

APPENDIX.

In the late Supreme Court.

1859.
April 26.

MA'NIKJI MEHERVA'NIJ.....*Plaintiff*.

RAHIMTULLA' ALUBHA'I.....*Defendant*.

Muhammadan Law—Statute of Frauds, Sec. 4—Procedure of the Courts.

The Statute of Frauds is to some extent in force in the island of Bombay. The fourth section of that statute is not applicable to Muhammadans.

CASE referred for the opinion of the Supreme Court by James Hore, First Judge of the Bombay Court of Small Causes.

The facts and arguments sufficiently appear from the judgment of the Court. The case was argued before SAUSSE, J., April 12, 1859.

Westropp for the plaintiff.

White for the defendant.

Cur. adv. vult.

April 26. SAUSSE, J. :—This is a case sent up by the Chief Judge of the Court of Small Causes for the opinion of this Court upon two questions, viz. —

1st—Whether the Statute of Frauds is in force in Bombay; and

2ndly—Whether the 4th section of that statute is applicable to Muhammadans in Bombay.

In reply to the first question it may be laid down as a general proposition that the Statute of Frauds is in force in the island of Bombay. Act XIV. of 1840, extending to India, in cases governed by English law, Stat. 9 Geo. IV., c. 14, s. 7, which amended the 17th section of the Statute of Frauds, is sufficient to show that the Statute of Frauds is in force, to some extent at all events, in Bombay. How far it is so applicable I shall not now inquire further than is rendered necessary by the second and more difficult question, viz., whether the 4th section of it is applicable to Muhammadans in Bombay. The Chief Judge has come to the conclusion that it is. [His Lordship here read the 4th section.] The reasons for which the Chief Judge came to that

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conclusion may be shortly stated thus:—That *Leroux v. Brown* (a) decided that the 4th section prescribes a rule of procedure only, and does not affect the validity of the contract, and that this Court was bound to adopt that rule.

But it would be a mistake to suppose that this Court was bound to adopt every rule of procedure prevailing in Westminster Hall up to the creation of the Mayors' Courts. For that, we have the authority of the highest court of judicature which takes cognisance of Indian cases.

In *Her Highness Ruckmabai v. Lullubhai Motichund* (b) it was most distinctly laid down that this Court, as one of the Supreme Courts in India, was, under the provisions contained in its Charter, empowered to frame rules of procedure for itself, and to adopt or reject any English rule of procedure.

Perhaps I could not give a stronger instance than that in the case just mentioned it was considered that the Statute of Limitations (21 Jac. I., c. 16) could not be regarded as binding on the Supreme Courts in India until it satisfactorily appeared (as it there did) that those courts had themselves adopted it as a rule of procedure. Sir John Jervis, commenting on *Williams v. Jones* (c) (which was decided in 1811), says (d): "The case was decided upon the ground that at all events the jurisdiction of the Court of King's Bench was not excluded; and Lord Ellenborough said: 'Assuming that the statute and charter referred to had given jurisdiction to the Indian Courts, and that the Courts had adopted the Statutes of Limitation, still those statutes could only have the effect of barring the remedy in those courts, but did not extinguish the right.' The extent of the authority of this case" (continues Sir J. Jervis) "is merely that Lord Ellenborough did not express any doubt of the competency of the courts in India to adopt the statute. It is abundantly clear that since 1811 the statute has been adopted in India, and made the foundation of judgments by the Supreme Courts there, and that adoption has been recognised and acted upon by this jurisdiction in the case of *The East India Company v. Oditchurn Paul* (e), in which case the statute was pleaded on the part of the East India Company, whose agents could

(a) 12 C. B. 301; S. C. 16 Jur. 1021. (b) 5 Moo. Ind. App. 234.

(c) 13 East 439.

(d) 5 Moo. Ind. App. 248.

(e) 5 Moo. Ind. App. 43.

not but be fully informed whether the statute was acted upon in the courts in India. The recognition and adoption by this jurisdiction of the plea in that case is, of course, of the greatest weight upon the present occasion :” and again : “This Committee is satisfied that the Statute of Limitations has been adopted and acted upon by the courts in India, and such adoption has been recognised and acted upon by this jurisdiction, and the Committee considers that such application of the statute ought not now to be questioned, whatever doubts might have originally existed on the subject” (f). With regard to the objection that the Statute of Limitations could not be pleaded in a cause in which the plaintiff and the defendant are Hindús, Sir J. Jervis said : “The substance of the objection to the plea seems to be, that a judgment in favour of the defendant founded upon the plea of the statute of limitations would be a determination upon the rights in litigation between Gentús, by virtue of a different law than that by which the same suit would have been determined in a Native Court, if instituted there. And it is conceded that the plea would not have been available in a Native Court. The merit of this objection depends upon the construction of the Charter, to which it is, therefore, necessary to refer. The Charter contains four sections which relate to the question—the 29th, 37th, 38th, and 39th. The 29th section is the governing section upon this point, and is to the following effect, namely, that in suits between Muhammadans and Gentús, their inheritance or succession to lands, rents, and goods, and all matters of contract and dealing between party and party, shall be determined by the laws and usages of the Muhammadans and Gentús respectively, or by such laws and usages as the same would have been determined by if the suit had been brought in a Native Court. The 37th section requires the Court to frame processes in criminal as well as in civil suits, and the rules for the execution of such processes, with an especial attention to the religion, manners, and usages of the inhabitants, and the circumstances of the country, so far as the same could consist with the due execution of the law and the attainment of justice. There are two other sections in the Charter (the 38th and 39th) which show that it was not intended that the Charter Court should adopt the course of procedure which prevailed in the Native Courts, but that the suits between Gentús and between Muhammadans in such courts

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should be by a course of procedure to be framed by the Charter Court of itself" (g). Again, at p. 264, he says: "The Charter, while creating the new Court, provided for two objects. The one object was that the rights of Gençús and Muhammadans, in regard to the matters specified in the Charter, should be adjudged in the new jurisdiction, according to the laws by which they would have been determined in a Native Court. The other was that the course of procedure in the new jurisdiction, by which such law was to be administered, should be consonant with the religious feelings, usages, and manners of the Native suitors. The first object seems to have been attained by placing Gençú and Muhammadan suitors in the Charter Court in the position in which, by the comity of nations, parties are placed who sue in the courts of one country in respect of rights or causes of action which had their origin in a foreign country. In such suits the *lex fori* adjudicates upon the rights and matters in litigation according to the law of the country where the rights or causes of action arose; and, consistently with that course, the Charter provides that Gençús and Muhammadans, who live and conduct their transactions under certain systems of law and government peculiar to them respectively, shall have their rights and causes of action decided upon, in the Supreme Court, by the same law by which they would have been determined in a Native Court. It was confided to the Court to secure the second object by establishing rules, orders, and processes for the regulation of causes in the Supreme Court between Gençús and between Muhammadans." He further (p. 265) says: "In truth it has become almost an axiom in jurisprudence that a law of prescription or law of limitation, which is meant by that denomination, is a law relating to procedure having reference only to the *lex fori*." In support of that view he quotes from Story on Conflicts, and mentions his reference to Pothier and Story's conclusion that statutes of limitation or prescription of suits "go *ad litis ordinationem*, and not *ad litis decisionem* in a just juridical sense." And at p. 269 Sir J. Jervis observes: "The Supreme Court was to frame a course of procedure, and it would be incident to that duty to enforce conformity to such course by attaching certain consequences to default, departure, or disobedience. The time for appearing, for declaring, for pleading, and for taking the several steps in the cause, and the

forms of the several proceedings, would all be within the province of the Court to prescribe, and consequently within its authority to give a judgment for plaintiff or defendant, as the penalty for defaults, disobedience, or departures from the prescribed rules. The Court could not exercise its jurisdiction effectually without such a power.”

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If, then, this Court had adopted the fourth section of the Statute of Frauds as a general rule of procedure, that rule would clearly have been binding as well upon Gençús and Muhammadians as upon the other suitors of the Court.

The question then will be, has this Court adopted the 4th section of the Statute of Frauds *as a rule of procedure*.

It may be that the Court has applied that section in suits which were not between Hindús or between Muhammadians, and yet not adopted it *as a rule of procedure*.

Up to the recent decision of *Leroux v. Brown* (h) the 4th section of the Statute of Frauds appears to have been regarded by some of the authorities in England and America not as a rule of procedure, but as affecting the substance of the contract.

In *Carrington v. Roots* (i) Lord Abinger, in speaking of that section, says: “The meaning of the statute is not that the contract shall stand for all purposes except that of being enforced by action, but it means *that the contract shall be altogether void*.” And Parke, B., says: “I think the right interpretation to be that an agreement which cannot be enforced at either side is a contract void altogether.”

So in *Reade v. Lamb* (j) Pollock, C. B., says: “*Carrington v. Roots* is in effect a decision that for the purposes of the present question there is no distinction between the 17th and the 4th section of the Statute of Frauds, and that not only no action can be brought upon an agreement within the 4th section of that statute if it be not reduced into writing, but that the contract is also void.”

In Story's Conflict of Laws, para. 262, p. 397, ed. of 1857 (k), it is laid down distinctly thus: “By the English and American law, contracts which fall within the purview of what is called the Statute of Frauds are required to be in

(h) 12 C. B. 801; S. C. 16 Jur. 1021. (i) 2 M. & W. 248.

(j) 6 Exch. 130. (k) p. 327 of the edition of 1865.

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writing. Such are contracts respecting the sale of lands, contracts for the debts of third persons, and contracts for the sale of goods beyond a certain value. If such contracts, made by parol (*per verba*) in a country by whose laws they are required to be in writing, are sought to be enforced in any other country, they will be held void, exactly as they are held void in the place where they are made."

In fact the 17th and 4th sections, although differing in words, were by those authorities held to be substantially the same in effect, viz., to make the contract practically void.

It is, therefore, not improbable that this Court may, previously to *Leroux v. Brown*, have taken a view of the 4th section of the statute similar to that taken in some of the earlier authorities, and regarded that section as affecting the validity of the contract.

So long as the Court may have been of that opinion, it would have necessarily held that it would be against the Charter and against the comity of nations, as guaranteed by it, to have acted on the 4th section of the Statute of Frauds in suits between Muhammadans, or in which the defendant was a Muhammadan.

For it is admitted that a parol contract (*per verba*) is, according to Muhammadan law and usage, of equal validity as if it were in writing: Macnaghten, Ch. XII., plac. 2, p. 76, ed. of 1825.

If, however, the Court had deemed the 4th section a mere rule of procedure, as in *Leroux v. Brown* it has been lately decided to be, the Court, before adopting it as a general rule of procedure applicable in suits between Gentús and between Muhammadans, or in which Gentús or Muhammadans are defendants, as well as in other suits, would have considered it with reference to the provisions relating to procedure in the Charter, and, if the Court found that such a general rule of procedure would be inconsistent with the well-established usages of Gentús or Muhammadans, and not indispensable to the due execution of law and the attainment of justice, would have refrained from adopting it as a general rule of procedure.

That it would be at variance with the usages of Muhammadans has been already shown. It is unnecessary at present to consider whether it would conflict with the usages of Gentús.

However, there is not to be found in Morley's Digest, or any Indian Reports of which I am aware, any case showing that the 4th section of the Statute of Frauds is applicable either to Gentú or Muhammadan contracts.

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As the Charters of the three Supreme Courts are, in respect of the framing of rules as to procedure, nearly identical, this question must have occurred in all of those courts.

That there should not be a single case on the subject in the Indian Reports, since the respective dates of the creation of the three Supreme Courts, leads strongly to the conclusion that the 4th section of the Statute of Frauds was not adopted as a rule of procedure applicable to all suitors alike.

That enactment has been prolific of litigation and decisions in Westminster Hall. It would be too much to say that its introduction as a rule of procedure was indispensable to the due execution of law or attainment of justice in the case of Muhammadan contracts.

The learned Chief Judge seems to have inferred that the whole of the Statute of Frauds is in force in the three Presidency Towns, because the Indian Act XIV. of 1840 extends to India, in cases governed by English law, Stat. 9 Geo. IV., c. 14, s. 7. But that enactment had reference only to the 17th section of the Statute of Frauds, by which it is declared that contracts for the sale of goods for the price of £10 or upwards shall not be "allowed to be good, except the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note, or memorandum in writing, of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorised." That section in fact avoids the contract, and, therefore, could not, consistently with the Charter, have been applied to Muhammadan contracts in suits between Muhammadans, or in which the defendant was a Muhammadan. That was not a mere rule of procedure, as the 4th section is, by *Leroux v. Brown*, now established to be.

It was admitted by Mr. Westropp that in a case of *Leech v. Párvatibái*, which occurred in this Court shortly before my arrival in this country, the plaintiff, Mr. Leech, who was a solicitor of this Court, and who endeavoured to enforce against

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 of Frauds in a suit in which the defendant was a Hindú.
 v. But that case seems to be quite isolated, and Mr. Westropp,
 RAHIMTULLA who was counsel for the defendant in it, has mentioned that
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 the point immediately, without reserving it for consideration,
 or searching for precedents. It was not for the interest of
 the defendant there to claim the benefit of the Hindú law,
 or to refer to the Charter, and I do not understand that the
 counsel for Mr. Leech did so.

For these reasons I have come to the conclusion that the provisions of the 4th section of the Statute of Frauds are not applicable in Bombay in suits between Muhammadans, or in which the defendant is a Muhammadan, and, therefore, that the second question must be answered in the negative.

I am happy to say that I have reason to believe that my opinion conforms to that held by the Judges in Madras and Calcutta.

This Court is much indebted to the Chief Judge of the Court of Small Causes for the clearness with which he has set forth his reasons, and for the research which he has exhibited in this case.

The order made by the Supreme Court mentioned that, pursuant to the 55th section of Act IX. of the Legislative Council of India, the Chief Judge of the Bombay Court of Small Causes submitted for the opinion of this Court the following questions, viz.—

- (1) Whether the Statute of Frauds is applicable to Bombay; and
- (2) Whether the 4th section of the Statute of Frauds is applicable to Muhammadans therein;

and stated that the Court replied to them thus :

- (1) That the Statute of Frauds is in force in the Town and Island of Bombay.
- (2) That the 4th section of the Statute of Frauds is not applicable to Muhammadans therein.

Note.—The report of the judgment in this case is from a short-hand note taken of it by Mr. Justice Westropp, to whose kindness the Editor is indebted for it.