Respondent.** [20th June, 1890.]

Practice—Privy Council—Appeal to Privy Council—Leave to appeal—Civil Procedure Code (Act XIV of 1882), s. 595.

Where a decree has been made directing accounts to be taken, but there is nothing so special in the case as to bring it under cl. *(c)* of s. 595 of the Civil Procedure Code, leave to appeal to the Privy Council will not be given.

[R., 10 C.L.J. 336=4 Ind. Cas. 459.]

[429] THE plaintiff (respondent), as Official Assignee and Assignee of one Alladinbhoy Hubibbhoy, filed this suit against the defendant,

* Suit No. 89 of 1887; Appeal No. 640.