CASES

DECIDED IN THE

ORIGINAL CIVIL JURISDICTION

OF THE

HIGH COURT OF BOMBAY.

Original Suit No. 228 *of* 1864; *Appeal No.* 19.

1867.
August 1.

NA'OROJI BERA'MJI .....*Defendant and Appellant,*

HENRY ROGERS and others,
trading in Bombay and
Puná as Rogers and Co. *Plaintiffs and Respondents.*

*Agreement for renewal of lease—Specific performance—Párs*is*—Jus mariti—Mortgage—Immoveable property in Bombay—Lex Loci—Introduction of English law into India—Royal Charters and Letters Patent—Portuguese—Treaty of* 1661*—Aungier's Convention—Feudal tenures—Manor of Mazagon—Emphyteusis—Conveyancing and tenures in Bombay—Act IX. of* 1842*—Act VI. of* 1851 (*Foras Lands*)*—Act IX. of* 1837.

Immoveable property situated in the Island of Bombay conveyed in 1859 to N. and his wife (Párs*is*), their heirs, executors, administrators, and assigns, was subsequently mortgaged by N. and his wife, but the mortgagee did not enter into possession. Afterwards, in 1861, N. alone entered into an agreement with the plaintiffs to give them a lease of that property for five years, the plaintiffs being willing to accept that lease with such title as N. could confer:—*Held* that, notwithstanding the non-concurrence of the mortgagee and of N.'s wife, N. must specifically perform his agreement.

Held also that it was unnecessary, under such circumstances, to consider whether the estate of N. and his wife in the property were chattel real, or real estate: for, if it were chattel real, N., by his marital right, according to English Law (which in this case applied), might dispose, either wholly or in part, of her interest; and if the property were realty, the lease by N. would at all events bind her for the term of five years, if N. should so long live.

Assuming the property to be realty, *Semble* that on N.'s death before the expiration of the term of five years, the lease would, as against the wife surviving, be voidable only, and not void.

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The non-concurrence of the mortgagee could not prevent the right of the plaintiffs to a specific performance by N. of the agreement, because N. should either himself redeem the mortgage, or permit the plaintiffs to do so.

The proposition, laid down by the Judge of the Division Court, *that all immoveable property in Bombay was of the nature of chattel real, and that there was not any property of the nature of freehold of inheritance in that island*, disapproved of and denied, as being irreconcilable with Royal Charters, Acts of Parliament and of the Legislative Council of India, decisions of the Courts both in India and England, and the tenures of land and practice of conveyancers in Bombay.

The tenure of land in Bombay under the Portuguese was of a feudal character.

Creation and tenure of the ancient Manor of Mazagon described.

Doctrine that the fief of the Middle Ages has sprung from the Roman tenure in emphyteusis, mentioned.

Ceremonies of enfeoffment and livery of seisin in Bombay.

The nature and results of Governor Aungier's Convention stated; and the origin of "pension *and* tax" in Bombay traced.

Treaty of the 23rd of June 1661 between Charles II. and the King of Portugal considered.

The treaty in 1664-65 by Mr. Humphrey Cook with the Viceroy of Goa was entered into without authorisation by the Crown of England or the Crown of Portugal,—was not ratified by either,—was expressly repudiated by the former, and never was of any force.

Doe d. de Silveira v. *Texeira*, 2 Mor. Dig. 250, observed upon.

Lex Loci Report of the Indian Law Commissioners, and the introduction of English law into India, discussed.

Distinction taken, with reference to the observations of Lord Kingsdown as to Calcutta in the *Advocate General* v. *Ranee Vurnamoye Dossee* (9 Moo. Ind. App. 425,426), between Bombay, which was held by the English in full sovereignty, and Calcutta, which was merely held by them as a factory.

Statement of the circumstances which led to the passing of Stat. 9 Geo. IV., c. 33 (Fergusson's Act), and also of those which led to the passing of Act IX. of 1837 (relating to the immoveable property of Pársis).

THIS was an appeal from a Decree made on the 3rd of November 1864 by Mr. Justice Hore, then an Acting Judge of the High Court.

The suit was for the specific performance of an agreement for the renewal of a lease of a house and premises within the Fort in the island of Bombay.

The plaint stated that by an indenture of lease, dated 4th October 1859, made between Hirjibhái Hormasji Setná of the first part, the defendant, Náoroji Berámji, and A'imáye, his wife, of the second part, and the plaintiff Henry Rogers of

the third part, the premises in question were demised to Henry Rogers from the 1st of May 1859 for a term of five years thence next ensuing, subject to certain rent and covenants; that at the time of granting that lease the demised property was subject to a mortgage to Hirjibhái Hormasji Setná, and that he joined as mortgagee in the lease; that Henry Rogers entered upon the demised premises, and by himself and his partners continued to occupy the same. The plaint next averred an agreement, on the 22nd of April 1861, by the defendant, Náoroji Berámji, with the plaintiff Henry Rogers, to grant to him a renewed lease of the premises for a further term of five years, from the expiration of the lease above mentioned, at the same rent and under the same conditions. That agreement was contained in the following correspondence. On the 8th of March 1861 the defendant wrote to Mr. H. Rogers as follows:—

"With reference to what you spoke to me the other day, I beg to inform you that I shall be greatly delighted to allow you to occupy the house as a tenant for a further period after the expiration of the term specified in the present lease, under the very same conditions: provided you agree to do so, and write me to that effect as soon as you conveniently can."

The plaintiffs, Rogers and Company, replied as follows:—

"In reply to your note of this day's date to our Mr. Rogers, we agree to renew the lease of the house, belonging to you and at present in our occupation, for a further term of five years on the expiration of the present lease; and, to prevent any further misunderstanding, we would be glad if you confirm the terms in writing, say for a further term of five years, on the expiration of the present lease, at the same rent and the same conditions on which we hold the house by the present lease. This we shall be glad to have at your earliest convenience, and before declining a house that we now have the refusal of."

The defendant, by letter dated 22nd April 1861, addressed to plaintiff Henry Rogers, replied as follows:—

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"With reference to yours to me dated 8th March 1861, I beg to state that I agree to the terms you propose for the renewal of the lease, viz., for a further term of five years on the expiration of the present lease, at the same rate of rent and under the same conditions."

The plaint also stated that at the time of that agreement the firm of Rogers and Company consisted of the plaintiffs; and that they were willing that the renewed lease, to be granted by the defendant, should be granted either to the plaintiffs, or to the plaintiff Henry Rogers alone.

It further stated that they had lately required the defendant to perform his contract, and that, though he expressed his willingness himself to execute a renewed lease, he had wrongfully refused or neglected to procure the concurrence of the mortgagee, and of the defendant's wife, A'imáye; that they, the plaintiffs, did not know the precise nature of her interest in the premises, but contended that the defendant ought to procure, in the renewed lease, the concurrence of the mortgagee and A'imáye; and, lastly, stated that the plaintiffs were willing, if necessary, to redeem the mortgage.

It prayed that the defendant should be decreed specifically to perform his contract, or, if unable to do so, to pay to the plaintiffs, or to the plaintiff Henry Rogers alone, damages to the extent of Rs. 60,000 for breach of contract.

The defendant, in his written statement, did not deny that he had entered into the agreement; but stated that by indenture of the 12th of February 1859, in consideration of Rs. 23,075 and reas 33, then paid by defendant and the said A'imáye to the grantors in that indenture, they "did grant, bargain, sell, assign, and convey, and *also, by virtue of Act IX. of* 1842 *of the Legislative Council of India, release* and confirm to the defendant and A'imáye his wife, their heirs, administrators, executors, and assigns, the said house and premises, to have and to hold the said land, messuage, hereditaments and premises, &c., unto, and to the use of, the defendant and A'imáye his wife, their heirs, executors, administrators, and assigns, for ever." That deed was produced. The grantors were Jáiji, widow, and Dhanjibhái Sorábji

Nárelválá and Návajbái, his second wife, all described as Pársi inhabitants of Bombay. It commenced the recital of the title as in Kharsedji Jiváji Ghándi, also a Pársi inhabitant of Bombay, who died on the 19th of December 1834, "seized and possessed" of the house and premises in question and other property. He left surviving him a widow, A'vábái, one son, Mánekji, and four daughters,—the said Jáiji, widow, Dinbái, first wife of the said Dhanjibhái Sorábji Nárelválá, the said Návajbái, his second wife, and the said A'imáye, the wife of the defendant. Mánekji died on the 17th of November 1839, intestate and without issue. Bhikáiji, the widow of Manekji, for valuable consideration, released all her claims against the estate of her husband, Mánekji, or of his father the testator, to A'vábái, to whom administration *cum testamento annexo* of the goods, chattels, rights, and credits of the testator was granted, on the 24th of February 1835, and of his son, with the consent of Bhikáiji, on the 15th of January 1845. By certain other recitals, to which it is unnecessary further to refer, it appeared that A'vábái died on the 21st of April 1850, leaving her daughters Jáiji, Návajbái, and A'imáye "her heirs and next of kin surviving her," and administration of her goods and effects was, on the 20th of April 1858, granted to Jáiji, and administration *de bonis non* of the goods and effects of the testator, Kharsedji Jiváji Ghándi, on the 17th of January 1859. Bhikáiji and her second husband, one Jamsedji Pestanji Pánde, granted a fresh release to Jáiji of any claim which they might have to the estates of the testator, Kharsedji, his son Mánekjí, or A'vábái. Subsequently it was agreed that the property of the testator should be divided into three equal parts, amongst Jáiji, widow, Dhanjibhái Sorábji, and Návajbái his wife, and Náoroji Berámji (the defendant), and A'imáye his wife; and that in part performance of that agreement the house and premises should be sold to the defendant and A'imáye his wife for Rs. 50,000, and they should pay to Jáiji, Dhanjibhái Sorábji, and Návajbái Rs. 23,075-0-33, being the difference between the price of the house and the one-third share of the estate of the testator, to which defendant and his wife were entitled, under the recited agreement. To carry out that

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sale, the indenture of the 12th of February 1859 was executed.

The written statement also stated that, by an indenture of the 14th of February 1859, the defendant and A'imáye his wife mortgaged the premises in question to Hirjibhái Hormasji Setná, his heirs, executors, administrators, and assigns, for Rs. 20,000, repayable on the 14th of August then next ensuing, with interest at eight per cent. per annum, payable monthly, which mortgage contained a power of sale, and other usual clauses, and a proviso that, if monthly payments of interest were regularly made, the mortgagee should not compel payment of the principal before the 14th of February 1862, or take proceedings to obtain possession; that the "mortgage money" was not paid; that the lease of the 1st of May 1859 to Henry Rogers expired on the 30th of April 1864, and that on the 28th of April 1864 the mortgagee had given to the plaintiffs notice to quit at the expiration of the lease, and the plaintiffs having refused so to do, the mortgagee, Hirjibhái Hormasji Setná, had, on the 7th of June 1864, brought in the High Court an action against Henry Rogers, to recover possession of the house and premises.

The written statement further alleged that the defendant had no authority from his wife, A'imáye, or the mortgagee, to agree to grant a renewal of the lease; and that they both repudiated any agreement on the part of the defendant to renew the lease.

The defendant submitted that, "being only a mortgagor, and having only the same interest as A'imáye his wife had in the said house and premises, and having no power or authority to contract for or bind either A'imáye or the mortgagee, he had, at the most, only a parcel or portion of an estate at sufferance; and as one tenant at sufferance cannot, as against a mortgagee, make another tenant at sufferance," he ought not to be compelled specifically to perform an agreement which, if performed, would be inoperative as against A'imáye and the mortgagee.

The issues settled by Mr. Justice Hore were as follows:—(1) Whether the alleged contract in the plaint mentioned was

a sufficient agreement to satisfy the Statute of Frauds; (2) Whether the defendant was or is bound to procure the concurrence of the mortgagee or A'imáye, or either of them, in granting, or joining in granting, a renewal of the lease; (3) Whether the allegations contained in the written statement, so far as the same are relevant, or any of them, are true; (4) Whether the defendant, *at or before the institution of this suit*, had any, and if any what, title or interest in the premises, or any and what power to grant a lease thereof, or the means of acquiring such title, interest, or power; (5) Whether the defendant, at the further hearing and final disposal of this suit, hath any, and what, title or interest in the premises, or any, and what, power to grant a lease thereof, or the means of acquiring such title, interest, or power; (6) Whether the mortgagee and defendant's wife, A'imáye, or either of them, had, at or before the institution of this suit, any, and if any what, title or interest in the premises; (7) Whether the mortgagee and defendant's said wife have, or either of them has, at the further hearing and final disposal of this suit, any, and if any what, title or interest in the premises; (8) Whether the plaintiffs have, by their conduct or lâches, disentitled themselves to a specific performance of the contract; (9) Whether, under the circumstances disclosed by the plaint and written statement, or either of them, so far as the same are relevant, the plaintiffs are entitled to the relief prayed, or any part thereof; (10) Whether the 4th, 6th, and 7th issues are, or any one of them is, material.

It was proved on the trial before Mr. Justice Hore that, in April or March 1864, the plaintiffs verbally offered to redeem the mortgage, but the mortgagee declined; and that, throughout the term of five years granted by the lease of 1859, the rent had been paid by the plaintiffs to the defendant, Naoroji.

The mortgagee, in his evidence, denied all knowledge of the agreement for renewal entered into by the defendant. The defendant's wife was not examined.

The conveyance of the 12th of February 1859 and the

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mortgage of 14th February 1859 were produced at the trial, on behalf of the defendant; and the execution of those documents by the parties thereto was admitted on behalf of the plaintiffs. Improvements were said, but not admitted, to have been made by the plaintiffs in the premises, with the knowledge of the defendant, his wife, and the mortgagee. Nothing eventually turned upon that point.

Mr. Justice Hore held—(1) That there was a sufficient contract in writing to satisfy the Statute of Frauds; (2) That the existence of the mortgage, and non-concurrence of the mortgagee, did not disentitle the plaintiffs to a specific performance of the agreement, inasmuch as the defendant must either himself redeem, or allow the plaintiffs to do so; (3) That all immoveable property in the island of Bombay is of the nature of chattels real or personal estate; and that, as the property in question was conveyed to the defendant and his wife, and as marriage, according to the English law, operates as a gift to the husband of all the wife's chattels real, the defendant is entitled to let it, or dispose of it in any way he may think fit, without the concurrence of the wife; (4) That "even supposing that the property is real estate, the defendant would be able to grant it on lease for five years, provided he and his wife should so long live; and as the plaintiffs are willing to accept a lease on these conditions," they were entitled to it. And, accordingly, Mr. Justice Hore decreed that the defendant should specifically perform the agreement. Against that decree the defendant, in April 1865, filed a petition of appeal.

The Appeal was subsequently, during two days, argued before COUCH, J., and WESTROPP, J.

Bayley, and *E. Howard*, for the appellant, contended that the estate whereof the appellant and his wife were seized was real, and not personal, estate; that the appellant was not competent to give a valid lease for five years certain; and that the Court accordingly would not decree him specifically to perform his contract. They waived the point as to the Statute of Frauds. The following authorities were

referred to :—*Freeman* v. *Fairlie* (*a*) ; *Gardiner* v. *Fell* (*b*) ; Co. Lit. 291 b ; *Keech* v. *Hall* (*c*) ; *Thornbrough* v. *Baker* (*d*) ; *Costigan* v. *Hastler* (*e*) ; *Hutton* v. *Beeton* (*f*) ; Sugden's Vendors and Purchasers, 11th ed., p. 237 ; *Harnet* v. *Yielding* (*g*) ;—Acts IX. of 1837, XXIX. of 1839, XXX. of 1839, and XXXI. of 1854 ; and *Doe d. De Silveira* v. *Texeira* (2 Morley Dig. 247).

Marriott and *Green*, for the respondents, insisted on a specific performance, whether the estate of the defendant and his wife in the premises were real or personal ; and, beside commenting on all, and relying on some of the authorities mentioned by the appellant's counsel, cited Coote on Mortgages, 334, 517 ; *Doe d. Whitaker* v. *Hales* (*h*) ; Fisher on Mortgages, p. 123 ; 1 Bright's Husband and Wife, p. 26 ; *Green d. Crew* v. *King* (*i*) ; and 2 Cru. Dig. by White, p. 374.

Bayley, in reply, mentioned *the Earl of Oxford's case* (*j*), and *Peterson* v. *Hickman*, there referred to by Lord *Ellesmere* ; *Pilling* v. *Armitage* (*k*) ; and *Dann* v. *Spurrier* (*l*).

Cur. adv. vult.

August 1.

The judgment of the Court was now delivered by—

WESTROPP, J., who (after stating the facts as above) said :—In his judgment the learned Judge has very clearly indicated his opinion upon some of the issues ; but neither in that judgment nor in the decree has he set forth formal findings upon all of the issues.

The wife of the appellant, and the mortgagee, being strangers to the contract, the plaintiffs have properly refrained from making them parties to this suit : *Tasker* v. *Small* (*m*).

On the argument of this appeal the point as to the Statute of Frauds was abandoned by the appellant's counsel.

(*a*) 1 Moore's Ind. App. 305. (*b*) *Ibid.* 299.
(*c*) 1 Douglas 21, 22 ; S. C., 1 Smith L. C. 293.
(*d*) 2 Wh. & Tu. L. C. Eq. 768. (*e*) 2 Sch. & Lef. 160.
(*f*) 9 Jur. N. S. 1310. (*g*) 2 Sch. & Lef. 549.
(*h*) 7 Bing. 322. See 2 B. & Ad. 473. (*i*) 2 Wm. Bl. 1211.
(*j*) 2 Wh. and Tu. L. C. Eq. 444. (*k*) 12 Ves. 78. (*l*) 7 Ves. 231.
(*m*) 3 Myl. & Cr. 63, 68.

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That disposes of the 1st issue, which must accordingly be found in the affirmative.

The plaintiffs (respondents) being willing to accept a lease for five years from the defendant, with such title as he can give, the 2nd issue seems to us to be immaterial. If the respondents, who, as intended lessees, are purchasers *pro tanto*, and as such, in the absence of any waiver of their right, would have been justified in demanding a good title, had insisted upon it, or if the appellant had been plaintiff, and sought to enforce a specific performance of the agreement, he must either have procured the concurrence of the mortgagee in the lease, or redeemed the mortgage (*n*). But it is within the competence of the intended lessee to waive his right to that concurrence: Fisher on Mortgages, p. 123; Coote 334. The lease will be good against the mortgagor himself by estoppel: *Maclaughland* v. *Wood* (*o*); and, on the other hand, so long as the mortgagee permit the mortgagor to remain in possession of the rents, the provisions of the lease may be enforced by the mortgagor against the lessee: *Trent* v. *Hunt* (*p*); *Wheeler* v. *Branscombe* (*q*). Moreover, the lessee may, if he please, redeem the mortgage: *Keech* v. *Hall* (*r*), per Lord *Mansfield*. Many of the remarks which we shall make on the 5th issue bear upon this 2nd issue also. The reasoning, which brings us to the conclusion that the 2nd issue is immaterial, compels us to hold that the 6th and 7th issues are likewise immaterial. Our decisions upon those issues and upon the 4th issue, which I shall presently mention, render it necessary that we should find the 10th issue in the negative.

With respect to the 3rd issue, we have no reason for saying that the allegations in the written statement, so far as they purport to be allegations of matters of fact, are untrue; but, even assuming those allegations to be true, we do

(*n*) Sugd. Vend., 11th ed., 253, 488, *et seq.* (*o*) 1 Roll. 874, pl. 10.
(*p*) 9 Exch. 14; 17 Jur. 899. (*q*) 5 Q. B. 373.
(*r*) 1 Douglas 21, 22; S. C., 1 Smith, L. C. 293, 294, acc. Fisher on Mortgages, p. 123; 5 Jarman Conv. by Sweet, 377, 378; 1 Seton on Decrees, 3rd ed., 461; 2 Story's Eq. Jur., pl. 1023, p. 260, 22nd ed.

not think that the facts alleged constitute any defence to this suit. The 3rd issue was, therefore, immaterial. Our reasons, for holding that the facts alleged in the written statement do not form a good defence, will appear when we discuss the 5th issue.

The 4th issue we must also hold to be immaterial. In order to entitle a plaintiff in equity to a decree for the specific performance of a contract, it is not necessary that the defendant should, at the time of making the contract, or at the time of the institution of the suit, be able to perform the contract. If at the final hearing of the suit he be able to perform the contract, the Court will compel him to do so: *Browne* v. *Warner* (*s*), per Lord *Eldon*; *Walker* v. *Barnes* (*t*); *Clayton* v. *Duke of Newcastle* (*u*); *Carne* v. *Mitchell* (*v*). However, if the 4th issue had been material, we should not have had any difficulty in finding it in the affirmative. The reasons which would have led us to that conclusion, are those which I am about to give, for the opinion at which we have arrived on the next issue.

Upon the 5th issue, we think that, at the hearing of the suit before Mr. Justice Hore, the defendant had such a title to and interest in, the premises in the plaint mentioned, and such a power, or the means of acquiring such a title, interest, or power, as would have enabled him to grant a lease of those premises to the plaintiff. As to his position with regard to the mortgagee we have already expressed our views. For the purpose of determining the 5th issue, we think it was quite unnecessary to consider whether the property in question was real estate or chattel real, that is to say, of a personal nature.

Until the recent legislation of the year 1865 (*w*), the law uniformly applied to Pársis and their property in the island of Bombay by the Supreme Court, and, since it was closed, by the High Court at its Original Jurisdiction side, has

(*s*) 14 Ves. 412.
(*t*) 3 Maddock R. 247.
(*u*) 2 Cases in Chan. 112.
(*v*) 15 L. J., Ch. 287.
(*w*) Act XV. of 1865, Act XXI. of 1865, and the Indian Succession Act of 1865.

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been, as correctly stated in the clear and able Report of the Pársi Law Commission (*x*), (of which Sir Joseph *Arnould* and Mr. Justice *Newton* were members), the English Law, except so far as it is varied by Act IX. of 1837, and also, since the decision of the Privy Council in 1856 in *Ardasir Cursetjee* v. *Perozebaee* (*y*), except as to matrimonial suits at the Ecclesiastical side of the court, and, perhaps I should add, except as to bigamy.

Whether, then, we have regard to the plaintiffs, or to the defendant and his wife, the law applicable to this case was English law. Under that law the premises in question must have been either chattel real or real estate. Whether the estate conferred by the indenture of the 12th of February 1859 upon the defendant and his wife, was chattel real or real estate in its nature, they were seised by entireties, and not as joint tenants *per my* and *per tout*, but *per tout* only: 2 Cru. Dig. by White, 373, Title XVIII., ch. 1, ss. 45, 46; Co. Lit. 187 a. If chattel real, his assignment or lease would bind her surviving: 2 Preston Abst. 39, 43; 1 Bright H. and W. 26; Furlong L. and T. 94. But, if real estate, his lease or conveyance would not bind her surviving: 5 T. R. 652; 2 Wm. Bl. 1211; 2 Ver. 120. However he, being seised, either in his own right, or *jure uxoris*, of the whole estate *during the coverture*, might bind that interest by lease or conveyance: Watkins Conv. 170, 8th ed. The defendant's demise, therefore, would be good for five years if the coverture so long endure.

The result would be substantially the same if the husband and wife be regarded as joint tenants, and seised *per my* and *per tout*, or the husband as simply entitled *jure uxoris*.

For, assuming that the estate or interest of the wife be chattel real, the husband, by his marital right, may dispose of it either wholly by assignment (*z*), or in part, as by demise or underlease: Co. Lit. 351 a; Com. Dig. Title Baron & Feme, E 2; Bac. Ab. Title Baron & Feme, C. 2;

(*x*) Dated 13th October 1862; see also Report of a Select Committee of the Council of the Governor General dated 10th August 1861.

(*y*) 6 Moo. Ind. App. 348.

(*z*) Co. Lit. 46 b., 351 a, and *Ibid.*, part 2 of note 1.

Syms' case (*a*), Co. Lit. 46 b; 1 Rolle's Ab. 344, pl. 10; *Grute* v. *Locroft* (*b*). In *Druce* v. *Dennison* (*c*) Lord *Eldon* intimated an opinion that even an agreement by the husband for an underlease of the wife's term would be good against the wife, and so it seems to have been decided in *Steed* v. *Cragh* (*d*.)

Admitting, however, the hypothesis that the estate or interest of the wife is of the nature of realty, and not chattel real, we find it stated in Bacon's Abridgment, with reference to leases not falling within the Stat. 32 Hen. VIII., c. 28, ss. 1, 3, but made under the Common Law, that "It is clearly agreed that if a husband seised of lands in right of his wife, make a lease thereof by indenture or deed poll, reserving rent, this is a good lease for the whole term, unless the wife, by some act after her husband's death, show her dissent thereto; for if she accept rent which becomes due after his death, the lease is thereby become absolute and unavoidable" (*e*). That position, however, has not been without assailants. It has been said that the lease of the husband alone is, *against the wife and those claiming under her*, not merely voidable, but absolutely void. I refer to the note of Serjeant Williams upon the case of *Wotton* v. *Hele* (*f*), *Miller* v. *Mainwaring* (*g*), and to Mr. Roper's remarks (*h*). By some text-writers (*i*) the point has been treated as doubtful. But it is admitted on all hands that if the lease be made by the husband and wife jointly (though not within the statute), it is voidable only: *Greenwood* v. *Tyber* (*j*); *Doe* v. *Weller* (*k*); 2 Wms. Saunders 180, note 9; *Smallman* v. *Agborow* (*l*); and Mr. Jarman observes, with much force, "It should seem upon principle that the non-

(*a*) Cro. Eliz. 33.

(*b*) Cro. Eliz. 287, and see Pop. 4, 145; Moo. Rep., p. 95, pl. 514; 1 Brod & B. 443, 445.

(*c*) 6 Ves. 385, 394. (*d*) 9 Mod. 43, 2 Eq. Cas., 37, pl. 3.

(*e*) Bac. Ab., Title Leases, C. 1.; *Ibid.* Tit. Bar. & Feme, I.

(*f*) 2 Wms. Saund. 180, note 9, and 180 a.

(*g*) W. Jones 354. (*h*) 1 Roper Husb. & Wife by Jacob, 94.

(*i*) Woodfall, L. & T., 6th ed., 20; Chambers, L. & T., 70. But Comyn (L. & T. 41) regards the lease of the husband as voidable only.

(*j*) Cro. Jac. 563. (*k*) 7 T. R. 478.

(*l*) Cro. Jac. 417.

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concurrence of the wife would not vary the rule, since she is incapable of binding herself by contract, and leases by her alone are absolutely void" (*m*). Mr. Furlong also, in his excellent work on Landlord and Tenant, for the same reason, treats a lease by the husband alone as voidable, not void (*n*). Mr. Furlong and Mr. Jarman both justly attach great weight to the authority of Chief Baron *Gilbert*, the author (*o*) of the passage already quoted from Bacon's Abridgment, to the effect that a lease by the husband alone is good for the whole term, unless the wife show her dissent thereto by some act after his death. His view is fully supported by *Jordan* v. *Wikes* (*p*), also by Mr. Jacob in his edition of Roper's Husband and Wife, and, as already mentioned, by Mr. Jarman, who concludes his remarks upon it by saying (*q*) "that little doubt exists that the Courts would now hold the lease for years of a husband, seised *jure mariti*, to be voidable only, and not void." Were it now necessary to decide the point, which it is not, we should not have any hesitation in adopting the same view.

However that may be, a husband takes a freehold interest, during the joint lives of himself and his wife, in land belonging to her in fee; and such interest passes by the deed of the husband alone; *Robertson* v. *Morris* (*r*). And even Serjeant Williams, in his note already mentioned, admits that a lease by the husband alone "is undoubtedly a good lease during the coverture" (*s*). Therefore, whether a lease for years by the husband alone, of the real estate of the wife, would, as against her surviving, be voidable only or void, yet he would have a title, though not a perfect title, to make such a lease.

The infirmity in the defendant's title the plaintiffs are will-

(*m*) 4 Byth and Jarm. Conveyancing, by Sweet, p. 242.

(*n*) page 29.

(*o*) In Mr. Gwillim's preface to the 5th edition of Bacon's Abridgment it is stated that the materials of that compilation as far as the title "Simony" were collected from Chief Baron *Gilbert's* writings.

(*p*) Cro. Jac. 332. See also Vaughan R. 46, 2 Taunton 180, and Cro. Jac. 617.

(*q*) p. 243. (*r*) 11 Q. B. 916. (*s*) 2 Wms. Saund. 180 b.

ing to excuse, and it is not competent for him, a vendor, to except to his own title: *Bradley* v. *Munton* (*t*).

There was not any argument seriously addressed to us on behalf of the defendant in support of the affirmative of the 8th issue, nor have we been able to discover any evidence which favours it. That issue must, accordingly, be found in the negative.

The remaining issue is the 9th. The conclusions at which we have arrived upon the other issues have already indicated our opinion that it must be found in the affirmative.

The appellant, we think, had such a title as would enable him to make a lease for five years, good as against himself, and, if not void, at least, upon his decease, voidable as against his wife and those claiming under her, if her estate in the premises be real, and absolutely good as against her and those claiming under her, if her estate be of the nature of chattel real.

The respondents being willing to accept a lease for five years with such a title as the appellant can confer, we think that the decree of the learned Judge, that the appellant should specifically perform his contract, was right, and must be affirmed with costs.

The learned Judge, however, not only decided that the property, the subject of this suit, was chattel real; but did so on the broad ground that all immoveable property in Bombay was of the nature of chattel real, and that there was not any immoveable property of the nature of freehold of inheritance in this island.

He rested that opinion upon certain general principles which he laid down, and also upon the judgment (given on the 31st of March 1817) of Sir Alexander Anstruther (who was Recorder of Bombay from the 10th of March 1814 to the time of his death, on the 16th of July 1819) in *Doe d. De Silveira* v. *Texeira* (*u*), of which Mr. Justice Hore says: "The law pronounced in that judgment is evidently the law which has regulated the law of succession to immoveable property in Bombay for the last forty or fifty years at least."

(*t*) 15 Beav. 460. (*u*) 2 Morley's Dig. 247.

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The reasons which we have already given for affirming the decree of the learned Judge in favour of the plaintiffs, sufficiently show that, in our opinion, it was unnecessary and extrajudicial on his part to decide whether the property in this case was chattel real, and still less necessary to decide whether all immoveable property in Bombay was of that nature.

Were we to remain silent as to the doctrine of the learned Judge, that all immoveable property in Bombay was, when he gave his judgment, of the nature of chattel real, and as to his statement that "the law pronounced" in the judgment of Sir A. Anstruther "is evidently the law which has regulated the law of succession to immoveable property in Bombay for the last forty or fifty years at least," it might be supposed by the legal profession and the public that this Court concurs in those views. Such a misapprehension might produce much embarrassment in conveyancing and in the deduction of title, and other injurious results. We should not, we conceive, show proper respect to the learned Judge were we simply to express our dissent, without, at some length, giving our reasons. Hence we find ourselves compelled to speak (and we do so with reluctance) extrajudicially on this subject.

It is unnecessary to touch upon the legislation of 1865 (the Indian Succession Act [X.] of 1865, and Act XXI. of 1865), or to consider what effect (if any) it may have in altering the nature of property for any purpose save that of transmission on the death of the owner, inasmuch as this suit was instituted, and the judgment of the court below was given, before that legislation took place or came into force; and the part of the learned Judge's judgment now under consideration, related to the devolution and nature of immoveable property (amongst persons other than Hindus and Muhammadans) previously to and down to the year 1864, and to the nature of that property under the law as it then existed.

What that devolution and nature were, must still for some time to come, notwithstanding the recent legislation of which we have spoken, be questions of importance.

In adverting to Sir A. Anstruther's judgment in *Doe d. De Silveira* v. *Texeira*, we shall refrain from expressing any opinion upon the ground on which he actually decided that case. He admitted that, on the cession of Bombay to the Crown of England, the Portuguese laws were not reserved to the Portuguese inhabitants. He said, "Upon referring to the treaty by which the island of Bombay was given to King Charles the Second in 1661, I find that the religion of the Portuguese inhabitants, and their *privileges* and *rights*, are secured to them as subjects of the King of England, but the continuance of the Portuguese law is not stipulated; *and this is the more strong, as the Portuguese laws were by the same treaty reserved to the Portuguese colonists at Tangier*" (*y*). But he presumed that a subsequent local law or regulation had been made by the East India Company (under the power to legislate given to them by the Charter 20 Charles II., 27th March 1668, which made over Bombay to the Company), reserving to the Portuguese their law or custom of succession, and on that presumption made his decree (*z*). The validity of that presumption is a question which has presented itself, and probably must be considered in another suit (*Lopez* v. *Lopez*), now pending before myself in the Second Division Court. The rest of his judgment was extra-judicial, and therefore fairly open to present criticism.

That the English Law has, to a certain extent, been introduced into India, has been arrived at by two different lines of reasoning.

The earlier of those was that adopted by judicial authorities, and attributes the introduction of English Law into British India to charters granted by the Crown, and certain statutes under which some of those charters were granted, or whereby they were modified.

The other is that adopted by the Indian Law Commissioners in their celebrated *Lex Loci* Report of the 31st October 1840.

A third school (the Mofussil courts) would appear never to have acknowledged any general *lex loci* in British India; and,

(*y*) 2 Morley's Dig. 250, 251. (*z*) *Ibid.*, 251, 252, 265.

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in the absence of any positive law, to have generally, though not invariably, held itself bound to follow the law of the domicile of origin of the parties, but with this peculiarity, that it has applied English law to all British subjects technically so called.

If it be denied upon general principles, as it has been by Sir Alexander Anstruther and Mr. Justice Hore, that any immoveable property in that part of British India called Bombay could have been of the nature of freehold of inheritance, it becomes important to consider the various grounds on which the Commissioners, the Queen's courts, or the Company's courts have arrived at the conclusion that the English law has, to any extent, been introduced into British India, and to ascertain whether, and to what extent, that portion of the English law which relates to real property has been applied, not only within any other presidency town besides Bombay, but also in the Mofussil at large. We think it the most convenient course to notice in the first instance the views of the Commissioners.

The question (*a*) discussed by them was "what is the law to which all persons in British India for whom no special provision has been made, or who are not excepted on account of special circumstances, are subject; or, in other words, what is the *lex loci* of British India."

The *lex loci* in Bombay previously to the cession of the island to Charles II. could only have been the Hindú law, the Muhammadan law, or the Portuguese law.

The argument of the Commissioners, as to what was the *lex loci* of British India when they made their Report, chiefly affects the Hindú and Muhammadan law. The argument of the Judges, founded on charters and statutes, would affect not only those two systems of law, but also the Portuguese law.

The argument of the Commissioners may be thus epitomised:—

Recognising the rule prevailing amongst civilised nations

(*a*) It arose upon certain petitions presented to Government by East Indians and Armenians.

that, upon the cession or conquest of a country, its laws remain in force until altered by the acquirer or conqueror, and bind all persons in the country, the Commissioners held that such a doctrine must receive some limitation when the law of the country is in its nature wholly inapplicable to strangers. Adverting to the exception from that doctrine mentioned by Lord *Coke* in *Calvin's* case (*b*), that by conquest of an infidel kingdom its laws are *ipso facto* abrogated, "for that they be not only against Christianity, but against the law of God and of Nature contained in the decalogue;" and also adverting to the extrajudicial *dictum* of Lord *Mansfield* in *Campbell* v. *Hall* (*c*), in which he designated that exception as "absurd," and suggested that it "in all probability arose from the mad enthusiasm of the crusades;" and further referring to his doctrine that "the law and legislative government of every dominion equally affect all persons and all property within the limits thereof, and are the rule of decision for all questions which arise there;" the Commissioners admit it to be absurd to suppose that the Hindú and Muhammadan laws were abrogated *ipso facto*, when the King of Great Britain brought those countries under his subjection. They adopt Lord Mansfield's doctrine, so far as to hold that the Hindú and Muhammadan laws did not cease upon the conquest to bind Hindús and Muhammadans, but reject so much of it as would compel them to say that these laws continued after that event to bind all Christians and others as long as they abode in this country, and give it as their opinion "that the Christian subjects of the British Crown and of other nations coming into British India, indeed all persons in British India not being Hindus or Mahomedans, are, independently of all Statutes, Charters, and Treaties, exempt from the operation of the Hindu and Mahomedan Laws," &c., and say that the Hindú and Muhammadan laws "are so interwoven with religion (*d*) as to be unfitted for persons professing a different faith."

(*b*) 7 Rep. 17. (*c*) Cowper R. 204, 209.

(*d*) See Master Stephen's report in *Freeman* v. *Fairlie*, 1 Moo. Ind. App. 324.

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The Commissioners, at some length, then proceed to show that the unfitness either of the Hindú law or of the Muhammadan law to be the *lex loci* of a country subject to a government neither Hindú nor Muhammadan, is the consequence of the indissoluble union of law with religion, but with this remarkable difference between the two cases, that the Hindús, in consideration of this intimate union, hold that, even in a country governed by their own princes, their own law, being the word of God addressed specially to the Hindú race, is not the law of the place, but the law of the Hindú inhabitants; whereas the Muhammadans draw a quite different inference from the identity of their law and religion, and hold that their law, being the word of God addressed generally to all mankind, is not only the *lex loci* of countries subject to Muhammadan sovereigns, but ought to be the law of the whole world. In accordance with this principle, they, departing from the international doctrine of Europe, hold that upon the acquisition of any country by a Muhammadan prince, their law becomes the *lex loci*, not at the discretion of the prince, but as a matter of strict law and religion; and also that their law, when it has been once introduced, can never be lawfully superseded by any other system. After noticing in detail the provisions of the Muhammadan law with respect to persons not Muhammadans by creed, as laid down by the more strict and as laid down by the more enlightened Musalmán lawyers, the Commissioners say: "Whether, then, we consider the Mahomedan law as itself repudiating the international doctrine of Christian Europe, or the ignominious position which it assigns to persons of a different faith, where the legal rights of Mussulmans are concerned, or lastly the practice sanctioned by its most liberal expounders, of having each class of subjects who are not Mussulmans to administer their own laws among themselves by judges of their own, we must conclude that the doctrine of the unfitness of the Mahomedan law to be the *lex loci* of a country which has passed under the government of a Christian prince, rests upon a more solid foundation than the mad enthusiasm of the crusades."

Having shown that neither the Hindú nor Muhammadan law

is the *lex loci* of any part of British India, the Commissioners proceed to contend that the English law is the *lex loci*, asserting that, if it be not, they are driven to conclude that there is none at all; and remark that "a country governed by one of the civilised nations of *modern* Europe, and yet having no *lex loci*, would be a phenomenon without example in jurisprudence." If there had been no authority for the proposition that English law owes its introduction into India to the charters of the Supreme Courts or the Mayors' Courts, the Commissioners say that they would have had "little hesitation in denying it, and in asserting that when any part of British India became a possession of the British Crown, there being in it no *lex loci*, but only two systems of rules for the government of two religious communities, the English law became *ipso jure* the *lex loci*, and binding upon all persons who do not belong to either of those communities." Then they proceed thus: "There is certainly no express authority (*e*) for this doctrine; but if it be admitted that neither the Hindu nor Mahomedan Law can be considered as *lex loci*, then British India must, we think, be considered, with regard to all persons not Hindus or Mahomedans, as an uninhabited country colonised by British subjects. And then, according to what is said to been laid down by the Lords of the Privy Council, 2 Peere Williams 75, with the reasonable limitations assigned to it by Sir Wm. Blackstone, 1, 107, those British subjects must be held to have carried with them to this country so much of English Law as is applicable to their situation, and so much of the English Law must be held to be, and to have been ever since the country became subject to the British Crown, the *lex loci* of British India."

The Commissioners add, that, as British subjects were not originally subject to the jurisdiction of the Mofussil courts, and as the Indo-British race had not sprung up when those courts were first established, it was not then of much immediate importance to determine what was the *lex loci*, or whether there was any; but that the time had arrived when it

(*e*) *i.e.*, no express judicial authority.

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was incumbent on Government to consider and decide those questions. The Charter Act (*f*) had thrown open India to British subjects. Act XI. of 1836 had made them amenable in civil cases to the Mofussil courts. Act IV. of 1837 had enabled them to hold land, and the Privy Council had declared that aliens were competent to do so. Trade had increased the influx of European and American foreigners, and the East Indian population had become numerous, and was yearly increasing. The want of a *lex loci* would soon become as mischievous in practice as it was anomalous in theory. They recommended the passing of an Act declaring that so much of the law of England as is applicable to the situation of the people, and not inconsistent with the Regulations or Acts of the Government of India, should be taken to be the law of the land throughout British India, except the places subject to the jurisdiction of Her Majesty's courts. They proposed to exempt from that law Hindús and Muhammadans, and to exclude from it British statutes passed since 13 Geo. I., unless specially introduced into India by Acts of the Government of India. The words "so much as is applicable to the situation of the people," they thought ought to be sufficient to exclude English tenures and conveyancing, "but, lest this should not be so, recommend an express exclusion of them." They recommended, but admitted that it required "direct legislative sanction," that the interest of any person in real property, situate without the limits of the local jurisdiction of Her Majesty's courts, shall go to the executor or administrator of such person, and be distributed according to the Statute of Distributions.

Mr. Amos, the President of the Commission, in a separate minute, stated that he agreed that it was desirable that a *lex loci*, founded on the English law, should be established, but was "not prepared to give a confident assent to the conclusion" of his colleagues, that English law had been introduced simultaneously with the acquisition of our territories in India. He thought the terms "conveyancing and tenure," as employed by them, were vague, and that "there

(*f*) Stat. 3 and 4 Wm. IV., c. 82, ss. 81 to 86.

is so much of the English laws of tenure and conveyancing, especially if a large interpretation be given to these terms, which is essential to the complete and secure enjoyment of property by a highly civilized people;" that he was not disposed to recommend the dispensing with them generally, though particular exceptions may be proper, and the free use of the most simple kind of conveyances be indispensable. He doubted as to the propriety of allowing succession to real property according to the Statute of Distributions, and was not then "prepared to recommend this departure from the law of England," and said, "Moreover, it is to be considered that the proposed rule will have the effect of establishing a different law of succession *from that which obtains in the Presidency Towns* and in England."

The recommendation made by the Commissioners as to passing a *declaratory* Act has never been carried into effect. The Indian and Pársi Succession Acts of 1865, although, from the 1st of January 1866, excluding throughout India the English law of succession to real property, are not declaratory Acts.

The Commissioners admitted that there is grave authority which is not reconcileable with their view, and that all of the Judges of the Supreme Court of Calcutta who have declared any opinion upon the subject have referred the introduction of the English law into India to royal charters. This doctrine the Commissioners, for various reasons, contend to be unreasonable, and conjecture that it was first broached after the establishment of the Supreme Court in 1774. They say that "it has rather the air of having been devised as a means of reconciling the language of the Charter, implying, as that language does, that the Courts were to administer English law, with the doctrine laid down by Lord *Mansfield* in *Campbell* v. *Hall* (decided in the very same year), according to which all Englishmen in India would, if there had been no legislative interference, have been subject to Hindu or Mahomedan law."

In support of their view as to the introduction of English law into British India, the Commissioners quote the opinion

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of Master Stephen, expressed in his very learned and able Report, made in the year 1823, in *Freeman* v. *Fairlie* (*g*) (which case we shall again mention). Referring to the two general rules: 1*st*, that if a new country is discovered or settled by British subjects, they carry with them the English law, so far as that law is applicable to their local circumstances; and 2*ndly*, that, on the other hand, in colonies or settlements acquired by cession or conquest, the laws of the place remain in force until changed by royal or parliamentary authority; he (*h*) treated the case of our Indian territories as anomalous, and that there not being in those territories, when we acquired them, any established *lex loci*, it became a matter of necessity that the British should adopt a new course, namely, to regard the case, in a great measure, as that of a newly discovered country,—to use the English law, so far as it was capable of being applied, for the government of the Company's servants, and other British or Christian settlers, and to leave the Muhammadan and Gentú inhabitants to their own laws and customs. He was of opinion that the charter did not introduce the English law, but implied that it had been already introduced.

Lord *Stowell*, in his eloquent judgment in *The Indian Chief* (*i*), in determining the temporary national character of an American merchant resident at Calcutta to be derived not from what, for the sake of argument, he assumes to be the paramount sovereignty of the Mogul, but from the British Factory, says: "It is a rule of the law of nations applying peculiarly to those countries, and is different from what prevails ordinarily in Europe and the Western parts of the World, in which men take their present national character from the general character of the country in which they are resident; and this distinction arises from the nature and habit of the countries. In the Western parts of the world, alien merchants mix in the society of the natives, access and intermixture are permitted, and they become incorporated to almost the full extent. But in the East, from the oldest

(*g*) *Ibid.*, 323, 324, 325. (*h*) Moo. Ind. App. 305.
(*i*) 3 Robinson's Adm Rep. 22, 29.

times, an immiscible character has been kept up. Foreigners are not admitted into the general body and mass of the society of the nation; they continue strangers and sojourners as all their fathers were: *Doris amarâ suam non intermisceat undam.*" (*j*)

As to the opinion at which the Commissioners arrived, that English law was introduced into our various territories in India simultaneously with the acquisition of them, *Colvile*, C. J., in *Musleah* v. *Musleah* (*k*), says: "This conclusion of the Commissioners, in the absence of that declaratory Act which they recommended, can only be treated as matter of opinion or speculation. It is inconsistent with the 9th section of Reg. VII. of 1832" (to which I shall presently refer), "nor could we, in the absence of that enactment" (the declaratory Act recommended by the Commissioners), "act upon it, so as to declare that the contrary practice of the Courts of the East India Company is, having regard to their peculiar constitution, erroneous. There is certainly more legal authority for the conclusion that this Court, when the parties are neither Hindus nor Mahomedans, is both empowered and bound to administer English law to all persons and over all persons within its jurisdiction. And the theory, which ascribes this modified introduction of English law into the Mofussil to the Charters and Letters Patent, in my opinion, derives additional weight from the 17th section of the 21 Geo. III., c. 70, which empowers the Court to hear and determine all suits against the inhabitants of Calcutta; and it is on the ground of the inhabitancy, actual or constructive, of the parties, that the Court generally acquires jurisdiction over immoveable property held by others than British subjects in the Mofussil, in the same manner as is prescribed for that purpose in the said Charter and Letters Patent. Nevertheless it is impossible to deny that there is some force in the Commissioners' objection to that theory; and Lord *Brougham's* masterly judgment in *The Mayor of Lyons* v. *The East India Company* (*l*), which in one passage

(*j*) Virg. Ecloga X. 5. (*k*) Boulnois Rep., p. 211.
(*l*) 1 Moore's Ind. App. 175.

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treats the introduction of British Law into the Mofussil as a question far less clear than its introduction into Calcutta, and in another assumes that what may be true of lands held by British subjects, is not necessarily true of lands held by persons who do not fall within that category, makes it difficult to treat the question (*m*) now under consideration as concluded by authority."

Assuming for the moment that the Commissioners were right in their opinion as to the original introduction of English law, yet if they regarded that law as continuing to be the *lex loci*, subsequently to the year 1832, of so much of the Mofussil as is subject to the Bengal Regulations, such a view is (as we have already stated was remarked in *Musleah* v. *Musleah* by *Colvile*, C. J.) opposed to Bengal Reg. VII. of 1832, Sec. 9, which provides that whenever " in any civil suit the parties to such suit may be of different persuasions, when one party shall be of the Hindu and the other of the Mahomedan persuasion, or where one or more of the parties to the suit shall not be either of the Hindu or Mahomedan persuasion, the laws of those persuasions shall not be permitted to operate to deprive such party or parties of any property to which, but for the operation of such laws, they should have been entitled. In all such cases the decision shall be governed by the principles of justice, equity, and good conscience ; *it being clearly understood, however, that this provision shall not be considered as justifying the introduction of the English or any foreign law,* or the application to such cases of any rules not sanctioned by those principles."

No such *express* prohibition of " the introduction of the English or any foreign law" is to be found in the Bombay or Madras Code of Regulations for the Mofussil.

The provision in the Bombay Code is Reg. IV. of 1827, Sec. 26 : " The law to be observed in the trial of suits shall be Acts of Parliament and Regulations of Government ap-

(*m*) That question was how the lands, situated in the Mofussil, of a Jew who died domiciled in Calcutta, should, by the Supreme Court at Calcutta, be held to descend.

plicable to the case; in the absence of such Acts and Regulations, the usage of the country in which the suit arose; if none such appears, the law of the Defendant; and, in the absence of specific law and usage, equity and good conscience alone;" and see Sec. 27, cl. 1 and 2.

The Madras Reg. II. of 1802, Sec. 17, adopted the old Bengal Reg. III. of 1793, which (Sec. 21) directed the Judges, in cases where no specific rule existed, to act according to justice, equity, and good conscience (*n*).

Having mentioned the foregoing Regulations, it is convenient here to advert to the third school. The Commissioners show that under those Regulations the Mofussil courts of India are in nearly the same position in regard to law as Courts of Equity in England. And they must and do, in order to decide rightly, adopt the maxim on which English Courts of Equity act, viz., that equity follows the law. The Commissioners stated that the principle which the Mofussil courts have adopted is that there is no *lex loci* in British India, and their practice has been to ascertain, in the best manner they could, what was the law of the country (it would perhaps be more correct to say, of the class) of the parties before them, with this limitation, however, that all British subjects (technically so called) were to have English law administered to them. So that a Scotsman would have English law administered to him, which, however, for cogent reasons assigned by the Commissioners, they considered to be no practical grievance. To some of the decisions of the Mofussil courts we shall presently advert.

To show the groundwork of the opinion of the school first mentioned, which attributes the introduction of the English law into India to royal charters and letters patent, it is needful to refer briefly to some of those documents (*o*).

The charter of the 43rd Eliz. (31st December 1601) created the Governor and Company of the Merchants of London

(*n*) See *Abraham* v. *Abraham*, 9 Moo. Ind. App. 195, and *Varden Seth Sam* v. *Luckpathy Royjee Lalla*, *Ibid.* 303.

(*o*) As to the introduction of the Law of England by charters, see Vaughan 293.

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trading into the East Indies (which I shall, for brevity, call the London Company), a body corporate capable in law "to have, purchase, receive, possess, enjoy, and retain lands, rents, privileges, liberties, jurisdictions, franchises, and *hereditaments* of whatsoever kind, nature, or quality soever they be, to them and their successors, and also to give, grant, demise, alien, assign, and dispose of lands, tenements, and *hereditaments*." It empowered the Governor and Company to make and enforce laws "for the good government of the same Company, and of all factors, masters, mariners, and other officers employed or to be employed in any of their voyages, and for the better advancement and continuance of the said trade and traffic," provided that such laws "be reasonable, and not contrary or repugnant to the laws, statutes, or customs of this our Realm." This power to legislate, it should be observed, contains no express reference to factories or territories.

The letters patent 7 Jac. I. (31st May 1609) confirm, in nearly identical language, the preceding charter (43 Eliz.) in the above particulars.

In the second index to a volume of charters, from A. D. 1601 to A. D. 1774, relating to India and published in 1774, it is mentioned that there was a charter, 20 Jac. I. (dated 4th February 1622), empowering the London Company to chastise and correct all English persons residing in the East Indies and committing any misdemeanour, either with martial law or otherwise" (*p*). I have not been able to procure any copy of that charter.

The letters patent 13 Car. II. (3rd April 1661) confirm the charter 43 Eliz. and the charter 7 Jac. I. (1609) in the above-quoted particulars, and, further, contain this very important provision: "That the Governor and his Council of the several and respective places where the said Company have or *shall have* any factories or places of trade within the said East Indies, may have power to judge all persons belonging to the said Governor and Company, or *that shall live under*

(*p*) See Anderson's English in Western India, 129; 1 Bruce's Annals 522; 3 *Ibid.* 551.

them, in *all causes*, whether *civil* or *criminal, according to the laws of this Kingdom*, and to execute judgment accordingly. And in case any crime or misdemeanour shall be committed in any of the said Company's factories in the said East Indies where judicature cannot be executed as aforesaid, for want of a Governor and Council, there, then, and in such case it shall and may be lawful for the chief factor of that place and his Council, to transmit the party, together with the offence, to such other plantation, factory, or fort, where there is a Governor and Council, where justice may be executed, or into this Kingdom of England, as shall be thought most convenient, there to receive such punishment as the justice of the offence shall deserve."

Master Stephen does not, nor does Lord *Lyndhurst* in *Freeman* v. *Fairlie* (*q*), specially mention the charter or letters patent of the 13 Car. II. (3rd April 1661), which, it will be perceived, is the first charter that actually created courts of justice in British India, directing, as it did, that the Governor and Council, not only of the factories and places of trade which the London Company then possessed, but also of those which they should subsequently acquire, should be courts of justice in *all* causes, civil and criminal; and that the laws to be administered in those courts, as well to the persons belonging to the Company, as to "the persons who shall live under them," should be "the laws of this Kingdom," *i.e.*, England. That charter has been noticed by Sir Charles *Grey*, C.J., in his judgment in *Jebb* v. *Lefevre* (*r*), and by Lord *Kingsdown* in *The Advocate General of Bengal* v. *Ranee Surnomoye Dossee* (*s*). The Indian Law Commissioners appear to have overlooked both it and the case of *Jebb* v. *Lefevre*, which was decided fourteen years before the date of their *Lex Loci* Report. We shall presently revert to the charter 13 Car. II. (3rd April 1661.)

Upon the marriage of Charles II. to Princess Catharine of Portugal in the same year (1661), the city and castle of

(*q*) 1 Moo. Ind. App. 321.

(*r*) Clarke's Addl. Cases, 56, 58, S. C.; Morton's Rep., Montriou's ed., p. 152.

(*s*) 9 Moo. Ind. App. 426.

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Tangier, with all its rights, profits, territories, and appurtenances, its income and revenue, and the full and absolute dominion and sovereignty of that city and castle, and the aforesaid territories with all their royalties, &c., were by the 2nd article of a treaty (*t*) dated the 23rd of June 1661, and consisting of twenty articles or clauses, ceded by Alfonsus VI., King of Portugal, to the British Crown. Then follows this proviso: "That all the military and other inhabitants of the aforesaid town and castle of Tangier, or so many as choose to remain and reside there, shall be treated on the most friendly footing; the free exercise of the Roman Catholic religion shall be permitted to them, and in all civil matters they shall obey the King of Great Britain, and, as subject to and under the dominion of the said King, *they shall be ruled and governed by the same laws and customs as have hitherto been used and approved in the aforesaid town and castle.*" By the eleventh article of the same treaty the King of Portugal gave, transferred, granted, and confirmed to the Crown of Great Britain "the port and island of Bombay, in the East Indies, with all the rights, profits, territories, and appurtenances whatsoever thereunto belonging, and, together with the income and revenue, the direct full and absolute dominion and sovereignty of the said Port, Island, and Premises, with all their royalties, freely, fully, entirely, and absolutely," &c. &c. "The inhabitants (as subjects of the King of Great Britain, and under his sovereignty, crown, jurisdiction, and government) being permitted to remain there, and to enjoy the free exercise of the Roman Catholic religion in the same manner as they do at present, it being always understood, as it is now declared once for all, that the same regulations shall be observed for the exercise and preservation of the Roman Catholic religion in Tangier, and all other places which shall be ceded and delivered by the King of Portugal into the possession of the King of Great Britain, as were stipulated and agreed to on the surrender of Dunkirk into the hands of the English; and, when the King of Great Britain shall

(*t*) See a copy of this treaty in the Records of Government, Vol. II., Public Department, A.D. 1773.

send his fleet to take possession of the said Port and Island of Bombay, the English shall have instructions to treat the subjects of the King of Portugal throughout the East Indies in the most friendly manner, to help and assist them, and to protect them in their trade and navigation there."

The distinction (noticed by Sir A. Anstruther) between the stipulations contained in this treaty as to Tangier and those as to Bombay is very remarkable. Though the free exercise of the Roman Catholic religion for the inhabitants of both those places is stipulated for, the retention of the existing laws and customs of Tangier alone is provided for. The absence of any such reservation in favour of the laws and customs of the inhabitants at large, or Portuguese inhabitants in particular of Bombay, cannot have been unintentional. We have not to look very far for the reason for this distinction between Tangier and Bombay. Two months and twenty days before the date of this treaty of cession the laws of England were, as we have seen, introduced by the charter of 13 Car. II. (3rd April 1661) as the guide in all cases, civil and criminal, in the factories or places in India which the London Company then had, or thereafter might have. It is not too much to suppose that the advisers of King Charles II. thought that it would be too glaring an inconsistency that the laws of England should prevail in the factories and settlements of the Company in India, and that the Portuguese or some other laws not English should prevail in the territory of the Crown in the same country. When we look at the names of the plenipotentiaries, Lord Chancellor Clarendon [Hyde], the Earl of Southampton, the Earl of Albemarle [Monk], the Duke of Ormond, the Earl of Manchester, and Sir Edward Nicholas and Sir William Morice (Secretaries of State), who entered into that treaty on behalf of Charles II., we cannot be surprised at finding that such an inconsistency was avoided. No such reason existed against the preservation of the laws and customs of the inhabitants of Tangier.

That treaty reserved, as has been seen, to the inhabitants of the island of Bombay, permission to remain there, and

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to enjoy the free exercise of the Roman Catholic religion; but, although I have often carefully perused the twenty articles of which the treaty consists, I have been unable to discover in it any such general reservation of their "privileges and rights," as Sir A. Anstruther mentions. He could scarcely have intended to refer to the twelfth article of that treaty, which was as follows:—"In order that the subjects of the King of Great Britain may enjoy more ample benefits from their trade and commerce throughout the King of Portugal's dominions, it is covenanted that the merchants and factors, over and above the grants made to them by former treaties, shall, in virtue of this treaty, have the liberty of residing in all places where they shall judge proper, and particularly that they shall dwell and enjoy the same *privileges* and *immunities*, so far as they relate to trade, as the Portuguese themselves, in the cities and towns of Goa, Cochin, and Diu, provided, however, that the subjects of the King of Great Britain resident in any of the aforesaid places shall not exceed the number of four families in any one of them." The privileges and immunities, here spoken of, are manifestly privileges and immunities of residence and trade, to be enjoyed not in Bombay, but in places still continuing under the government of Portugal. It is not improbable that, by an error of memory, Sir A. Anstruther attributed to the marriage treaty of 1661 the clause as to privileges contained in the charter of 1668, of which we shall presently speak.

The Earl of Marlborough was deputed to take over possession of Bombay, its territories and appurtenances, on behalf of Charles II. Disputes arose between him and the Portuguese as to whether the islands of Salsette and Caranja formed part of the territories and appurtenances of Bombay. After some fruitless endeavours to arrange the extent of cession, the Earl returned to England, leaving Sir Abraham Shipman, who with five hundred troops had accompanied him to India. Sir Abraham landed his men at the island of Anjeediva, not far from Goa. He and the greater part of the troops having died on the island from want of provisions and accommodation, and the unhealthiness of the cli-

mate, (*u*) his secretary, Mr. Humphrey Cooke, "to preserve his own life and the lives of the remaining troops" (*v*), acceded to a treaty with the Viceroy of Goa, Don Antonio de Mello e Castro, for the cession of Bombay, substantially renouncing all claim to the neighbouring islands, granting to the Portuguese of those islands the free use of the fisheries and of the harbour of Bombay, without payment of tribute or custom duty, and free ingress and egress for the fleets of the King of Portugal; that owners of estates in the island of Bombay, whether resident there or not, should be free to farm those estates, or to sell them, on the best terms procurable, and should the English require them they should give for them their fair and just value;—that all deserters, runaway slaves, "Gentoos" in charge of property belonging to Portuguese or other subjects of the King of Portugal, *Curumbees* (Kunbís), Bhandáris, and artificers who might escape from Portuguese territory, and place themselves under the protection of the British flag, should be immediately sent back to the Portuguese territory. It also contained provisions for the free exercise of their religion by the inhabitants of the island, and *inter alia* the following clause: "Persons possessing revenue at Bombay derived either from patrimonial or crown lands, shall continue to possess them [*sic*] with the same right, and shall not be deprived thereof, except in cases which the laws of Portugal direct, *and their sons and descendants shall succeed to them with the same right and claim* above mentioned, and those who may sell the said patrimonial or crown estates shall transfer to the purchasers the same right and perpetuity they had, that the purchasers may enjoy the same, and their successors in the like manner." It was also provided that the inhabitants and landholders of Bombay should not be obliged to pay to the Crown of England a higher foras than they used to pay to the Crown of Portugal. A copy of that treaty will

(*u*) Fryer says: "In the meanwhile Sir Abraham Shipman, with near 300 of his best men, rested content without any further acquests, leaving their bones at Angediva, poisoned partly by the noisomeness of the air, the violence of the rains, and the little defence against them, but chiefly by their own intemperance."

(*v*) 2 Bruce's Annals 155.

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ke found at pages 1987 to 1994, and a summary of it at pages 1994 to 1996, of Vol. 95 of the Diary of the Revenue Department at the Bombay Secretariat for 1814, being Nos. 1 and 2 of the papers which form the Appendix to Mr. F. Warden's Report, or Essay, on the Landed Tenures of Bombay, which Report has been *in part* published in the Proceedings of the Bombay Geographical Society for June to August 1839.

Some only of the documents annexed to it, or abridgments thereof, including the treaty entered into by Humphrey (Inofre) Cooke, have been published in the same number of the Bombay Geographical Society's Proceedings, at page 68 to page 71.

The so-called treaty of Humphrey Cooke with De Mello e Castro was never ratified, either by the Crown of England or that of Portugal, and was expressly repudiated by the former (*w*).

In a letter (*x*) from Charles II., dated the 10th of March 1676-7, to Lewis de Mendoça Furtado, Count of Lavradio, Viceroy and Captain General of Indian Affairs and Dominions for the Regent of Portugal, Cooke's treaty is thus spoken of: "That very unjust capitulation which Humphrey Cooke was forced to submit to at the time when that place (Bombay) was first transferred to our possession, which capitulation neither he, Humphrey, was empowered to come unto, nor any one else to impose upon him in contravention to a compact" (the treaty of the 23rd of June 1661) "framed in so solemn and religious a manner. We therefore are determined to protest against the said capitulation, as prejudicial to our Royal dignity and derogatory to our right, which we hold in the higher estimation for coming to us, in part of her dowry, with our aforesaid dearest Consort." The

(*w*) 2 Bruce's Annals 168; Warden's Report on the Landed Tenures of Bombay, paras. 10, 187, 188, 189 (pp. 4, 43, 44 of the printed edition); Anderson's English in Western India, 113, 353; 1 Mill Hist. Ind. 67, 5th ed.; and see per *Perry*, C. J., in *Wardens of Nossa Senhora v. Bishop Hartmann*, Perry's Oriental Cases, p. 335.

(*x*) Copy in Records of Government Vol. 27, Public Department, for 1773-4, p. 146.

same letter also speaks of the displeasure with which Charles II. had learned "that our subjects going by sea on the prosecution of their trade unto the dominions of the Great Mogul and Savagee (Sivájí), between whom and us a good understanding subsists," were charged with a tribute for sailing "through the open Straits of Tannah, as also for passing by Caranjah, though lying contiguous on the very waters of our said Port" (Bombay), and that he (Charles II.) had forbidden the East India Company to submit to that tribute.

A subsequent effort, made in 1699-1700, by the Portuguese, to induce the Government of Bombay to form a treaty recognising the treaty of Humphrey Cooke, completely failed (*y*).

By Royal Charter (20 Car. II.) dated the 27th of March 1668, *reciting the Charter of the* 13 *Car. II.* (*3rd April* 1661), and reciting also the treaty of the 23rd of June 1661, Charles II. did "give, grant, transfer, and confirm" to the London Company the Port and Island of Bombay, "with all the rights, profits, territories, and appurtenances thereof whatsoever, and all and singular royalties, revenues, rents, customs, castles, forts, buildings, and fortifications, privileges, franchises, preëminences, and *hereditaments* whatsoever," &c., in as large a manner as the Crown of England enjoyed or ought to enjoy them, under the grant of the King of Portugal in the treaty of 1661, "and not further or otherwise," and created the London Company "the true and absolute Lords and Proprietors of the Port and Island and premises aforesaid, and of every part and parcel thereof," which appertained to the Crown of England by force of the grant of the King of Portugal, "and not further or otherwise" (saving the allegiance due to the Crown of England, and its royal power and sovereignty over its subjects in and over the inhabitants of the port and island), "to have, hold, &c. the said Port and Island, &c. "unto them," the said Company, "to the only use of them," the said Company, "their

(*y*) Anderson 353, citing a letter from Sir J. Gayer and his Council to the Court of Directors, dated 1st February 1700.

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successors and assigns for evermore, to be holden of Us, our heirs and successors, as of the Manor of East Greenwich in the County of Kent, in free and Common Socage, and not in Capite, nor by Knight's Service," at the rent of ten pounds yearly payable to the Crown (z).

This charter reserved, as the treaty of 1661 had done, to "the inhabitants of the said Island" "the free exercise of the Roman Catholic religion," "and further also that the said inhabitants, and other our subjects in the said Port and Island, shall and may peaceably and quietly have, hold, possess, and enjoy all their several and respective properties, privileges, and advantages whatsoever which they lawfully had or enjoyed, or ought to have had or enjoyed, at the time of the surrender of the said Port and Island to us as aforesaid, or at any time since, anything in these presents contained to the contrary notwithstanding." We think that this proviso cannot be regarded as conferring upon the inhabitants of the island any other or higher rights than they were entitled to under the marriage treaty of Charles II.

The charter also provided that the Company or their assigns should not at any time "sell, alien, transfer, or otherwise dispose of the said Island and premises, or any part or parts thereof, to any Prince, Potentate, or State, or other person or persons whatsoever, but such as are or shall be the subjects and of the allegiance" of the Crown of England. Had the question as to the introduction of so much of the English law of real property as prevents aliens from holding freehold land arisen in Bombay, which arose in *The Mayor of Lyons* v. *The East India Company*, with respect to lands in Calcutta and the Bengal Mofussil, this proviso would have been important (a). In saying so, however, we are not to be understood as intimating any opinion that the result of such a question arising in the present day at Bombay might not be the same as it was in Calcutta and the Mofussil. We have not met with such a proviso in any of the other charters relating to India.

(z) See Perry's Oriental Cases 62.

(a) See the remarks of Lord Brougham in *the Mayor of Lyons* v. *The E. I. Company*, 1 Moore's Ind. App. 275.

This charter further contained a power for the Company "to ordain, make, establish, and under their common seal to publish, any laws, ordinances, and constitutions whatever, for the good government and other use of the said fort and island of Bombay and the inhabitants thereof," and also "to impose pains, punishments, and penalties, by fines," &c. &c. "for the observation of the same laws," &c., "*so always as the said laws, &c., pains, &c., be consonant to reason, and not repugnant or contrary, but as near as may be agreeable, to the laws of this our Realm of England.*"

It further provided that it should be lawful for the Company, "by themselves or by their Governor or Governors, officers, and ministers, &c., according to the nature and limits of their respective offices and places within the said port and island of Bombay, the territories and precincts thereof, to correct, punish, govern, and rule all and every the subjects of Us, our heirs and successors, that now do or at any time hereafter shall inhabit within the said port and island, &c. according to such laws," &c. as by the said Company, "in any general Court or Court of Committees as aforesaid, shall be established, and to do all and every other thing and things which unto the complete establishment of justice do belong, by Courts, Sessions, forms of judicature, and manner of proceedings therein, *like unto those established and used in this our realm of England*, although in these presents express mention be not made thereof, and by Judges and other officers" by the Company, or by the "Chief Governor or Governors of the said port and island of Bombay, to be delegated to award process, hold pleas, judge and determine *all actions, suits, and causes whatsoever, of any kind or nature whatsoever*, and to execute all and every such judgment, so always as the said *laws, ordinances, and proceedings* be reasonable, *and not repugnant or contrary, but as near as may be agreeable, to the laws, statutes, government, and policy of this our Kingdom of England*, and subject to the provisos and savings herein." (*b*). It also

(*b*) See Perry's Or Ca. 63, n., referring to a passage in Clark's Colonial Law p. 7, n. 9, which is as follows: "But when by royal commission a new legal constitution has been granted to a colony establishing a legis-

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for military purposes, or in case of rebellion, mutiny, or sedition, purported to sanction the use of military law (*c*). It further declares that "all and every the persons being our subjects which do or shall inhabit within the said Port and Island of Bombay, and every of their children and posterity, &c., within the precincts and limits thereof, shall have and enjoy all liberties, franchises, immunities, capacities, and liabilities of free denizens and natural subjects within any of our dominions, to all intents and purposes as if they had been abiding and born within this our Kingdom of England, or in any other of our dominions."

The next proviso is also important. It declares that it shall be lawful for the Company, their agents, factors, and servants," to have, hold, *exercise*, enjoy, and *execute* all and singular the *jurisdictions*, powers, liberties, privileges, benefits, and advantages whatsoever within the said Port and Island of Bombay, " &c., as they or any of them " may or can hold, use, *exercise*, enjoy, and *execute*, by force and virtue" of the Charter 13 Car. II. (3rd April 1661), "*in any other place or places of the said East Indies, or* touching any other their plantations, &c., and servants or, &c. &c., comprised or mentioned, or intended to be comprised, within our said charter or letters patent, in as large and ample manner, to all intents, constructions, and purposes, *as if the said jurisdictions*, powers, liberties, &c. &c., *were herein particularly mentioned and expressed.*"

The reason given by Lord *Kingsdown*, in *The Advocate General* v. *Ranee Surnomoye Dossee* (*d*), for not holding that the Charter 13 Car. II. (3rd April 1661) conferred jurisdiction (by the authority given to the Governors and their Councils to judge all persons belonging to the said Company, or that

lature, courts of justice, &c., the commission has generally directed that the law administered in its courts of justice, shall be in all things as nearly agreeable as possible to the law of England. After the issuing of such commission, therefore, the law of England is the rule in cases not specially provided for." And see *ibid.*, pp. 25, 26.

(*c*) For an instance of capital punishment by martial law at Bombay, A.D. 1674, see 2 Bruce 367, 368, and Anderson 219.

(*d*) 9 Moore's Ind. App. 426.

should live under them) over native subjects of the Mogul does not seem applicable to Bombay. It was not a factory, such as the Company had at Surat or on the Hooghly, or in many other parts of India. It was not held by the Company from the Mogul or any other Native power. The full sovereignty of the island had been acquired by Charles II. from the King of Portugal, and Charles II. had full power by those letters patent of 1668 granting the Island to the London Company, expressly purporting to provide for legislation and administration of justice in accordance with the law of England, and by reference incorporating in those letters patent all jurisdictions &c. mentioned in the charter of the 3rd of April 1661, to introduce English Law for the government of all persons resident in Bombay. It may perhaps be considered that, on the principle *expressio unius exclusio alterius*, the marriage treaty of 1661, by expressly reserving their laws to the inhabitants of Tangier, and by silence as to the laws of the inhabitants of Bombay, implied that the English Law should prevail in Bombay.

Subsequently to the cession of the island by the Portuguese to the Crown, disputes arose between the Government and the inhabitants, as to what lands belonged to the latter, and what had belonged to the Crown of Portugal. Those disputes continued after the island was made over to the Company (*e*). Under date the 12th of November 1672, certain articles of agreement (*f*), (known as Governor Aungier's Convention), were entered into between Governor Aungier and his Council, on behalf of the Company of the one part, and "the people of this Island" of the other part. That convention recites that since the surrender of Bombay to the Crown of Great Britain, "some occasions of great discontent did succeed, through the want of a good under-

(*e*) 2 Bruce's Annals 191, 255; Warden, paras. 21, 28, 57, pp. 7, 8, 10, and 17 of the printed edition.

(*f*) See copy at p. 1996 of the Diary for the Revenue Department for 1814. This convention has not been printed in the Proceedings of the Geographical Society with Mr. Warden's Report, although forming No. 3 of the Appendix to the original Report. That Report and all its Appendices were copied into the Diary above mentioned.

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standing of what did belong of right to the Crown, and what did belong to the people, which gave the original cause of seizing of lands and estates of several people, to the general disquiet of His Majesty's subjects." The grant of Bombay by the Crown to the Company was also recited, and that orders were issued by the Governor in Council, "in obedience to His Majesty's and the Hon'ble Company's commands, for restoring the said lands to the persons who were aggrieved, provided that, upon examination of their titles, they could show just right thereunto;" but that it so happened that, in the examination of such titles, many doubts arose, which gave cause of disquiet to the present possessors of houses and lands, and that the people, "in a public declaration and manifesto," proposed to the Governor in Council the payment of "a yearly contribution or composition, of 20,000 xeraphins (*g*) per annum to the Honourable Company, *including the present quit-rent or foras* (*h*), provided that the present possessors of their respective lands and estates may be confirmed and established in their possessions, and thereby be secured from all doubts and scruples that may arise thereafter, and that the lands formerly seized may be restored to the pretenders thereunto; that, at the desire of the Governor in Council, "a general assembly of the chief representatives of the people" was held on the 1st of October 1672, at the Castle of Bombay; and on the 4th

(*g*) Thirteen xeraphins *tempore* Charles II. equalled £ 1-2-6 sterling. The xeraphin contained five tangoes or three larees. Fryer, Letter IV., chap. VII., p. 205.

(*h*) "*Foras*" is derived from the Portuguese word "*fora*," (Latinè *foras*, from *foris* a door), signifying *outside*. It here indicates the rent or revenue derived from outlying lands. The whole island of Bombay fell under that denomination when under Portuguese rule, being then a mere outlying dependency of Bassein. Subsequently the term *foras* was, for the most part, though perhaps not quite exclusively, limited to the new salt batty ground reclaimed from the sea, or other waste ground lying outside the Fort, Native Town, and other the more ancient settled and cultivated grounds in the island, or to the quit-rent arising from that new salt batty ground and outlying ground. The quit-rent in Governor Aungier's convention called *foras* also bore the still older name of *pensio* (*pensao*, pension), and since that convention has been chiefly known by the name of *pension*. It was payable in respect of the ancient settled and cultivated ground only. *Vide infrà*, note (*p*), page 45.

of the same month, they presented to the Governor in Council a paper containing twelve proposed articles of agreement, which were publicly read at "another general assembly, whereunto all the people in general interested in this affair were invited to appear," which was held on the 1st of November 1672, and this convention or "composition between the Hon'ble East India Company and Inhabitants of this Isle of Bombay and Mayim, subjects of the said Company, and others, that having *lands of inheritance* on this isle are living in other places," was agreed to. There were present at this meeting Governor Aungier and his five Members of Council, all bearing English names, and amongst them Mr. James Adams, "Attorney General for the Hon'ble Company;" also the English Secretary to the Council, the Portuguese Secretary, and a Portuguese named DeLima, Assistant to the Attorney General. The chief representatives of the people were also present, namely, "Father Reginald Burgos, Procurator for the Reverend Fathers of the Society of Jesus, Mr. Henry Gray,* Signor Alvaro Perez de Tavora, Lord of the Manor of Mazagon," and five other persons bearing Portuguese names, one of whom is described as a procurator. It is unnecessary to state the twelve proposed articles at full length: suffice it to say that they comprised the offer of a payment, by the inhabitants, of 20,000 xeraphins yearly, including therein the quit-rents theretofore paid, and, in substance, stipulated that the Company should waive all claims to the estates in the possession of the inhabitants, and should confirm them, "notwithstanding any suspicion that the present possessors may have fallen into," and should deliver up to "the old possessors, of what condition soever," the estates which had already been seized; that the lands should not be measured, "that the people may not be at so great a charge, considering their extreme poverty;" that if any exemption should be granted by the Company to any individual of his share of the 20,000 xeraphins, the amount of that share should be deducted out of the 20,000 xeraphins, "and this in respect this

* Henry *Gray* may probably be a clerical error for Henry *Gary*, mentioned *infrà*, p. 47.

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composition is made upon all estates and *lands of inheritance* of the interested in the Isle." Similar deductions were demanded in the event of any of the oarts, batty-grounds, of other lands subject to the annual charge, devolving upon the Company, or being taken for the purpose of building the city or fortifications, or if any of the palmyras were cut down for those purposes. None of the proposed articles contained any reference whatever, either direct or indirect, to the course of descent of or succession to immoveable or any other property belonging to the inhabitants. The articles ultimately agreed to and accepted on both sides were fourteen in number. The 1st was "That in consideration of the 20,000 xeraphins to be paid annually, at three payments, into the Hon'ble Company's Treasury," the Governor in Council, on behalf of the Company, promised "to put a final end to all claims, pretences, and lawsuits whatsoever, which have arisen or may arise between the Hon'ble Company and the people touching the titles, lands, or estates of palmyras, cocoanut trees, or batty grounds, throughout the whole isle, excepting what is by joint agreement excepted." The 2nd, "That to the present possessors be granted new patents, confirmed according to the respective titles by which their heirs and successors shall enjoy their estates." The 3rd in substance declared that deductions should be made from the 20,000 xeraphins to the extent of any exemption granted by Government to any individual contributor, and also if any lands subject to the tribute should be taken for public purposes, "and this in respect the said contribution is made upon all the estates and *lands of inheritance* of the whole isle." The 4th, "That all estates of batty grounds and cocoanut trees seized by the former government, and now in possession of the Hon'ble Company, shall be restored to their respective owners, and they, *their heirs* and successors, confirmed in their said possession as above is expressed." The 5th article provided that if any of the said lands &c. should devolve upon the Company by any title whatsoever, or if any trees were cut down, or "oarts of batty ground made use of for the building of cities, towns, or fortifications, then the value of the said lands or trees shall be

computed, and a proportionable abatement" made out of the annual contribution. The 6th article contained the assent of the Governor in Council to the manuring of the palmyras and batty grounds with fish, provided the Company sanction the same (*i*). The 7th provides for an abatement in the annual contribution in the event of injury to the lands or estates, by storm or other calamity. The 8th provides for the collection of the annual tribute by persons to be nominated by the contributors, and two persons to be nominated by Government. The 9th article is as follows: "That all royalties, rights, privileges, immunities, which did formerly belong to the Crown of Portugal *of* (*j*) foras and royal rents, of what nature or condition soever, they shall be saved, as of right they belong to the Hon'ble Company. The 10th article reserves to the Company "the little isle Colio (*k*), reaching from the outer point westwardly of the Isle to the paccary (*l*) called Polo" (*l*), which, it is stated, "will be of great use to the Hon'ble Company in the good design which they have for the security and defence of the whole Isle." A "reasonable satisfaction" is promised to "the persons interested therein." The 11th article provides for the time at which the tax or tribute should commence, and that the first payment thereof should "be left in the hands of the people by the Governor in Council, towards purchasing and buying out those persons who have estates and lands in the Colio." The contributors were, however, to pay the quit-

(*i*) The Company is recited to have previously objected to such a practice. And see Fryer, Letter II., chapter I., p. 68, and Despatch from the Council of Surat to the Deputy Governor and Council of Bombay dated 4th June 1672: Outward Letter Book, Vol. I., p. 267.

(*j*) *Sic* in copy; *quære* whether "of" is not a mistake for "and."

(*k*) "Colio" is probably derived from the Coli or Koli fishermen, who had a village or hamlet on the isle, which would appear to be that now known as Colaba or Koolaba—Arabic for a strip of land running out into the sea.

(*l*) Pákhadí, Maráthi for a paved path, or an alley (literally a wing) of a village.

(*m*) Polo, a corruption of Pálwa, derived from Pál (पाल), which, *inter alia*, means a large fighting vessel, by which kind of craft the locality was probably frequented. From Pálwa or Pálwar the bandar now called Apollo is supposed to take its name. In the memorial of a grant of land, dated 5th December 1743, by Government to Essa Matra, in exchange for land taken from him as site for part of the fort walls, the pákhadí in question is called "Pallo."

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rent as usual. The 12th article provided for the survey of the whole isle, and measurement of the lands and estates of each person at a moderate charge. The 13th, "That there shall be reserved for the Hon'ble Company's Service all grounds on the water side within the compass of the Isle, to be disposed of in necessary occasions for the public, excepting such ground wherein there are at present planted gardens of cocoanut trees, or rice grounds, as also churches, houses, or warehouses of stone; and whensoever for the public good it shall be necessary to make use of any of the said places or properties, the Governor and Council shall make satisfactions to the interested in a reasonable manner. But the people are to take notice that they receive in this particular favour from the Hon'ble Company, their Governor and Council, in regard that in all Kingdoms of the World, the ground on the water side from the distance of forty yards at least from high-water mark belongs, as a sovereign right and privilege, to the Kings or Princes thereof." The 14th article declared that the Governor and Council established and ratified this agreement as perpetual and irrevocable between the Company and the people, and contained a promise by the Governor in Council to prevail with the Company "to establish and confirm the same by a patent made under their hands and seals."

That Convention was signed by the Governor, the Deputy Governor (Captain John Shaxton), the five Members of Council (including Attorney General Adams), and the English Secretary to the Council, and purported to be sealed with the Company's seal. It was also signed by "one hundred and twenty of the eminents of the Povo (*n*), on behalf of the whole Povo of the Isle."

The Governor and Council having "been given to understand that several inhabitants of the Isle did give out divers words tending to the dishonour and discredit of the Hon'ble Company's Government on this Isle, saying that the abovesaid contract made between the Governor or

(*n*) *Povo*, people.

Hon'ble Company and the Povo was unjust" (*o*), reconvened all the Povo in a general assembly on the 16th of July 1674, and desired them "to declare their minds freely, without the least apprehension of fear, concerning their sense of the said contract, and whether they owned those exclamations against it; declaring further that they were at their own liberty whether it should be disannulled and made void, or be confirmed. Whereupon the Povo in general said they never exclaimed against the said contract, but were thoroughly satisfied therewith, and of the justice thereof, it being an affair of their own request and seeking after, and desired that the Governor in Council would be pleased to ratify and confirm the said contract unto them, which was unanimously on both sides agreed on, and signed and confirmed by both parties in Bombay Castle, the 16th July 1674, 26 Caroli Secundi Regis Angliæ &c." (*p*)

(*o*) In a subsequent despatch to the Court of Directors, dated 17th January 1675-6, Governor Aungier and his Council wrote: "When the contribution of 20,000 xeraphins per annum raised on the lands was established, certain English, very few in number, who possessed lands, refused to pay what was assessed on them, pretending they did not sign the contract, which we thought not prudent to take much notice of during the war. But, since, we have demanded what they owe thereon; which they have much complained of, and we presume will present your Honours with a petition, whereunto we have only to say that a few might be gratified if the consequences were not evil. Private property is generally too eagerly pressed, without regard to public inconvenience. It may so fall out that a great part, if not the whole, of the lands on the island, may fall into the hands of the English, who might pretend the same privilege, and therefore we thought it not safe to begin an evil example. But we submit to your better judgment, it were well if the English were encouraged to plant on the island, which would be made secure, if all the land were possessed by them. But some better way may be found to privilege them above others, which we recommend to your Honours' better judgment."

(*p*) Mr. Warden, at para. 33 of his Report on the Landed Tenures of Bombay, (p. 11, printed edition,) says of Governor Aungier's Convention:—"At this early period, therefore, were the inhabitants secured in their possessions; all who now hold property subject to the payment of what is called pension (pensão), possess it by a tenure of which the Government cannot deprive them unless the land is required for building 'cities, towns, or fortifications,' when reasonable satisfaction is to be made to the proprietors." Mr. LeMessurier, Advocate General, in his Report printed in No. III. of Bombay Government Records, New Series, para. 56, p. 16, says of the same Convention that it referred "to lands which are known under the designation of Fazendary lands, paying pension and tax, and not to foras or salt batty lands, which it may be said were not at that time in existence, having been recovered from the sea some years afterwards." *Vide supra*, note (*h*), p. 40. As to the probable extent of the lands on which the Convention operated, see Warden.

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Whether there was any formal ratification, by the Court of Directors, of Governor Aungier's Convention, does not appear. In the answer of the Company to the memorial of the Portuguese Envoy, relative to the military services of the Portuguese inhabitants of the island of Bombay, dated 18th March 1691-92, it appears to have been referred to as a valid and subsisting arrangement (*o*). There is not any doubt that it has been acted upon by the Government of Bombay and the inhabitants.

The annual payment of 20,000 xeraphins, which was the foras or quit-rent fixed by this Convention, continues to the present day under the name of pension (pensão), a name of great antiquity, and which in Latin, pensio, designated the yearly payment made by tenants in emphyteusis, a species of tenure which it will be necessary that we should again mention.

The island of St. Helena was, by Charter 25 Car. II. (16th Dec. 1674), granted by the Crown to the Company; to hold in free and common socage as of the manor of East Greenwich, and not *in capite* or by knight's service.

The Charter 28 Car II. (5th Oct. 1677) recites and confirms the charters 13 Car. II. (1661) and 20 Car. II. (1669), which have been already mentioned.

The Charter 35 Car. II. (9th August 1683) recited the confirmation, by the Charter 13 Car. II., of the charters of Elizabeth and James I., and the monopoly of trading thereby granted to the London Company; and that the London Company had complained of many "disorders and inconveniences which have happened and been committed" by British subjects and foreigners, and that many other difficulties might arise necessary to be redressed; and established a Court of Judicature to be held at such places, forts, plantations, or factories upon the coast, as the Company should from time to time direct, and to consist of "one per-

para. 60 (p. 18, printed ed.), and as to the addition of tax to pension, *ibid.*, paras. 71 to 74 (pp. 23, 24, printed ed.).

(*q*) 3 Bruce's Annals 104. 105; Warden's Report, paras 32, 53 (pp. 10, 16, printed ed.).

son learned in the civil law, and two merchants," to be appointed by the Company, with power to determine what may be briefly described as all mercantile and maritime cases, and trespasses, injuries, and wrongs committed upon the high seas, or in the trading limits of the Company in Asia, Africa, and America, "according to the rules of equity and good conscience, and according to the laws and customs of merchants."

In his recent able and learned argument in *Lopez* v. *Lopez*, I recollect that Mr. Edward Howard quoted, from 2 Bruce's Annals, p. 242, the recommendation of the Commissioners who took over Bombay for the Company from the Crown, in 1668, that, "as disputes must arise from the habits of the people, accustomed to civil Law, a Judge Advocate might be appointed to take cognizance and decide in such cases;" and he suggested that the fact of the appointment of a Doctor of Civil Law (Dr. John St. John) to be a Judge at Bombay, in 1683-84, was a compliance with the recommendation of the Commissioners, and indicated that the Civil Law, rather than the Common Law, then prevailed in Bombay. The phrase "civil law," however, coupled as it is with civil cases, was probably used by the Commissioners in contrast to military or martial law, and not as meaning the Roman law. That the Directors so understood it, would seem probable from their comment in 1670-71, which I shall presently mention, on the proposal that a professional Judge should be appointed. Mr. Edward Howard also sought to draw a like inference from the earlier appointment of Captain Henry Gary in 1677-78 (who had been previously Deputy Governor) to be Judge of the island of Bombay (*r*). Of him the late Rev. Philip Anderson, in his accurate and interesting work "The English in Western India," says, "Hamilton calls him an old Greek, but he had been born in Venice, of English parents. He was more merchant than soldier, and had gained some learning, being well acquainted with Latin, Greek, and Portuguese" (*s*). In a subsequent part of his

(*r*) 2 Bruce's Annals 407, 417.

(*s*) p. 116; and see Fryer, Letter IV., ch. II., p. 157, and Letter II., ch. I., p. 64.

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book, Anderson gives a remarkable instance of the mode in which Mr. Gary occasionally discharged his judicial duties (*t*). Mr. Edward Howard argued that whether Mr. Gary was Greek or Venetian, he was more likely to know the Civil than the English law, and probably for that reason, as well as his knowledge of Portuguese, was appointed Judge of the island of Bombay. But the Court of Directors in 1670-71, while approving of the plan of civil administration (of which, so far as it was judicial, I shall presently speak) of Governor Aungier, explained "that care should be taken that trial by jury should be introduced into the Courts of Justice, agreeably to English Law, but declined engaging a Judge versed in civil law, being apprehensive that such a person might be disposed to promote litigation, and probably might not obey the orders which the President and Council might find it for the interest of the Company to give him; it had, therefore, been resolved to send some persons who had received education in law, as civil servants, without making the practice of the Law their only object, and if they deserved well, they might be appealed to, as assistants in the Courts of Justice:" 2 Bruce's Annals, 279 (*u*). It was after this, in 1677, that Mr. Gary was appointed a Judge. In 1669-70 Governor Aungier had formed two Courts of Judicature in the island. The inferior court, consisting of a Company's civil servant, assisted by natives, who were to take cognisance of all disputes under the amount of 200 xeraphins, and the superior Court to consist of the Governor (*v*) or the Deputy Governor and Council, to whom appeals were competent from the inferior court,

(*t*) p. 20, referring to Hamilton's New Account, Chap. XVII.

(*u*) And see Anderson 130.

(*v*) By two minutes of Governor Aungier and his Council (31st January and 4th February 1669), it appears that in 1669, he and they, with the assistance of eleven additional councillors (specially appointed for the occasion) "and a jury consisting of half English and half Portugals," tried Mr. Richard Ball for the killing of Diego Rodrigues. The jury properly acquitted him, the evidence being of the weakest character. The constitution of the jury seems to have been in obedience to a prior general order of the East India Company, "that all cases of difference between English and Portugals should be decided by a jury of half English and half Portugals." Instances of juries empanelled in Bombay in 1672 are mentioned in the Surat Outward Letter Book, Vol. I., pp. 261, 267.

to take cognisance of all civil and criminal cases whatever, and their decisions were to be final and without appeal, except in cases of the greatest necessity; these courts were to meet regularly once a week: 2 Bruce's Annals, 271; Anderson 129, 130, 134 (*w*). Doctor Fryer, a Fellow of the Royal Society, whose travels in India commenced in 1673 and finished in 1681, whom Anderson affirms to be "next to official records the best authority we have for the knowledge of men and manners at that time," and whose account of Bombay contains intrinsic evidence of intelligent observation and precision, says: "The Government here now is English; the soldiers have *martial law*, the freemen *common;* the chief arbitrator whereof is the President with his Council at Surat; under him is a justiciary, and Court of Pleas, with a committee for regulating affairs, and presenting all complaints" (*x*). The administration of the Common Law, as described by Fryer, is in complete accordance with the Charters 13 Car. II. (3rd April 1661) and 20 Car. II. (27th March 1668), which made over Bombay to the Company. The constitution of the two civil courts, as described by Bruce, was warranted by those charters when taken in combination. The use of military law (mentioned by Fryer) for military purposes was countenanced by the latter charter.

The Charter 35 Car. II. (9th August 1683) contains, as has been already stated, a recital of the reasons for the creation of the new courts, each of which was to consist of a Doctor of Civil Law and two Merchants. By a despatch dated 7th April 1684, from the Court of Directors to the President and Council at Surat, the Court, in relation to Doctor St. John, says: "We have chosen Dr. John St. John, Doctor of the Civil Law, to be Judge of the Admiralty Court in the East Indies, and of all our maritime affairs there, to be erected in pursuance of His Majesty's additional Charter of the 9th August last, at the salary of £200 a year, and to

(*w*) And see minutes of Council on the 2nd of February 1669, Bombay Government Records.

(*x*) Fryer's Travels, ed. of 1698, Letter II., ch. i., p. 68; and see Letter II., ch. v., pp. 87, 88.

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have the accommodation of his own diet at the Governor's table of Bombay (but all other accommodation for himself and his two servants are to be at his own charge), and to take place at the Governor's table as Second. We therefore order and direct that a convenient place be assigned him for holding the Courts of Admiralty, and that you appoint such Officers as are necessary to attend that Judicature, which is designed for proceeding against all interlopers and private ships and persons trading in the East Indies, or to or from the East Indies, contrary to His Majesty's Royal Charter granted to us." After a direction that the proceedings of the Court should be carried on in English, and not in Latin, and that a table of fees should be published, the despatch continued thus :—

"His Majesty has been pleased, upon our approbation of him, to grant him a Commission under the Great Seal of England (*y*) to the purport aforesaid, and for which also he hath our Commission, under our larger Seal (*z*), a copy whereof we herewith send you. And he is, from time to time, to transmit to you, as also to represent unto the Deputy Governor and Council of Bombay, an impartial account of all his proceedings as Judge of the said Court, *but all other judicatures upon our said Island are to remain in the same condition and order they now are, and under the management of the same persons, until you receive our further orders after we have an account from you of the good deportment of the said Doctor* (*a*).

When Dr. St. John arrived in India, Bombay was in the hands of Captain Keigwin and the garrison, who had revolted against the Company, and declared that they had taken possession of the Island on behalf of the King (*b*). Dr. St. John's commission was, in the first instance, published, and his court erected, at Surat, on the 17th of September

(*y*) Dated 6th February 1683-84. (*z*) Dated 7th April 1684

(*a*) Professor Wilson's note 3 at page 83 of the 1st volume of Mill's History, 5th ed, stating that Dr. St. John had been sent out "to preside in all judicial proceedings at Bombay," requires modification.

(*b*) 2 Bruce's Annals, 512.

1684 (*c*). By the judicious policy of Sir Thomas Grantham, Captain Keigwin was, on the 19th of November 1684, induced to make a formal surrender of the Island to Sir Thomas Grantham, as bearing the King's commission, and by him it was immediately transferred to Dr. St. John, as the King's Judge, by whom it was delivered over to Mr. Zinzan, as the Company's Governor, until the arrival of the President, Sir John Child, from Surat (*d*). Shortly afterwards Dr. St. John's Admiralty Court was opened in Bombay. Subsequently he appears to have taken umbrage at having been strictly limited to maritime cases, and at not having been appointed, after his arrival in Bombay, to be the Judge to try *all civil actions* in Bombay. The President, Sir John Child, who had appointed Mr. Vaux to that office, retained that gentleman in it, and, of the conduct of Sir John Child in that respect, Dr. St. John complained in a letter to Sir Leoline Jenkins, Secretary of State. On the other hand, allegations were made that Dr. St. John had taken part with some of the interlopers (*e*).

The law which Mr. Vaux professed to administer was the law of England, a course disapproved by Sir Josiah Child, Governor of the London Company, who observed that the English laws were "a heap of nonsense compiled by a few ignorant country gentlemen," and that his orders, not the laws of England, should be the rules by which Mr. Vaux ought to abide (*f*). Mr. Vaux was also made Deputy Governor, but about two years afterwards was suspended from office, and was in 1697 accidentally drowned in the river Tapti (*g*). Dr. St. John's career as a Judge in Bombay would appear to have been closed at all events in the year 1690, if not, as seems more probable, at an earlier date (*h*). It is stated in the 3rd volume of Bruce's Annals, 439, that for the

(*c*) 2 Bruce's Annals, 538. (*d*) *Ibid.* 541; Anderson, 226.
(*e*) 2 Bruce's Annals, 565.
(*f*) See Perry's Oriental Cases, 573. Anderson 256.
(*g*) 3 Bruce's Annals, 125; Anderson, 256, 257.
(*h*) There is some slight evidence in the correspondence of the Bombay and Surat Governments that the office of Admiralty Judge was, subsequently to the retirement of Dr. St. John, held for a short time by Dr. Davenant.

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eleven years immediately preceding the years 1701-2, no court of judicature had been held in the island of Bombay. (See also 3 Bruce's Annals, 127, 568.)

By a commission (*i*) dated 20th January 1685, reciting the Charter 35 Car. II. (9th August 1683), the Company appointed Captain John Nicholson (*j*), Vice-Admiral of the fleet of ships then bound for the Coromandel coast, Judge Advocate of the Court of Admiralty in the Bay of Bengal, both at sea and on shore, during that expedition, and such two out of five factors as might be nominated by the Agent and Council at the Hooghly to be the Judge's assistants (*k*).

The Charter 2 Jac. II., dated 12th April 1686, contained a repetition of the provision in the Charter 35 Car. II. (9th August 1683) establishing courts of judicature, consisting of one person learned in the civil law, and two merchants; and referred to the charters of Eliz. and Jac. I.; and, reciting all of those of Car. II. (especially including those of 1661 and 1669), ratified and confirmed all of "the said Charters and Letters Patent," and gave, granted, constituted, erected, and established unto the London Company "all such, so many, and the like rights, &c., *jurisdictions*, &c., *courts* and authorities, together with such covenants, and subject to such provisions, and in such manner and form to all intents and purposes," as the London Company ever had or enjoyed, &c., "by force or virtue of *all or any* of the before recited Letters Patent."

This confirmation, it should be observed, clearly includes not only the new courts established for mercantile and maritime causes in 1683 by Charles II., and renewed, so to speak, by this charter of James II. in 1686, but also the courts of English law, the establishment of which was sanctioned by Charles II. by the charter of 1661, or authorised by the charter of 1669. The peculiar constitution of the

(*i*) See copy in the Inward Letter Book, 1685.

(*j*) It does not appear how Captain Nicholson was brought within the description of "a person learned in the civil law," as required by the charter of 1683.

(*k*) 2 Bruce's Annals 559.

new mercantile and maritime courts, which were to consist of one person learned in the civil law, and two merchants who were to decide according to the laws and customs of merchants, was used as an argument in *Jebb* v. *Lefevre* (*l*), in favour of the proposition that lands amongst a commercial community would have been treated as assets for the payment of all debts.

Sir Charles *Grey*, C.J., dealing with that argument, says: "The Courts established by Charles II. and James II., in which a person learned in Civil Law was to sit, and everything was to be decided by the Law Merchant, may be entirely laid out of consideration, for the Letters Patent from which these Courts derived their authority specify particularly what causes they are to entertain, and it is quite plain that they had no jurisdiction to hold any plea respecting lands or houses, or any interest in them, whether chattel or real."

The charter 5 Wm. and Mary, dated 7th October 1693, confirms the former charters, and in so doing expressly grants and confirms to the London Company all ports, islands, plantations, territories, &c. &c., *manors, lordships*, &c., houses, lands, tenements, *hereditaments*, &c., chattels real and personal, debts, &c., *jurisdictions*, &c., to which the Company were entitled under their former charters; and a subsequent part of this charter directs that "all the manors, lands, tenements, &c., chattels real, chattels personal, and other the premises" thereby granted and confirmed, should be subject to the Company's debts.

Of the Charter 5 Wm. and Mary, dated 11th November 1693, it is unnecessary to say more than that the laws &c. which the London Company is thereby empowered to make, are not to be "contrary or repugnant to the laws, statutes, or customs" of England.

The Charter 10 Wm. III., dated 5th September 1698, established and incorporated the English Company, and empowered it to hold "manors, &c., lands, rents, &c., heredita-

(*l*) Clarke's Addl. Rules and Cases, pp. 62 a, 62 d.

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ments, &c., and to purchase and acquire all goods and chattels whatsoever," and contained provisions as to courts for trying mercantile and maritime causes, precisely similar to those established by the charters of 1683 and 1686 granted to the London Company.

In the Indenture Tripartite of the 22nd of July 1702, between Queen Anne, the London Company, and the English Company, by which those two companies were united under the name of the United Company of Merchants trading to the East Indies (which I shall call the East India Company), Queen Anne sanctioned and agreed to confirm the grant and conveyance by the London Company to the English Company of the port and island of Bombay, and the island of St. Helena, with such "rights, &c., authorities, *hereditaments*, &c." as she might lawfully grant, and were granted by the Charters 20 Car. II. (27th March 1668) and 25 Car. II. (16th December 1674).

By Indenture Quinquepartite of the 22nd of July 1702, the London Company "granted, bargained, sold, assigned, and set over unto the English Company, the Ports and Islands of Bombay and St. Helena, with all the rights, &c., appurtenances, &c., prerogatives, royalties, &c., and *hereditaments* whatsoever" of the London Company in the same islands, or either of them, and also (*inter multa alia*) the factories at Surat, Swally, and Broach, and the factories of Amadavad (Ahmedabad), Agra, and Lucknow, the forts of Carwar, Tellicherry, and Anjengo, and the factory of Calicut.

By Letters Patent 13 Geo. I. (dated 24th September 1726), a corporation, consisting of a Mayor and nine Aldermen (seven of which aldermen were to be natural-born subjects of the Crown, and the other two aldermen might be "subjects of any other Prince or State in amity" with Great Britain), was established at Madraspatnam (Madras), and was constituted a Court of Record by the name of the Mayor's Court, and "authorized to try, hear, and determine all civil suits, actions, and pleas between party and party" that should or might arise, &c., "within the town of Madras-

patnam, or within any of the factories subject or subordinate unto Fort St. George, or to the Governor or President and the Council of Fort St. George." The civil jurisdiction was over any persons, at the time of the institution of the suit, residing or being, or who, at the time the cause of action accrued, resided, within the said Fort or Town, or the precincts, district, or territories thereof. The judgment and sentence was to be according to justice and right; and the execution was to be by seizure and sale of "*the goods and chattels*" of the defendant. In the event of the defendant withdrawing himself from the jurisdiction, and of the sheriff returning *non est inventus* to the summons or warrant, and upon verification (by affidavit or proof) of the plaintiff's demand, the Court might "grant a sequestration to seize the *estate and effects*" of the defendant. In the event of judgment being subsequently given for the plaintiff, the court was empowered "to direct *the effects* so seized to be sold, and out of the produce thereof to make satisfaction to the Plaintiff," and in case such produce should not be sufficient to make satisfaction to the Plaintiff, "to award execution for the residue of the duty and costs recovered in manner aforesaid." Similar Corporations and similar Mayors' Courts, with the same powers and jurisdiction as the Corporation and Mayor's Court of Madras, were by this charter established at Bombay and Fort William. By the same charter the Governor and Council of Fort St. George were constituted a Court of Record in the nature of a Court of Oyer and Terminer, with power to administer criminal justice, in all cases except high treason, "in the same or in the like manner as is used in that part of Great Britain called England," with the assistance of a grand and petty jury. The Governor and Council of Bombay, and the Governor and Council of Fort William, were by this charter constituted into Criminal Courts in Bombay and Fort William respectively, with the same jurisdiction as the Governor and Council of Madras. It also empowered the respective Governors and Councils of Madras, Bombay, and Fort William respectively, with the sanction of the Court of Directors of the East India Company, to make by-laws, rules, and ordinances for the good govern-

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ment and regulation of the several corporations thereby erected, and of the inhabitants of the said several towns, places, and factories, and to impose reasonable pains and penalties upon offenders against them, "provided that all such bye-laws, rules, and ordinances, and all pains and penalties thereby to be imposed, be agreeable to reason, and not contrary to the Laws and Statutes of England." It also authorised the Mayors' Courts to grant probate of wills and letters of administration "as touching the debts and estate" of the deceased. And the administrator was declared entitled to act as such, touching the *debts, effects,* and *estate* of the deceased. The form of administration bond to be prescribed by the charter was, however, conditioned only for the giving of "a true and perfect inventory of all and singular the *goods, chattels,* and *credits* of the deceased."

Of that charter, *Peacock*, C.J., in *The Advocate General of Bengal* v. *Ranee Surnomoye Dossee,* said with reference to Calcutta (*m*) : "It is a well recognized doctrine, and one which has been acted on by this Court for more than half a century, that, speaking generally, the first introduction of English Law into Calcutta was effected by the Charter of George I., by which, in the year 1726, the Mayor's Court was established. It is unnecessary to cite authorities in support of that position." Of the direction in that charter to give judgment "according to justice and right" in suits and pleas between party and party, he says it "could have no other reasonable meaning than justice and right according to the laws of England so far as they regulated private rights between party and party. Such general words could not possibly refer to any law such as the Mortmain Act or the Alien Laws, which had reference merely to some views of public policy supposed to be applicable to England, even though private rights might be affected by them. Still less could they be supposed to refer to the rights or revenues of the Crown, depending upon prerogative, and which were wholly inapplicable to a territory to which the Sovereignty did not extend."

(*m*) 9 Moo. Ind. App. 394, and see per Lord *Kingsdown*, Ibid., 426, 427.

The Charter 1 Geo. II., dated 17th November 1727, granted to the East India Company the fines &c. imposed by the Mayor's Court.

The East India Company, by petition, stated that in September 1746 the French, during their war with England, besieged and took Madraspatnam, and expelled its inhabitants; that the Mayor and most of the Aldermen afterwards died, or returned to Great Britain, or settled in other parts of India, whereby the Company were advised that the Mayor's Court at Madraspatnam was dissolved; and that it had been found by experience that there were some defects in the charter of 1726; and prayed His Majesty to accept a surrender of the charters of 1726 and 1727, and to grant a new charter for creating courts, civil and criminal, at Fort St. George, Bombay, and Fort William, with such alterations &c. as would tend to the better administration of justice. The Crown, accordingly, did accept such a surrender, which was made by the East India Company by indenture of the 6th of January 1753.

In the year 26 Geo. II., on the 8th of January 1753, the Crown granted a fresh charter to the East India Company, erecting, as before, corporations at Madraspatnam, Bombay, and Calcutta (consisting in each of these places of a Mayor and nine Aldermen, of which latter two might be foreign Protestants the subjects of any Prince or State in amity with England), and Courts of Record, called Mayors' Courts, with similar jurisdiction to try, hear, and determine "all civil suits, actions, and pleas arising in Madraspatnam, or in the factories subject to Fort St. George, or to the Government and Council thereof," as in the charter of 1726, but with the following variation:—"except such suits or actions shall be between the Indian Natives of Madraspatnam only; in which case we will that the same be determined among themselves, unless both parties shall by consent submit the same to the determination of the Mayor's Court." Suits were declared to be maintainable against persons residing or being, at the time of the institution of the suit, or at the time of the accruing

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of the cause of action, in either of the three localities in question, "unless the same shall be between the Indian Natives only as aforesaid, or unless such cause of suit shall not exceed five pagodas." Judgment was to be pronounced "according to justice and right." The provisions as to execution or sequestration against ordinary defendants were the same as those in the charter of 1726. The clause as to legislation to some extent differs from that in the charter of 1726, and empowers not only the respective Governors and Councils, but also the Court of Directors, to legislate for the Corporations *and Courts* and inhabitants. It, however, agrees with the charter of 1726 in providing that the legislation shall not be contrary to the laws and statutes of the realm of England.

This charter constituted Courts of Request to try suits for causes of action not exceeding five pagodas. The provisions constituting the Governors and their Councils respectively Courts of Oyer and Terminer for trying offences (*n*), and the provisions as to granting of probate and administration by the Mayors' Courts, were the same as those in the charter of 1726.

The Statute 13 Geo. III., c. 63, empowered the Crown to establish a Supreme Court in lieu of the Mayor's Court at Fort William, to consist of a Chief Justice and three other Judges, being barristers of England or Ireland. The number of the Puisne Judges was subsequently, by 37 Geo. III., c. 142, limited to two.

Accordingly by Charter 14 Geo. III., dated 26th March 1774, the Supreme Court was established at Fort William. It was, by clause 13, empowered to try and determine (amongst other suits) actions and suits arising upon or concerning "any rights, titles, claims, or demands of, in, or to any houses, lands, or other things *real* or personal in the several provinces of Bengal, Bahar, or Orissa, or touching the possession or any interest or lien in or upon the same, and

(*n*) Except that there was a slight diminution of the local extent of the jurisdiction of the Courts of Oyer and Terminer.

all pleas *real*, personal, or mixt," against the East India Company, the corporation of Calcutta, "and against any other of our subjects" resident, or who shall have resided, in Bengal, Bahar, or Orissa, or "who shall have any debts, effects, or estate, *real* or personal, within the same, and against the executors and administrators of such our subjects," and against other persons, to whom it is unnecessary now to make further reference. The judgment was (clause 14) to be "according to justice and right." Execution of judgments might be made by seizure and sale of "the houses, lands, debts, or other effects, *real* or personal," of the party against whom the suits were awarded, or by imprisonment. To compel appearance in suits, "the houses, lands, goods, effects, and debts" of the defendant might be sequestrated, and, in the event of judgment passing against him, might be sold. Criminal justice was to be administered as in England. Power was given to the court to grant probate of wills, and also to grant letters of administration of "the goods, chattels, credits and all other effects" of British subjects dying within the three provinces mentioned. The administrator was to give security "to the value of the estate, credits, and effects of the deceased." The condition of the bond, in the form prescribed by the charter, shows that the administrator "of the goods, chattels, and effects" of the deceased, was to make and exhibit in the court "a true and perfect inventory" of the "goods, credits, and effects." Jurisdictions similar to those of the courts of King's Bench and Admiralty in England were given to that court. Important alterations in and additions to that charter were subsequently made by the Stat. 21 Geo. III., c. 70; Stat. 24 Geo. III., c. 25; Stat. 26 Geo. III., c. 57; and 33 Geo. III., c. 52. The 17th section of the first of these statutes reserved to Gentús and Muhammadans their respective laws of inheritance, succession, and contract.

The Stat. 37 Geo. III., c. 142, authorised the Crown to establish at Madras and Bombay, in lieu of the Mayors' Courts, courts consisting of the Mayor and three Aldermen and a Recorder, who should be "a Barrister of England or Ireland."

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By Charter 38 Geo. III. (20th February 1798), those Recorders' Courts were established at Madras and Bombay. Jurisdiction similar to that of the Court of King's Bench in England, "as far as circumstances would admit," was given to them; also jurisdiction over all British subjects resident in any of the factories subject to or dependent upon the Governments of Madras and Bombay respectively, and to hear and determine "all suits and actions whatsoever" against any British subjects arising in territories subject to or dependent upon those governments respectively, or within the dominions of any Native power in alliance with those governments respectively, or against any person in the service of the East India Company, or of any British subject, and to try and determine all civil suits or actions rendered triable by Act of Parliament in the Mayors' Courts at Madras and Bombay respectively, and all suits and actions brought against the inhabitants of Madras or Bombay respectively; "yet nevertheless in the cases of Mahomedans or Gentús, their inheritance to lands, rents, and goods, and all matter of contract and dealing between party and party, shall be determined, in the case of Mahomedans by the laws and usage of the Mahomedans, and, where the parties are Gentús, by the laws and usages of the Gentús, or by such laws and usages as the same would have been determined by, if the suit had been brought and the action commenced in a Native Court; and, where one of the parties shall be a Mahomedan or Gentú, by the laws and usages of the defendant." Judgment in all cases was to be "according to justice and right." Execution was to be made by seizure and sale of "the houses, lands, debts, or other effects, *real* and personal," of the party against whom the writ should be awarded, or imprisonment, or both. The provision as to sequestration was similar to that in the charter of the Supreme Court of Fort William of 1774. An equitable jurisdiction, similar to that of the Court of Chancery in England, was given to these Recorders' Courts, and power to appoint guardians of the persons of infants and lunatics and of "their estates." The Recorder' Courts were also made Courts of Oyer and Terminer, to administer criminal justice as in England, "or

as nearly thereto as the condition and circumstances of the places and persons would admit," "attention being had to the religion, manners, and usages of the native inhabitants." Under their Ecclesiastical jurisdiction they were (*inter alia*) authorised to grant probate of wills of British subjects "dying and leaving *personal effects* within the said territories, and of all persons who shall die or have effects" within Madras or Bombay, and letters of administration "of the goods, chattels, credits, and all other effects whatsoever of the persons aforesaid." The proviso as to the giving of security, and the form of the administration bond, were similar to those in the charter of the Supreme Court at Fort William. The court was also empowered to grant letters of administration of the "money and effects," within the limits of its jurisdiction, of persons dying out of those limits. The Admiralty jurisdiction given was similar to that in the Fort William charter.

An illustration of the sense in which the word "effects" is used in this charter of the Recorders' Courts, is furnished by a clause in it directing that when "the monies, securities, and effects of suitors" are ordered to be paid into or deposited in court for safe custody, they are to be paid or made over to the local government, "to be by them kept and deposited with the cash and effects" of the East India Company. There was a similar clause in the charter of the Mayors' Courts of 1753.

The Stat. 4 Geo. IV., c. 71, authorised the Crown to create for Bombay and its dependencies a Supreme Court, with the same powers, and subject to the same restrictions, as those which the Supreme Court for Fort William and its dependencies then had and was subject to. The 17th section enacted that it shall be lawful for the Supreme Court at Madras, within Fort St. George and Madras and the factories &c. &c. dependent upon the Government of Madras, and "that it shall be lawful for the said Supreme Court of Judicature at Bombay, to be created by virtue of this Act, within the said Town and Island of Bombay and the limits thereof, and the factories subordinate thereto, and within the territories

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which now are or hereafter may be subject to or dependent upon the said Government of Bombay: and the said Supreme Courts respectively *are hereby required*, within the same, respectively to do, execute, perform, and fulfil all such acts, authorities, duties, matters, and things whatsoever as the said Supreme Court of Fort William is or may be lawfully authorized, empowered, or directed to do, execute, perform, or fulfil within Fort William, in Bengal, aforesaid, or the places subject to or dependent upon the Government thereof."

Accordingly, by Charter 4 Geo. IV., dated 8th December 1823, the late Supreme Court at Bombay was erected. The provisions of that charter are so familiar to the profession, that I shall merely notice that all the powers of the Mayor's Court under the charter of 1753, and of the Recorder's Court, are conferred upon it; that the provision as to the civil suits between Muhammadans and Gentús is the same as that in the charter of the Recorder's Court, except that the words "and succession" are introduced after "inheritance" in the charter of the Supreme Court; that execution is to be made by seizure and sale of "the houses, lands, debts, or other effects, *real* and *personal*, of the party against whom the writ should be awarded," or by imprisonment or both; that the provisions as to granting probate and administration, and the form of the administration bond, are the same as those in the charter of the Recorder's Court; and also the provision as to paying into court and depositing "the money, securities, and effects" of suitors, with "the cash and effects" of the East India Company.

Before referring to the authorities, it should be observed that a conflict of opinion arose as to the legality of a practice which would seem, to some extent, to have existed in Calcutta and Bombay, whereby the lands and houses of deceased persons other than Hindús and Muhammadans were sold by executors and administrators.

In *Doe d. Savage* v. *Bancharam Tagore* (o) it was held, in 1785, by the Supreme Court of Calcutta, that "the Common

(o) Morton R. 70, by *Chambers*, C.J., *Hyde*, J., and *Jones* (Sir Wm.), J.

law of England, and the greatest part of the Statute law, having been introduced here (Calcutta) by royal charters, the lands of British subjects must descend as in England, except in so far as the descent is interrupted, or the succession varied by Statute or Charter; and that the necessary consequence of the clauses in the Charter (Supreme Court, 1774) directing that actions, real as well as personal, may be brought not against the heir, but the executor, of a British subject leaving lands, and that houses and lands are to be subjected to execution for debt like chattels, is that land must go to the executor or administrator in the first instance," for the purpose of paying debts, but if not required for that purpose, or so far as it may not be so required, in trust for the heir at law. The administrator *de bonis non* of Whiffin, a British subject deceased, was there, by all of the Judges, held entitled to recover the lands in ejectment from the purchaser, to whom they had been sold by the sheriff under a *fi. fa.*, upon a judgment recorded against the second husband of Whiffin's widow. Whiffin had by his Will, attested by two witnesses only, devised to her a beneficial interest in the lands, which (the widow being dead at the time of the ejectment) was argued to be a life estate only, a point upon which *Chambers*, C.J., and *Hyde*, J., gave no opinion, as they held that the devise was of no effect, being insufficiently attested under the Statute of Frauds. *Jones*, J., inclined to the same opinion, but rested his judgment on the ground that the Will, even if sufficiently attested, gave the widow no more than a life estate.

But in 1815, the Supreme Court of Calcutta, in *Doe d. Arratoon Gaspar* v. *Paddolochum Doss* (*p*), held the eldest son of Gaspar Arratoon, an Armenian, and who, *while an infant*, had joined his mother, the widow and executrix of Gaspar Arratoon, in selling and conveying after his death, by Bengáli bill of sale, a house and premises in Calcutta to the defendant's sister, entitled to recover them in ejectment. The Advocate General, for the defendant, contended that the widow, as executrix, had power to sell the house and premises,

(*p*) East's Notes, No. XIX., 2 Morley's Dig. 30.

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"real property in India being on the same footing as personalty, and equally liable to executions for simple contract debts, &c." But the Court said: "As to the doctrine, attempted to be sustained by the Advocate General, that in the case, as this was, of an Armenian family, which is just the same with British subjects as to the laws of property in India, recognized real property is to be considered exactly as personalty, the Court entirely dissented from it, and said that the power given under the charter cited to seize realty in execution, was merely a power given to the Court, and not by any means to the executor or mere personal representatives, as it distinctly appeared by the words there used, viz., 'after judgement'; so that though the Court *may* do so at their discretion, the executors cannot *mero motû*." The Advocate General declared that this decision would invalidate many titles to realty in India, and overrule many judgments of the Supreme Court; but the Court denied this, and gave judgment for the lessor of the plaintiff, with costs. And in the year 1816, in the case of *Maria Zora, survivor of Stephen Carapit*, v. *Moses Cachecarraky* (*p*), *East*, C.J., reserved his opinion how far lands were made assets generally in the hands of executors and administrators, which was touched upon in the argument; not being satisfied that the charter (1774) had made them such generally, but only *sub modo*, under a writ of execution issued by the Court for debts recovered by judgment.

However, in *Joseph* v. *Ronald* (*q*), decided in 1818 at Calcutta, *East*, C.J. (with much doubt and difficulty, and, as he said, trembling at "the accumulated implications" from the language of the charter [1774] which he found it necessary to make in order to arrive at such a result), and Sir Anthony *Buller*, adhered to the doctrine laid down in *Doe d. Savage* v. *Bancharam Tagore*, that the executor or administrator of a deceased person, not being a Hindú or Muham-

(q) East's Notes, No. XLIX., 2 Morley's Dig. 70, 72.

(r) Cited in 1 Moore's Ind. App., pp. 310, 313, 314, 315, 320, 345; and in *Jebb* v. *Lefevre*, Clarke, Add. Rules & Cases, 62 c, 62 i.

madan, took an estate in lands and houses (held in perpetuity in Calcutta), for the benefit not only of judgment and specialty creditors, but also of simple contract creditors, and not a bare power of sale without an interest; and that, after those creditors were satisfied, the executor or administrator held the property, subject to the dower of the widow, for the heir at law. *Macnaghten*, J., dissented as to the last proposition, and was of opinion that lands in Calcutta were of the nature of chattel, and would, after payment of debts, go to the next of kin, according to the Statute of Distributions. We cannot discover that his view has ever found favour with any of the previous or subsequent Judges at Calcutta. Lord *Lyndhurst*, in *Freeman* v. *Fairlie*, says that he had read through the reasons assigned by Sir F. Macnaghten for his judgment, but that they were very unsatisfactory to his mind (*s*). Master Stephen had previously, in his Report, said that Sir F. Macnaghten's "construction of the Charter is utterly irreconcileable with the words of that instrument itself, which expressly describes real actions, and directs the sale by execution of real as well as personal property."

In *Gardiner* v. *Fell* (*t*) the lands were situate at Barrisaul, in Bengal, tenure of them by the testator under a zamindár was evidenced by pottahs; the testator had a perpetual right of occupancy, subject to the payment of certain fixed annual rents to the zamindár, and to forfeiture in case of nonpayment. The zamindár held the same land under Government by a similar tenure. Sir William *Grant*, M. R., by his decree in 1817, referred to the Master to inquire what was the nature of the interest which the testator possessed in lands, and whether they passed by his Will attested by two witnesses. The Master reported that the interest of the testator in the lands was in the nature of fee simple, and that no part thereof passed by his Will attested by two witnesses. The report was confirmed, and the cause coming on for further directions before Sir Thomas *Plumer*,

(*s*) 1 Moore's Ind. App. 345.
(*t*) 1 Moore's Ind. App. 299; S. C, 1 Jacob & Walker 22.

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M. R., in 1819, he said: "Next, to consider the true meaning of this report. The estate is said to be of the nature of fee simple; that is, it possesses the quality of a fee simple estate; it must, therefore, have the quality of being descendible to the heir. How can it be of the nature of fee simple unless it descend to the heir at law? It is an estate of inheritance, and if such, the rules and doctrine of estates of inheritance must be applied to it. All this must have been known and felt by the Judge who directed the inquiry; for otherwise his decree would have been defective." Thus these lands in Barrisaul, in the Bengal Mofussil, were, by the Rolls Court in England, held to descend upon the heir at law of the testator, and not to pass under his Will, it not having been, in accordance with the 5th section of the Statute of Frauds, attested by three witnesses.

Next in order comes Master Stephen's report made in *Freeman* v. *Fairlie* (*u*) in 1823. He, under a reference in that suit, which was in the Court of Chancery in England, reported that lands held in perpetuity by Thomas Oldham, a British subject, in Calcutta, were of the nature of freehold estate of inheritance; that a difference of opinion existed amongst the Judges at Calcutta on the subject; and that, although he adopted the general conclusion of the majority, he dissented from their reasons. His views as to the introduction of English law into India, we have already casually mentioned, in speaking of the *Lex Loci* Report of 1840. The investigation being in England, he took evidence as to the law of Calcutta, and stated the result to be that lands and houses in Calcutta, whatever their tenure, or the nature of the estate in them which an absolute proprietor possessed, were liable to be sold under executions at law obtained against him in his lifetime, were chargeable with his simple contract as well as his specialty debts at his decease, and might not only be sold for satisfaction thereof, under execution against his executors and administrators, without joining the devisee or heir at law, but that an executor or administrator might

(*u*) I Moore's Ind. App. 305.

sell them for that purpose by his own voluntary act, and that a conveyance by him without the concurrence of the heir or devisee would give a good title to the purchaser (*v*). But, although holding those points as to the liability of lands to payment of debts, and the right of the executor to sell for that purpose, to be established, and that so much of the English law of real property as opposed those practices was not applicable to the local circumstances in which the new settlers were placed, and, therefore, not binding on them, Master Stephen deemed those practices to be merely a partial adoption, by the English settlers, of the existing laws and customs of the country, possibly for reasons of commercial policy, and thought that, notwithstanding these exceptions, there was a general adherence to English law, and that there was no sufficient reason for departing from the rules of that law as to the inheritance of real estate; and, therefore, that if lands and houses were not applied in payment of debts, or if a surplus of the proceeds of sale remained after payment of debts, such lands and houses or surplus went to the heir at law. Without repeating his arguments in detail, we shall content ourselves with saying that to our minds they appear to outweigh the reasoning by which Sir A. Anstruther in 1817, and Mr. Justice Hore in 1864, arrived at the conclusion that there was not any freehold estate in the island of Bombay. Master Stephen also shows that the analogy, which some of the Judges at Calcutta imagined to exist between the alleged powers of executors and administrators in Calcutta, and the powers of executors and administrators in the British colonies in America and the West Indies, rested on a completely erroneous supposition, on the part of those Judges, that executors or administrators in those colonies could sell and dispose of the real estate of their testator or intestate, by their own voluntary act and conveyance; the fact being that they could not do so even for the necessary satisfaction of his debts (*w*).

(*v*) Notwithstanding those findings, it will be seen that some of the propositions thus laid down were subsequently denied by Sir C. *Grey*, C.J., in *Jebb* v. *Lefevre*.

(*w*) 1 Moore's Ind. App. 316 *et seq.*

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In the interval between the date of Master Stephen's report in 1823 and the ultimate decision of that case in 1828, the case of *Jebb* v. *Lefevre* (*x*) was decided in Calcutta, at the end of 1826 or beginning of 1827. The facts stated in the special case were briefly these:—"On the 20th July 1824, George Rowland died intestate, in Calcutta, of which place he was a native, born in wedlock of native parents, of Portuguese descent; he left a widow, Caroline Rowland, and a son, George Henry Rowland, an infant aged one year, both of whom are living; the widow obtained letters of administration from the Supreme Court, and afterwards married Charles Lefevre, against whom and herself, as administratrix, this action was brought upon a promissory note of the intestate. The defendants pleaded that they had no goods or chattels of the intestate; and the plaintiff, at the time of the trial, was unable to prove any assets, except that George Rowland, at the time of his death, was the owner of several parcels of land and houses, some within the town of Calcutta, and others in the neighbourhood. Some of these had been conveyed to him by lease and release, to hold to him and his heirs; others by instruments known in Calcutta by the name of Bengallee bills of sale, and which have always been treated, amongst the natives of Calcutta, as conveying the entire interest in lands as between the vendor and vendee, and also, as Bengallee bills of sale, severally contained clauses releasing to the vendee all claims from the vendor and his heirs; under which said bills of sale the said George Rowland obtained actual possession of the said lands, and was possessed thereof at the time of his death. These several parcels of land and houses of which George Rowland was the owner, were at the time of the trial in the occupation of the defendants, and the question reserved for argument was, whether the estate, property, or interest of George Rowland in these lands, or any of them, was assets to be administered by his administratrix for the payment of his debts." We gather from the judgments that all of the arguments, relied on by Sir A. Anstruther and Mr. Justice Hore, and other arguments also, were then put forward in support of the propo-

(*x*) Clarke's Addl. Rules & Cases 56.

sition, that the lands of George Rowland were assets to be administered by his administratrix, for the payment of his debts, as well of simple contract as of higher degree. Amongst those arguments were, that there was no distinction between lands and goods in respect of the succession to them; that colonies are only "instruments of commerce;" that most of our legal distinctions between land and goods have their foundation in the feudal system, which, including the law of primogeniture, is supposed to be ill adapted to commercial communities; that the object of the East India Company at first was trade only, and the possession of territory; that no subject of the Crown could come here but by their licence; and that, as the heir would seldom be in this country at the death of the ancestor, it was improbable that the King or Parliament intended to create or recognise any estates of inheritance; that the charters of justice, by which British courts have been constituted in India, do not speak of such estates, and none of them make mention of heirs, though several, and especially that of 1774 (Supreme Court, Calcutta), recognise executors and administrators, and make lands liable to be taken in execution for all debts. The three Judges who heard that case, to a certain extent differed in opinion, Sir Charles *Grey*, C.J., in an extremely able judgment, holding that the administratrix took neither an estate in, nor a power of sale over, the lands, but that an estate of inheritance in them vested immediately upon the death of Rowland in his heir. Sir Anthony *Buller*, J., who was one of the Judges who decided *Ronald* v. *Jacob*, adhering to his opinion in that case, held that the lands went first to the administratrix, but, after payment of debts, would be (as he said had been previously held) liable to dower, as well as to all other rights incident to freehold property, and that equity should decree her to deliver over the lands to the heir. Sir John *Franks*, J., in a judgment of great ability, held that lands in Calcutta may be sold in a suit by even a simple contract creditor of the deceased, against the executors or administrators, without joining the heir; and further, that, inasmuch as that was

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so, therefore the executors or administrators may sell them for payment of debts without suit, but that for that purpose they took a mere power over, and not an estate in, the lands. He says: "It is a rule of equity that a trustee may do without suit whatever he would be compellable by suit to do; and as it was the intention of the Charter (1774) to give a more speedy and efficient remedy to creditors for recovery of their debts, this Court ought to give to creditors the benefit of such rules of interpretation for the advancement of that remedy. But it is not necessary to decide that the heir shall not take estates that would be inheritable in England by inheritance here, in order to advance the remedy of the creditor. The law may give a power to the executor or administrator over the estate without breaking the descent to the heir, and it appears to me to have done so by this charter, for the purpose of providing a better remedy for creditors. But I do not think it ought to be held to have done more, or to have effected the tenure of estates of inheritance; and it would be an interpretation of the charter venturous and unnecessary to hold that it had altered the tenures of such estates. It is not necessary to the creditor to give it such an interpretation; provisions made by the charter would be left nugatory. It has provided real actions amongst the remedies for the subject here." He subsequently points out that the word "heir" is not mentioned in the charter, nor has the Legislature or the charter expressed an intention to disinherit the heirs of British subjects, or subjects capable of enjoying the rights of British subjects, in the Presidency of Fort William. That were the Court to hold that they were disinherited, it should do so by implication, but that "according to decisions, early, and recognised without interruption, it has been uniformly held that an heir at law shall not be disinherited by implication: *Gordon* v. *Sheldon* (*y*)."

He concluded thus: "Upon the whole of this case it appears to me, that British and Christian subjects of His Majesty the King of Great Britain are capable of acquiring

(*y*) Vaughan R. 262.

estates of inheritance within this Presidency; but that the quantity of estate, or tenure of each subject, must depend upon the quantity of estate the grantor to him had to convey, and the terms of the conveyance made to the grantee; and that, in the present case, from the terms of the instruments whereby the late George Rowland derived title to the estates in question, his creditors have a right to act towards these estates according to the tenures, by which he admitted himself proprietor of them; that the plaintiff has a right of action, admitted by the *Defendant's* Plea, and a power to sell those estates by virtue of an execution, pursuant to the 15th Section of the Charter of 1774, if he should issue execution. And that the defendant, the *administratrix*, has power to sell the *land*, by operation of that section of the Charter, and thereby to acquire funds for payment of debts: and that it is a power, given thereby to personal representatives, to be exercised over the estates of ancestors who die indebted, and leave estates of inheritance that descend to Heirs, debts remaining unpaid. And I conceive the plaintiff is entitled to judgment."

Thus it will be seen that although the Judges differed as to the position of an executor or administrator with regard to the real estate, they were unanimous in holding that, ultimately at least, the heir at law, and not the next of kin, became entitled to it.

One of the results of that case was, that, on the 27th of June 1828, was passed the Stat. 9 Geo. IV., c. 33 (commonly known as Fergusson's Act), which, after reciting that doubts had arisen "whether and to what extent the real estates of British subjects *and others* (not being Mahomedans or Gentús), situate within or being under the jurisdiction of His Majesty's Supreme Courts of Judicature in India, are liable, as assets in the hands of executors and administrators, to the payment of the debts of their deceased owners," and that "it is expedient that such doubts should be removed," enacted (z) "that whenever any British subject shall die seized of or entitled to any real estate in

(z) Sec. 1.

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houses, lands, or hereditaments situate within or being under the general civil jurisdiction of H. M.'s Supreme Courts of Judicature in Bengal, Fort St. George, *and Bombay* respectively, or whenever any person (not being a Mahomedan or Gentú) shall die seized of or entitled to any such real estate, situate within the local limits of the civil jurisdiction of the same Courts respectively, such real estate of such British subject or other person as aforesaid (not being a Mahomedan or Gentú) is and shall be deemed assets in the hands of his or her executor or administrator, for the payment of his or her debts, whether by specialty or simple contract, in the ordinary course of administration." The 2nd section empowered the executor or administrator "to sell and dispose of the real estate for the payment of such debts as aforesaid, and to convey and assure the same to a purchaser in as full and effectual a manner in law as the testator or intestate," &c., "could or might have done in his lifetime." Sec. 3 rendered the executor or administrator, in actions brought against him for debts of his testator, &c., chargeable with the net proceeds of the real estate (when sold by the Sheriff), as assets to be administered. The 4th section enabled the courts in such actions to sequester or sell, by way of execution, houses, lands, or real effects in the hands of the executor, in the same manner as in the lifetime of the testator or intestate. The 5th section declared conveyances theretofore made by executors or administrators to be valid. The 6th section provided "that neither this Act, nor anything herein contained, shall be construed to operate as, or have the effect of, changing or altering the legal quality, nature, or tenure of any lands, houses, estates, rights, interests, or any other subject of property whatsoever, or of making the same, or any of them, to be of the nature of real property, if by law, before the passing of this Act, the same or any of them were personal property; but that the law in that respect shall be and continue the same as if this Act had not passed" (*a*).

(*a*) As to sales under that Statute, see *Doe d. Cullen* v. *Clark*, Morton Rep. 76.

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In *Stephen* v. *Hume* (*b*), *Malkin*, J., said that statute "clearly applies only to the case of persons strictly and technically described as British subjects, except when the lands are situated within the local jurisdiction of the Supreme Court. It does not, therefore, affect the present case of an Armenan Christian at Dacca."

About eighteen months after the decision in *Jebb* v. *Lefevre*, but apparently without being acquainted with that case, Lord *Lyndhurst*, before whom, in 1827, the exceptions to Master Stephen's report in *Freeman* v. *Fairlie* had been argued, gave judgment upon them, on the 17th of November, 1828. He confirmed the Master's report, and held that Samuel Oldham had a freehold estate of inheritance according to the acceptation of those terms by the law of England. Lord Lyndhurst was of opinion, although the contrary had been contended, that the Native proprietors of the soil had a permanent interest in it at the time when the English first established themselves on the banks of the Hooghly; that the law existing at Calcutta when he gave his decision was the law of England, and that the English had carried it there with them, and acted on it, as it was almost impossible for them to adopt the Muhammadan or Hindú laws, blended as they were with their respective religions; and that from 1601 downwards it appears, by Charters and Acts of Parliament (and he referred particularly to the charter of 1726), that the English law had been considered as the law of the settlement as regarded British subjects. He next held that if the permanent interest of the native proprietor be transferred to and vested in a British subject, and the case be governed by English law, such an interest is an estate of inheritance descending to the heirs. He says; "If it appears in the evidence to be an absolute ownership, what law is to be applied to it? Those who contend that it goes to the personal representatives, *in a degree* apply to it the English law; because the law as to personal representatives is an

(*b*) Fulton R. 231. As to the question whether it is declaratory or not, see a difference of opinion in the same case between *Malkin*, J., and *Grant*, J.

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English law. If, then, we are to apply to it the English law, if the absolute ownership of the soil is possessed by the party, and the English law is in any shape to be applied to it, the party must take a fee simple, and the property will descend to the heirs." This is an argument quite as applicable to Bombay as it was to Calcutta. Lord Lyndhurst also, in support of his decision, relies upon the evidence taken by the Master, and upon the previous decisions of the Supreme Court at Calcutta. In referring to the evidence, he lays some stress upon the fact that, constantly since 1774, lands had been conveyed by lease and release in Calcutta, and that it had also been shown that fines had been levied of lands of the description there in contest. But, with the greatest possible deference to the remarks made in *The Mayor of Lyons* v. *The E. I. Company* upon *Freeman* v. *Fairlie*, we think that it will be found, on perusal of his judgment, that Lord Lyndhurst drew the bulk of his arguments from other sources. And we are strongly inclined to think that if there had not been any evidence whatever of conveyancing at Calcutta by lease and release, the decision would have been the same. Master Stephen says (*c*): "It appears incidentally before me that, prior to the establishment of the Supreme Court, conveyances by lease and release, or other English forms, were little, if at all, in use upon the sales of lands or houses from one British subject to another, but a brief note of the sale and transfer was used in their stead." He had previously spoken of the ordinary pottah taken by the landholder and the E. I. Company, but he (and Lord Lyndhurst concurred in his view) (*d*), regarded it as evidence of holding according to a local and fiscal regulation, and not as a conveyance (*e*); but Master Stephen held that, in the special case of a pottah of common or untenanted land, it was the only conveyance or evidence of title, and that the purchaser under it from the Company obtained at least an equitable fee. He further was of opinion (*f*) that the only written evidence of grants from the Native sovereigns to zamindárs or other proprie-

(*c*) 1 Moo. Ind. App. 338.
(*d*) *Ibid.* 345, 346.
(*e*) *Ibid.* 345 *et seq.*
(*f*) *Ibid.* 338.

tors of land was a pottah, in the same form as since used by the Company for the same purpose. For British subjects it seemed to him "a natural if not a necessary course" to use the same means that they found to be established for granting and transferring lands and houses, at what he conceived to be "the true era of the tacit introduction of the English Law, namely, the first establishment of the Company's settlements in India, till long after which they had no regular Courts, and probably no practitioners of law capable of preparing conveyances in the English form." The Master, accordingly, reported that the pottah, when it performs the functions of a grant, as in the case of common lands, by the Company, may be considered as a sufficient creation or evidence of title in fee. And so Lord Lyndhurst held, saying (*g*) "That the East India Company, when they convey these small portions of land in the way I have stated, without executing deeds of lease and release, or any conveyance beside authorizing the Collector to issue the pottah, consider they are conveying the absolute property in the soil, is quite clear from the evidence." We should observe that the Calcutta charter of 1774, although conveyances by lease and release, or other English forms, were then, as Master Stephen says, little if at all in use, treats of real estate as then existing in Calcutta, and subjects it to seizure and sale in execution. Lord Lyndhurst relies, in that particular, upon the charter, referring to which he says: "We find in the language of it a distinction expressly drawn, and in terms, between personal and real property. It has, I think, been said, by one of the learned Judges to whom I have referred, or it has been glanced at, that that may be satisfied, by considering this property as a chattel real; but, looking further into the Charter, it will be found that this explanation will not avail, because the Courts have jurisdiction expressly and in terms, in all actions and pleas, real, personal, and mixed; a recognition, therefore, by the Crown (the highest authority), that real property exists in that country, according to the meaning of that term as used in the law of England."

(*g*) 1 Moo. Ind. App. 347.

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In *Doe d. Savage* v. *Tagore* (*h*), *Chambers*, J., in the year 1785, said: "It has been urged that titles might be endangered if lands and houses in Calcutta should be considered real property, because they have been transferred by instruments which would not be sufficient to convey real property by English law; but this danger is only ideal. The lands and houses of British subjects have usually been conveyed, in this settlement, by deeds of lease and release, or *by bargain and sale*. The title by lease and release depends on the Statute of Uses, which is a remedial Act, and has always been considered by this court as applicable to the lands of British subjects in this country. The conveyance by deed of bargain and sale would indeed be endangered by the Statute of Enrolments (27 Hen. VIII., c. 10), if the latter extended hither; but the Court are of opinion that it cannot be so extended, because its provisions are inapplicable to this country. A mere bargain and sale of land is, therefore, sufficient here to convey an estate in fee, as it would have been in England under the Statute of Uses, if the Statute of Enrolments had not been passed." And in *Jebb* v. *Lefevre*, part of the property in which Rowland was held to have an estate of inheritance descendible to his heirs, was held, not under lease and release, but under Bengáli bills of sale, a species of assurance which in Calcutta had been always treated as conveying the entire interest.

Mr. Justice Hore would, I may here observe, have been more accurate if, instead of saying that deeds of lease and release are entirely unknown in Bombay, he had said they were extremely rare. Several years ago, so many that memory does not enable me to specify the property to which they related, further than that it was situated in the Mazagon or Chinchpoogly district, I met with two instances in Bombay of conveyancing by lease and release; the documents in both cases bearing dates of the eighteenth century, about the time when Mr. Hornby was Governor of Bombay.

We are quite unable to concur in the learned Judge's statement that conveyances executed in Bombay since the

(*h*) Morton R. 72.

passing of Act IX. of 1842 (*i*) very seldom refer to that Act, our experience being that conveyances of an absolute estate, prepared by professional men in Bombay, as a rule, generally purport to have been made in pursuance of that Act, and to be releases of the property the subject of them. It is unnecessary to travel out of this suit for an example. The conveyance of the 12th of February 1859, put in evidence by the defendant, and under which he and his wife derive their title to the premises as to which this suit has been instituted, purports to be made in pursuance of that Act, and to release those premises.

The supposed inconsonance of liability of the land to sale, by way of execution, or by the executor or administrator for payment of simple contract debts, with the English rule of inheritance, seems to have weighed as heavily with Sir A. Anstruther as with the one Calcutta Judge, Sir F. Macnaghten, who maintained that all immoveable property at Calcutta was of the nature of chattel. We believed that the decisions in *Jebb* v. *Lefevre* and in *Freeman* v. *Fairlie* had put that objection finally to rest, and were therefore surprised to find it revived by Mr. Justice Hore. Lord Lyndhurst says he never felt the weight of it. Putting the case of an Act of Parliament passing for England similar to Fergusson's Act, which had passed for India in the previous session, he says: "It would render real property assets for the purpose of paying the simple contract debts of the testator or intestate, but it would not alter the tenure of the land; the land would still be inheritable: it still would descend to the heir at law." He adds: "If it were introduced by competent authority, it would be a charge or liability engrafted or imposed on the real estate, to which otherwise it would not be subject. In what way it was introduced does not, I think, very clearly appear." Stating that he concurs with the Master in not being perfectly satisfied with the arguments which refer its introduction to the charter, he proceeds: "I think it not improbable

(*i*) Extending to India the Stat. 4 and 5 Vic., c. 21, being "an Act for rendering a release as effectual for the conveyance of freehold estates as Lease and Release by the same parties." So early as 9 Geo. II., c. 5, an Act with a similar object was passed in Ireland.

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that it crept in at a very early period, when the law was not much attended to in that country: it got established by use; it was continued as being found convenient; and perhaps it has no legal origin; it now has, however, the sanction and authority of an Act of Parliament. If it had a legal origin, it appears to me that it would not affect the decision of this question; if it had not a legal origin, still less would it affect it; the only way in which it can be used at all is as an argument that, it being an incident to personal property to be applicable to payment of debts, this should be considered personal property; but, as an argument standing alone, I think it weighs very little in opposition to the weight of argument and evidence on the other side." We shall presently refer to the "argument and evidence" specially relating to Bombay, but at present continue our enumeration of the Bengal and Calcutta authorities.

In *Hoo* v. *Marquis* (*j*) the Bengal Ṣadr Adálat, in 1827, on the authority of *Gardiner* v. *Fell*, and after consulting the Advocate General, held as invalid the sale, by an administratrix, of real estate situated in the Bengal Mofussil, the property of the intestate, her husband, who was an Englishman, and decreed that his son should recover it; but, owing to certain equitable circumstances in the case relating to the application, for the benefit of the plaintiff, of the purchase money paid by the defendant, put the plaintiff under terms to repay the defendant the purchase-money.

In 1834 Sir B. *Malkin* reluctantly held that the charter of the Recorder's Court at the Straits Settlements abrogated the Dutch law at Malacca: *Rodyk* v. *Williamson* (*k*). The reasoning which brought him to that conclusion is equally applicable to the abrogation in Bombay of the Portuguese law by the charters of the Mayor's Court, the Recorder's Court, and the Supreme Court. Speaking of the exceptions in the two latter charters in favour of Gentús and Muhammadans at Calcutta, Madras, and Bombay, he says:

(*j*) 4 Mac. S. D. A. Rep. 243.

(*k*) Mentioned *in the goods of Abdulla deceased* Morton Rep. 19, 20. As to the abrogation of Portuguese law see Perry's Oriental Cases, 60, 332-573.

"The benefit, if it be one, is confined to Mahomedans and Hindus, and is limited to certain classes of rights and privileges."

In *Emin* v. *Emin* (*l*) an Armenian widow was, by the Supreme Court at Calcutta, decreed dower out of the lands of her deceased husband in the Mofussil; a decision which Sir Henry *Seton*, J., in *Musleah* v. *Musleah* (*m*), said "must have proceeded, not on the ground of any personal law applicable to the parties as British subjects; this Court (Supreme Court, Calcutta) having no jurisdiction to administer the personal law of the parties except in the case of Hindus and Mahomedans, but on the ground that the parties and the property being alike subject to the jurisdiction, and the parties not being within the exception, the English was the only law which the Court was competent to administer between them. For this purpose there can be no distinction between Jews and Armenians, neither being within the excepted classes. The law of England makes no distinction between Jews and other persons, except as to their laws of marriage, and as to certain incapacities for office (*n*). Their law of descent must be governed by the tenure of the lands to which it is incident, and where this is quasi freehold, as it is found to be by the decisions of this Court and those of the Court of Chancery, which are binding on it, the law of primogeniture must prevail. If the lands in question had been held by any customary tenure subject to the Jewish law of descent, the case might have been different." In that case of *Musleah* v. *Musleah*, the majority of the Judges ruled, in 1844, that lands situate in the Bengal Mofussil belonging to a Jew who died domiciled in Calcutta, must by the Supreme Court be held to descend according to English law, and decreed, accordingly, in favour of his eldest son and heir at law. *Grant*, J., dissented (*o*), being of opinion that "the immoveable property situated in the Mofussil

(*l*) Referred to in *Stephen* v. *Hume*, Fulton R. 227., See also *De la Cruz* v. *Goorachund Seal*, Cl. R. (1829) 335; 1 Morley Dig. 300, plac. 97.

(*m*) Fulton R. 423, 441.

(*n*) See per Lord *Stowell* in *The Indian Chief*, 3 C. Rob. 32.

(*o*) *Ibid.* 438.

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must descend according to the law of the Mofussil (thereby meaning the law of the Mofussil courts); in the same manner with the moveable property there situated, if any; and both must descend according to the law regarding moveables of the domicile of the deceased;" and this he presumed to be "the law of England for the distribution of personal property." Taking the deceased to be domiciled in Calcutta, *Grant*, J., admitted that the immoveable property situated in Calcutta must go to the heir at law, by right of primogeniture, subject to payment of debts under Fergusson's Act. *Peel*, C.J., as to the Mofussil lands, concurred with *Seton*, J., in holding that there was no *lex loci rei sitæ*, and, therefore, they were bound to decide by the *lex fori*. He mentioned, as decisive of the question, *Gardiner* v. *Fell*, and the *Mayor of Lyons* v. *The E. I. Company*, which latter case he considered as a direct authority that English law is to be applied in a suit in the Supreme Court to the question of the right to exercise the testamentary power over lands in the Mofussil belonging to a Frenchman, although a Mofussil court would have applied the law of the domicile of origin, the French law. Pointing out the jurisdiction of the Supreme Court to try causes relating to lands in Bengal, Behar, and Orissa, he says: "The local boundaries of Calcutta circumscribe its jurisdiction over persons, not over things. The laws by which it is to decide are prescribed. It has no discretionary power, is not a Court of conscience, and must decide by those laws alone which are ordained for it. *The general law of the Court is the English law. The exceptions are statutory, and the introduction of those very exceptions prove the general rule.* The Courts of the East India Company are concurrent, and not exclusive, Courts. Their course is prescribed by Regulation." He shows that their Regulations, so far from enjoining any general law, prohibit them from the adoption of any such law, either English or Foreign, as their *lex fori*; their decision, therefore, cannot be viewed as evidence of any general law. As to the Supreme Court he said: "A British subject has no special privilege in this Court to have a special law applied to his case. The same law applies to all, and the

law of descent is one and the same for all of the suitors of the Court, except Hindus and Mahomedans." He concluded by deciding reluctantly in favour of the exclusion of the younger children by the eldest son.

On a rehearing of that cause in 1857 before *Colvile*, C.J., *Buller*, J. and *Jackson*, J., the former decision was by them unanimously affirmed (*p*).

In *Abraham* v. *Abraham* (*q*) Lord *Kingsdown* says that the Mofussil Courts have, properly speaking, no obligatory law of the forum, as the Supreme Court had.

Storm v. *Homfray* (*r*) was a case before the Supreme Court of Calcutta in 1849 and again in 1850. On both occasions, *Peel*, C.J., lays it down that there can be no doubt that British subjects litigating in that Court as to the title to immoveable property, though situate in the Mofussil, must have their right determined by the law of England, so far as it had been introduced here. He admits, both in that case and in *Sibchunder Doss* v. *Sibkissen Bonnerjee* (*s*), that when immoveable property is in question, English law incorporates into it a *lex loci rei sitæ*, and local customs prevailing in greater and less degree, and whether relating to succession or enjoyment (*t*).

In the recent case of *Rigordy* v. *Smith* (*u*), *Phear*, J., citing *Abraham* v. *Abraham* (*v*), *Musleah* v. *Musleah*, and *Freeman* v. *Fairlie*, held that where persons neither Muhammadans nor Hindús, though not, strictly speaking, all of them European British subjects, had adopted the law affecting European British subjects in India, their real estate, as well in Calcutta as in the Mofussil of Bengal, descended to the heir at law.

(*p*) Boulnois R. 234. (*q*) 9 Moore's Ind. App. 240.

(*r*) 1 Taylor and Bell, 49; 331.

(*s*) Boulnois R. 74. And see per *Colvile*, C. J., in *Musleah* v. *Musleah*, Boulnois R. 239.

(*t*) 1 Taylor and Bell 334, 52.

(*u*) Ind. Jur. 290, decided 1866.

(*v*) 9 Moore's Ind. App. 195. For an application of the English doctrine of advancement, between a father and daughter of English extraction in the Mofussil, see *Kishen Koomar Moitro* v. *Stevenson*, 2 Calc. W. R. 111.

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Sir Alexander Anstruther regarded with much apparent alarm the possible application of feudal doctrines to Bombay, or any other part of British India. He does not, however, seem to have been aware that when Bombay belonged to the Portuguese the tenure of lands was feudal.

Mr. F. Warden, Chief Secretary to the Government of Bombay, in his impartial and elaborate Report on the Landed Tenures of Bombay, which he made to Government in 1814, shows that the ancient constitution of the island was feudal, and that the lords of it could claim the military services of the tenants, until the year 1718, when an annual payment or rent, specially denominated "tax," was substituted (*w*). That rent must not be confounded with the chief or quit rent of one-fourth part of the profits previously paid to the King of Portugal, as seigneur of the island, and afterwards commuted for 20,000 xeraphins annually payable, under its ancient name of pension, by virtue of Governor Aungier's Convention of 1672 (*x*). In the London Company's reply (*y*), dated the 18th of March 1691, to the Portuguese Envoy, the liability of all of the landholders in the island, whether lay or ecclesiastic, by themselves or their substitutes, to render military service, was fully insisted upon, as was also the right of Government to treat any landholder, who refused military aid, as having forfeited his land.

The lands of the Jesuits, and others who refused to render such military service, or who intrigued with the enemies of the Company, were, accordingly, confiscated (*z*). To some of the less grave offenders their lands were afterwards restored (*a*). Amongst those which were never restored were the lands of the Jesuits at Sion and Parell (*b*). Rámа

(*w*) Paras. 53, 71, 72, 73, 74, 173 (pp. 16, 23, 24, and 40 of the printed ed.); and see Perry's Oriental Cases 496, 534.

(*x*) The two payments have for a long time past been made together, and appear in the Collector's books and receipts as "pension and tax."

(*y*) 3 Bruce's Annals 104, 105; Warden, paras. 53, 55 (pp. 16, 17, of the printed ed.).

(*z*) 3 Bruce's Annals 95, 104; Warden, paras. 18, 51, 52, 65 (pp. 6, 16, 21, of the printed edition); Anderson 288, 353.

(*a*) 3 Bruce's Annals 164.

(*b*) Warden, para. 65, p. 21; Anderson 288, 353.

Kámáti's lands were also confiscated in 1720 (*c*); Sir E. Perry, C.J., gives some account of his trial (*d*).

Whether any new patents were made out, under Article 2 of Governor Aungier's Convention, I have not been able to discover. With the exception of the patents of one estate, I have not succeeded in obtaining any information as to the old patents of dates prior to the cession of the island to Charles II.

The exception of which I speak are letters patent bearing date the 3rd of June 1637, granted by Don Philip, King of Portugal, to Bernardin de Tavora, and purporting to be a "Charter of Confirmation and of Gift and Investiture in Chief (Emcabecimento)," an elaborate and lengthy document. The subject of the charter was the well-known district, Mazagon. Bombay was at that time sometimes called the island of Bombaim, but quite as frequently described as the island of Mahim. Accordingly the estate is in the charter described as "the Village Mazagaõ, which is in this island of Mahim, dependency of Bassein." From preliminary recitals I gather the following facts. The village had, for some time previously to the year 1571, been leased on some terminable interest, either for lives or years, to Don Antonio Pessoa, by the Portuguese Governor, Don Joaõ de Castro. Lionel de Souza married Donna Anna Pessoa, daughter of Antonio Pessoa. Her father having died in, or previously to, 1571, the village was, by order of Don Sebastiaõ, then King of Portugal, leased on lives to Lionel de Souza by Don Antonio de Noronha, Viceroy of India in 1571, at the same annual rent which Lionel de Souza's late father-in-law, Antonio Pessoa, had held it, viz., "195 Pardaõs of gold and three tangas of silver, at the rate of six double pise and one quarter the silver tanga," payable quarterly. In compliance with the subsequent request of Lionel de Souza, King Sebastiaõ, having regard to the age and merits of Lionel de Souza, who had served him for many years in various

(*c*) Warden, para. 66, pp. 21, 22, printed edition; 1 Perry, Or. Ca. 574.
(*d*) Perry, Or. Ca. 65. See also Vol. 3 Bom. Quar. Rev. for 1856, p. 48. Two of the witnesses at the trial were put to the question.

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parts of India "as a Captain of his vessels at his own expense," as well as "in company of the King's Viceroys and Governors of India in any other things with which he is charged by the said Viceroys and Governors, by reason of the great experience that he has of the country, and the length of his service therein," granted, through the Viceroy, Don Antonio de Noronha, to Lionel de Souza, letters patent, dated the 18th of January 1572, conferring upon him the said village, to hold at the former rent as "a quit rent" by the tenure of emphyteusis for ever (em fatista para sempre) (*e*), with remainder on his death to his wife, Donna Anna, as chief tenant. She was, however, to pay a moiety of the rents and profits to her and Lionel de Souza's two sons, Ruy and Manoel de Souza, and to answer for the quit rent to the royal officers at Bassein. On her death the village was to "remain in his (Lionel de Souza's) said sons, vested in the elder as head or Chief Tenant." Then followed a long and not very clearly penned limitation, in favour of the sons of the elder son and their issue, with a remainder over, on the exhaustion of his issue, to the other son and his issue, and, on the failure of "heirs descendants" of those sons, to the heirs and successors of the survivor, with remainder to such descendants of Lionel de Souza as he should by will nominate. The letters patent of 1572 permitted Lionel de Souza to reside at Choul, but directed that he should repair to Bassein when the King's "service is to be done." Referring to Mazagon, the letters patent proceeded thus: "The which Village it shall not be in his power to sell, exchange, or to alienate without the King's leave, or that of his Viceroy," nor could it be divided, but should

(*e*) Emphyteutical grants or leases are either perpetual, or for a long term of years, on condition that the grantee or lessee of the lands should cultivate, plant, and otherwise improve them, as the word *emphyteusis* signifies. Such grants are subject to conditions as to liability to quit or ground rent and other charges, and as to alienation, according to the diversity of the grants, and according to the custom or usage of the place where the lands are situate. Although tenure by emphyteusis seems to have been restrained by its primitive institution to barren lands, yet it has been also applied to fruitful lands, and to houses and buildings. An estate held in emphyteusis in perpetuity is transmissible to the heirs and assigns of the grantee: Domat, Civil Law, plac. 544, 545, 546, 547, 548, 549, *et seq.*, Cushing's edition of 1853. The grantor of an emphyteusis is the *dominus emphyteuseos*, the grantee is the *emphyteuta*.

"go always in one sole person." Those letters patent of 1572, in the concluding portion, seem to have described the Village of Mazagon, and its appurtenances thereby granted, as a manor, and were registered at Goa and at Bassein in 1572, and were produced to and recognised by the officers of the Crown of Portugal in the years 1580, 1583, 1589, 1590, and 1632. By the letters patent of the 3rd of June 1637, which recited the foregoing facts, King Philip of Portugal confirmed to Bernardin de Tavora, only son of Ruy *alias* Luis de Souza by Donna Beatrix de Tavora, "an instrument of assignment and gift" of the said village and its appurtenances (executed, in consequence of his advanced age and consequent inability to administer the village, by his father, the said Ruy *alias* Luis de Souza), to hold the same to the said Bernardin de Tavora in emphyteusis for ever (em fatista para sempre), subject to the said quit rent payable to the Crown of Portugal, "which said village (the letters patent proceeded to say) it shall not be lawful to sell, give, or exchange, or in any other way to alienate, without my leave or that of my Viceroy or Governor of India; nor yet shall it be in the least divided, but shall go always entire in one only person, who shall himself cultivate, and take the uses and fruits it may produce, as his own property, in the same manner that Lionel de Souza and Ruy de Souza, his (Bernardin de Tavora's) grandfather and father, had and possessed the same." Those letters patent appear to have been registered at Goa and at Bassein in the year 1637, in which they bore date. A copy of the English translation of them, whence my knowledge of their contents has been obtained, was annexed to Mr. Warden's Report. The village of Mazagon and its appurtenances formed the principal (*f*) private estate in the island, and in it we have a clear instance of the adoption of the rule of primogeniture.

According to the Roman law, the emphyteuta, though not *dominus*, had nevertheless *jus in re*, and a true *possession*

(*f*) In Deputy Governor Gary's return, made in 1667 to Charles II., of the revenues of the island, the rent (pension) yielded by Mazagon to the Crown is stated at a considerably higher amount than that of any of the other six districts in the island: see Warden, para. 19 (p. 7 of the printed edition).

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within the technical meaning of that term as used by the Roman lawyers. He was entitled to a real action, and at his death his estate or interest was transmitted to his heirs (*g*). Mr. Sumner Maine, with his usual perspicuity and learning, traces the fief of the Middle Ages to the emphyteusis of the Romans, and more especially to the *agri limitrophi* held by that tenure, on the frontier of the empire along the line of the Rhine and Danube, by the veteran soldiers of the Roman army. He says the emphyteusis "marks one stage in the current of ideas which led ultimately to feudalism" (*h*).

It is impossible now to say with certainty that many or any other lands than those of Mazagon were held, before the cession, in emphyteusis, but it is certainly worthy of note that the quit rent payable for a large part of the island (the whole of it, probably, which was in occupation or cultivation at the time of the cession) to the Portuguese government, and which was commuted under Governor Aungier's convention, bore the same name of *pensio* (pensaõ, pension) as that of the annual payment made by the emphyteuta to the *dominus emphyteuseos*.

The repudiated treaty of Mr. Humphrey Cooke contained the following passage: "That although the manor right of the lady proprietrix of Bombay is taken away, the estates are not to be interfered with, or taken away from her, unless it be of her free will; she being a woman of quality, they

(*g*) Von Savigny on Possession (Sir E. Perry's translation), pp. 77 to 79, *et in notis*, and pp. 214, 215; Mackeldeii Systema Juris Romani, Lib. I., cap. iv., plac. 295 to 299 (Leipsic ed. of 1847); Sandars' Institutes of Justinian, Lib. II., tit. v., pp. 215, 45; Domat. Civ. Law, plac. 544 to 549 *et seq.*; Smith's Greek and Roman Antiquities, 2nd ed., p. 458, title "Emphyteusis," by Mr. Geo. Long; and see same title, Eng. Cyc. Arts & Sciences, Vol. IV., p. 869.

(*h*) Ancient Law, 2nd ed., pp. 299 to 303, chap. viii. See, as to the origin of primogeniture, *Ibid.*, pp. 227 to 243, chap. vii. A controversy has existed amongst jurists whether fiefs are deducible from the emphyteusis. Amongst those who maintain the affirmative are Cujacius, the great civilian of the 16th century (Observ., lib. 8, c. 14, and De Feud, lib. 1, princip.), and Sir F. Palgrave, (2 Eng. Com.); and see Selden, Tit. of Hon., 2nd ed., c. i., 23, p. 332. The negative is maintained by Hargrave (note 1, Co. Lit. 64 a) and Hallam (1 Middle Ages, 11th ed., note x., pp. 315, 316.) The affirmative, as put by Mr. Sumner Maine, seems to be the preferable doctrine.

are necessary for her maintenance. But after her death, and when her heirs succeed to the said estates, the English may, if they choose, take them on paying for the same their just value, as is provided in the case of other proprietors of estates; and should the English now wish to take her houses to build forts therewith, they shall immetately pay her their just value."

Possibly that passage may refer to the then possessor of the village of Mazagon.* But if so, it is right to say that I have not found any other authority for the statement that the manor right had been then resumed. On the contrary, Aungier's Convention mentions the presence of "Signor Alvaro Perez de Tavora, Lord of the Manor of Mazagon," at the meeting of the 1st of November 1672, as one of the *Vereadores* or chief representatives of the people. But he would appear to have been subsequently punished by, or threatened with, confiscation of his lands (*i*).

If confiscated, they appear to have been subsequently restored, either to himself or his heirs, as amongst the unpublished papers in the appendix to Mr. Warden's Report was a warrant of attorney, executed at Bassein on the 17th of May 1731, by Martinho de Silveira deMenezes (on behalf of himself and his son Joaõ Vicente), and also by his wife Donna Mariana de Noronha, to Wissia Senoy Telung (a Brahmin), to sell the village of Mazagon and its appurtenances for 21,500 xeraphins, and to execute the necessary conveyances.

In the same appendix was a copy of a deed of sale, bearing date the 3rd of August 1731, by which Wissia Senoy Telung, with the consent of the Governor of Bombay, sold and conveyed the village of Mazagon for 21,500 xeraphins,

* It should, however, be mentioned that one of the seven districts, into which the island was divided, was called Bombaim. It probably formed the site of the present native town. Next to Mazagon, it in 1667 yielded the largest rent (pension) to Government. The other districts were Mahim, Parell, Vadela, Sion and Veroly (Worlee). Warden, para. 19 (p. 7 of the printed ed.).

(*i*) 3 Bruce's Annals 104; Warden para. 52, (p. 16, printed ed.;) and despatch dated 18th December 1675 from the President in Council of the Surat Factory to the Deputy Governor and Council of Bombay: Surat Factory Outward Letter Book 2, 1675, 1676.

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to Antonio de Silva and Antonio de Limas, with all its appurtenances and services, new and ancient, with the two houses of lordship, one ruined and the other standing, and the administration perpetual and general of the church of Nossa Senhora de Gloria, situated in the said village, and of the patrimonial estate thereof, " to the end that they, by themselves and by their heirs and successors, attornies and executors, may possess, enjoy, and disfruit the said Village," &c., on condition, however, of their paying the annual pensions of the said church &c., according to the Will of Senhor Christovaõ de Souza, a former quit-rent tenant of the said village, and administrator of the said church. The title of Martinho de Silveira de Menezes was stated in the deed to be " by the nomination made of the said Villages &c. to him by the Donna Senhorinha de Souza, his grandmother, deceased, by reason of its appertaining to him as the eldest and most immediate descendant of Senhor Lionel, the first quit-rent tenant (Foreiro) and possessor of the said Village." That deed was registered at the Government Secretariat.

The objection resting on the supposed unsuitability of the English rule of descent of freehold estate to a community chiefly commercial, is to a great extent neutralised by the well settled rule of English equity, that where real estate is purchased *with partnership capital*, for the *purposes of partnership trade*, it will, in the absence of any express agreement, be considered as absolutely converted into personalty; and upon the death of one of the partners, his share will not go to his heir at law, or be liable to dower, but will belong to his personal representatives: *Townsend* v. *Devaynes*, *Selkrig* v. *Davies*, *Philips* v. *Philips*, and the other cases collected in the note to *Lake* v. *Craddock*, 1 White and Tudor, p. 130, 1st edition.

In one of the unpublished appendices to Mr. Warden's Report, he has given, but not quite in chronological order, one hundred and twenty-nine specimens of memorials, *i.e.*, summary abstracts of conveyances, registered in the Secretariat from 1715 to 1802. Four of the deeds so registered are stated to have been respectively dated in 1697, 1705,

1709, and 1711, and the others as bearing dates varying from 1715 to 1802. The specimens given by Mr. Warden are apparently limited to memorials of conveyances by private owners of houses and lands situated in or immediately around the Fort, and of lands given by Government in other parts of the island, in exchange for ground taken from private owners as a site for the Fort walls (generally described as the town walls), or as a glacis (esplanade), made to the extent of three hundred yards, in front of those walls. There are, amongst those memorials, one of a sale by the executor, and another of a sale by the administratrix, of Muhammadans, in 1798 and 1800 respectively, two of sales by the administrators and one by the administratrix of Hindús, in 1748, 1773, and 1800 respectively, and some sales by widows of Párs*is*, Hindús, or Muhammadans, in which the heirs sometimes joined; but although there are, amongst the memorials, several instances of sales by British subjects to British subjects or to other vendees, there is not one in which the vendor appears to have been an executor or administrator of a British subject. There are two sales by order of Council, but whether on the decease of the owner or by way of execution* does not appear. The Governor and Council, as mortgagees, sell in one other case.

Many of the memorials, especially those of comparatively recent date, are so uniformly meagre, as to render it next to impossible to determine from them what were the forms of the conveyances. A large proportion simply state the names of the vendor and purchaser, the parcels and boundaries, the price, and sometimes that the sale is subject to "quit" or "ground rent," or "pension," or "pension and tax." I infer from the memorials that several of the conveyances were deeds of bargain and sale. Some memorials show that the conveyance was to the grantor and his heirs, some to him, his heirs and assigns, and some few to him, his heirs, executors, administrators, and assigns. In only one does the interest conveyed appear to have been of a terminable

* At the time of those sales the Governor and Council were the principal Court of Justice in the island.

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nature. It was a lease, dated 18th April 1716, by the Governor in Council to William Mathias, mariner, "his heirs and assigns" (*sic*), of a piece of ground and dwelling house for thirty-one years, with power for him, his executors, administrators, and assigns, at any time before the expiration of fifteen years, to renew the lease on payment of a year's rent. A memorial, dated 20th August 1717, shows that "William Gyfford of Bombay, merchant, sold to Blackett Midford of Bombay,* merchant, for the sum of Rs. 2,500, current money of Bombay, all that messuage or tenement and ground, *freehold estate of inheritance*, in the tenure and occupation of the said William Gyfford, situate on the green of Bombay, having for boundaries, Eastward the new bunder, Westward the Hon'ble Company's garden, and Southward the adjoining dwelling house of Mr. Douglas Burniston, together with all yards, outhouses, &c." There are also four memorials of deeds made by way of feoffment. Of those, three appear to have been executed on behalf of the East India Company, for the purpose of carrying out exchanges of land when the Company was taking over land for the town walls, fortifications, and esplanade from the proprietors, and giving them in lieu thereof land belonging to the Company in other parts of the island. From the memorials the feoffments would seem to have been made by the Vereadores (*j*) of Bombay, under the authority and order of the Governor in Council. In one, dated 27th September 1720, the Vereadores are represented as having, "in the usual legal manner, enfeoffed the said Govindjee Ragoojee (the feoffee) of said oarts Razaury," &c., "which he accepted of, at same time desisting from his right over said oarts Garwarry, &c., in favour of the Hon'ble Company, who were in same manner duly enfeoffed of the same, which they accepted of

* Mr. Midford became a Member of Council.

(*j*) Mr. E. Menesse, the Portuguese interpreter to the Court, says: "Vereador is one who holds the staff or wand of power; is a member of Council or of the Chamber; a functionary charged with the administration of the police, or the repairs of public roads; a bazaar superintendent; a magistrate, or a public functionary who fixes local tariffs or taxes." The Vereadores assisted in collecting the pension fixed by Aungier's Convention; also in mustering and officering the island militia, and subsequently in collecting the tax substituted in 1718 for military service.

in exchange for said two oarts Razaury, &c., so given to said Ragoojee, as per deed of exchange, dated 27th September 1720." What were the ceremonies usually accompanying feoffment at that time in Bombay appear in another case, which I shall mention. "In like manner" the Collector is stated to have made grants of land, by way of exchange for land wanting for the town walls on the 15th of October 1742, in sixteen other instances. It is not actually stated that the grantees were enfeoffed with the usual ceremonies, but the clear inference is that they were so. In a memorial of a deed, dated 20th September 1720, the Vereadores, under like authority, are represented as having given certain oarts and batty ground to Pascoal Barretto and Antonio de Souza, "and satisfied them in and enfeoffed them the said oarts and batty ground by performing the usual ceremonies," &c.

The third, dated 15th October 1745, states that "Mr. Richard Sanders, Collector of the rents and revenues of the Hon'ble Company, in conjunction with Diego Ribeiro, Vereador de Var, and the other Vereadores of Bombay, his assistants," by like authority, gave to Balcrustna Bhat an oart in lieu of another, "and satisfied the said Balcrustna Bhat in duly enfeoffing him of the said oart, by performing the usual ceremonies of putting earth, straw, and a green branch in his hand in taking of legal possession." Hence it appears that the ceremonies then usually accompanying an enfeoffment in Bombay amounted to a perfect livery of seisin. The only other exchange of land, for the purpose of obtaining a site for the town walls and space for the glacis, *stated* to have been carried out by the intervention of the Vereadores, was on the 27th of September 1720. It is not mentioned whether the usual ceremonies of enfeoffment were resorted to, but the probability is that they were, as we have seen that the Vereadores did resort to those ceremonies on the same day in a like case. Beside those already mentioned, there were sixteen other cases of like exchange for the same purpose, one of them dated 5th December 1743; the others are of uncertain date, but it seems probable that they were made in 1720, 1742, or 1743; and although the memorials

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are silent as to the intervention in those cases of the Vereadores, and as to the ceremonies observed, the strong probability is that the Vereadores were employed in carrying out the exchanges, and that the usual deeds of enfeoffment were made and livery of seisin given.

The fourth was a private sale. The memorial refers to the deed of sale as dated "Mahim, 25th July 1738," and chiefly consists of a description of the parcels. I infer, however, that the deed of sale was a feoffment, from the commencement of the memorial, which runs thus: "Amador de Cruz sold unto Bhiccoo Sinoy Newracur, being on account of Manoel Barretto, who at the time of enfeoffment declared the purchase to be on account of his Aunt Catharina Rodriguez, Widow of Pascoal Barretto," &c. Near the end of the memorial, after mention of payment of the consideration, it states that Catharina Rodriguez "is hereby acknowledged lawful proprietrix" of the premises.

During fourteen years' experience in this island in the Supreme Court and this Court, partly at the bar and partly on the bench, I have occasionally met with conveyances in the Portuguese language, seldom less than from eighty to one hundred years old, and have found that the most ordinary English conveyances, of dates ranging from the middle of the eighteenth century down to the passing of Act IX. of 1842, which are seen here, are in the form of a bargain and sale under seal, whereby the property conveyed is so to the grantee and "his heirs," or to him, "his heirs and assigns," or more frequently to him, "his heirs, executors, administrators, and assigns." The observation, already quoted, of *Chambers*, J., that in Calcutta the Statute of Enrolments does not apply, is good also as to Bombay; therefore, where the estate conveyed is perpetual, a freehold would pass. I have met with deeds of bargain and sale here in hundreds. Such conveyances, when not prepared by professional men, are often very incorrect, but even then generally show some adherence to the vocabulary of the law, and are doubtless imitations by Purvoes, and other Native writers, from some English prototype. Although English lawyers did not in the earlier days of

our possession of this island abound in it, yet one or two generally have in those days been here. Even so far back as the year 1675, we find that at the trial of Captain Shaxton before "a select Court of Judicature, for abetting mutinous conduct of his soldiers," a person whom Anderson describes as "a pompous attorney" was, according to Fryer, "ordered to impeach" Shaxton, and accordingly, "with some borrowed rhetorick, endeavoured to make him appear a second Catiline" (*k*). No doubt a very large proportion of the muniments of title are in the Gujaráti or Maráthi languages; and neither in the case of such documents nor of English conveyances does this court, nor did the Recorder's or the Supreme Court, insist upon technical precision. The intention of the parties is what is looked to. It is, as Sir E. Perry, C.J., observed (*l*), the duty of the Court to put a construction upon such documents as are brought before it.

A recovery with double vouchers suffered in the Supreme Court, the proceedings in which commenced on the 10th of February 1842, and terminated by judgment on the 25th of June 1842, appears not to have been brought to the notice of Sir E. Perry. John de Faria, a Portuguese, was the demandant, Francis John Lugrin the tenant to the præcipe, and the attorney on record was Acton Smee Ayrton. The disseisor was Hugh Hunt, and the vouchees were Joseph Maria de Ga and Manoel Murzello. The property consisted of seven oarts and several other pieces of land, situated in Girgaum, two messuages, dwelling-houses and a church, also situated in Girgaum.

Sir Alexander Anstruther appears to have stated that in two instances, the division of immoveable property amongst the children of an English subject had been contested, but he does not state in what court in Bombay, or when, the contest took place, or under what circumstances, or by whom, the cases were decided; and, for aught that appears in his statement, they may have been compromised. As regards British subjects the point can seldom have arisen. Until Act IV. of 1837 they were incapacitated from holding

(*k*) Anderson 220; Fryer, Letter III., chap. iv.
(*l*) *Doe d. Mackenzie* v. *Pestonjee*, Or. Ca. 534.

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in perpetuity lands in the Mofussil of this Presidency without the permission of Government, which permission it was considered impolitic to concede. In the island of Bombay, Europeans generally rent their houses from Native proprietors, and rarely acquire a permanent interest either in lands and houses; those who have done so, sensible that they are only temporary sojourners in India, in almost all cases, on quitting it, convert their lands and houses into money. Those who are engaged in commerce generally have partners, and the rule already noticed as to real estate purchased with partnership capital for partnership purposes, would exclude any question as to the enforcement of the British law of descent of real property in such cases. However, we were astonished to find that Mr. Justice Hore had stated that all immoveable property in the island of Bombay is of the nature of chattels real, and that the law as laid down by Sir Alexander Anstruther had prevailed in Bombay for the last forty or fifty years at least.

The proposition that there was no real estate in Bombay is inconsistent with what in 1854, on my first coming to this country, I gathered to be the opinion of the Judges of the Supreme Court and the profession; and although I have heard the judgment of Sir A. Anstruther in *Doe d. De Silveira* v. *Texeira* occasionally alluded to, it has been always denied to be sound doctrine so far as it referred to any other persons than Portuguese. As to its validity with regard to the alleged rule of succession amongst Portuguese, or what has been the opinion of the bench or the legal profession on that subject, I say nothing at present.

We are at a loss to understand how the learned Judge whose decision is now under appeal, could have arrived at the conclusion that Sir A. Anstruther's doctrine as to the non-existence of real estate has ever prevailed in the Supreme Court, and have been unable to discover that it has been in even a solitary instance adopted. Mr. Justice Hore has not specified any such instance. The learned Judge has claimed for himself a greater experience than that of any other person now in Bombay, and therefore renders it necessary that we

should point out that the experience of which he speaks was not in the Supreme Court. The two periods during which the learned Judge was a practitioner in that court extended, on each occasion, over a few months, and during the interval between them he practised at the Calcutta bar. His appointment to the office of Administrator General removed him from practice in Bombay from the 1st of April 1858, and since the middle of 1855 he has been the Chief Judge of the Court of Small Causes. The absence of Reports may have prevented him from being fully aware of the opinions of the Supreme Court. With the exception of Sir Erskine Perry's interesting and useful collection, some cases in which Mr. Morley previously published in the 2nd volume of his Digest, there has been a total absence of Reports of the decisions and dicta of the Judges of the Supreme Court. Sir Erskine Perry's Reports contain no case in which the existence of freehold estate of inheritance in Bombay was actually contested. Nevertheless, they furnish matter which shows that he was not under the same impression on that subject as the learned Judge, who has quoted a passage from *Doe d. McKenzie* v. *Pestonjee* (*m*) to support his position, that immoveable estate has always been considered to have been of the nature of personal estate, but has failed to perceive that in that very case Sir Erskine Perry held that the Pársi grantees, under the documents bearing date in the years 1783 and 1795, took a complete estate in fee in the lands thereby granted; the contest of the unsuccessful party there being, that the estate created was merely an estate tail, leaving a reversion in the Crown. Sir E. Perry's observations in *Hough* v. *Leckie* (*n*) show very clearly that, in the case of a grant of land in perpetuity by Government, he would have held, in accordance with *Freeman* v. *Fairlie*, that a freehold would pass. The whole of the contest in *Hough* v. *Leckie* was unnecessary if the law relating to real estate had no place in Bombay. Neither of the learned counsel in that case ventured to assert that, if a perpetual interest had been created by the instrument there under consideration, the doctrine

(*m*) Perry's Or. Cases 534. (*n*) *Ibid.* 496.

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of *Freeman* v. *Fairlie* would not have been properly applicable to it. Those counsel were two of the most eminent practitioners of their day at the Bombay bar, the late Mr. William Howard, and Mr. Sebastian Dickenson. The instrument in question, a letter from the Collector of Bombay (dated 14th February 1806), was held to amount to a lease for nine years from Government. It had expired many years before the institution of the suit. The tenant had died before the expiration of the lease. His devisee for life continued in possession, and on her death her daughter took possession, and paid the original rent to Government. The tenancy was, in 1848, held by Sir Erskine Perry to have become a tenancy from year to year.

The observation of Mr. Justice Hore, that it must be borne in mind that Act IX. of 1837 "was passed with reference to the property of Pársis situate in all the Presidency Towns, and not in the town of Bombay only," and "by a Legislature whose deliberations were conducted in a town where the English law of real property prevailed," is not, in our opinion, of any force.

The Pársis of India are inhabitants of Bombay, Surat, and Nausári; of these the vast majority dwell in Bombay. A few may be sprinkled throughout Calcutta, Madras, and other parts of India, but the number is so small as to be of no importance. The petition from the Pársis, praying legislative relief, was presented to the Bombay Government in March 1836. It complained, *inter alia*, that in the charters of the Recorder's and Supreme Courts no such exceptions had been made in favour of Pársis as had been made in these charters in favour of Gentús and Muhammadans, and, in substance, stated that theretofore Pársis had been in the habit of making wills, and that such wills, although not duly attested according to English law, had been recognised; and that, in cases of intestacy, Pársis had divided the property, immoveable and moveable, of the intestate amongst the widow and children, "according to certain usages which have prevailed amongst the most wealthy and respectable families, and in some instances corresponding with the mode of distribution

or division which has obtained amongst Hindús in this part of India." They added: "These usages have been so long submitted to, and have been followed in so many instances from generation to generation, that they have by many persons been considered to have the force of law." Thus it will be seen that they did not put forward any fixed or universal rule of distribution or succession, and they wholly omitted to mention the proportions in which distribution, when made, was made, except in those cases in which they say resort was had to the Hindú rule. Speaking of the omission in the charters of the Recorder's and the Supreme Courts to make an exception in favour of Pársis, they say: "The inconvenience, however, was not felt while Pársis agreed among themselves, and kept themselves and their family disputes and differences from being taken into the Recorder's and Supreme Courts;" and then the petitioners mention the institution of suits in the Supreme Court, in which the English rules of descent, and as to the attestation of wills of real property, were sought to be applied to Pársis; and praying a legislative remedy, they suggested that an Act should be passed confirming all partitions of landed property "where no fraud prevailed," and declaring that persons in possession for twenty-five years under any will, partition, or other family arrangement, or arbitration, or award, should not be disturbed. They suggest that the Judges of the Supreme Court should be consulted in the matter. Whether that was done I have been unable to discover. But the Bombay Government lost no time in laying the petition before Mr. Roper, then Acting Advocate General, and of great professional experience in Bombay. He, after examining the authorities on Pársi usages, which he found very indefinite and inconclusive, said that it would be difficult to assert that there was "any system of law peculiar to Pársis," and advised Government that "even if such a peculiar custom did exist and could be ascertained, the Supreme Courts were not empowered to administer it, and that he always understood that Pársis at Bombay were, strictly speaking, subject to the English law." He also, in a subsequent part of his opinion, said "According to my experience, Pársis have hitherto made

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no distinction etween immoveable or landed and moveable property. They have treated all such property as chattels, distributing it, where the owner died intestate, amongst the next of kin, to the exclusion, however, of female kindred, wherever such exclusion could be effected. In legislating with respect to Párs, the rights of the female members of that community might be established or declared. I am not aware of any instance in which lands or immoveable property have been held to be real estate in the hands of a Párs; or in which the oldest son of a Párs has been held entitled, as heir, to lands or immoveable property; or in which the will of a Párs has been held insufficient to pass lands or houses, because such will had not been made as a will of real property is required to be made in England. Such questions and others, in like manner important to Párs, are evaded by the Court. *Either the cases in which those points arise are decided upon other grounds, independent of such points, or the parties are importuned to refer their differences to arbitration.* They submit to such references with reluctance; not that they are now more litigious than formerly, but their Panchayat, I believe, is not in very high repute amongst them, and if parties can obtain the judgment of a court on their disputes, they frequently prefer such judgment to the decision of private arbitrators. The better remedy for the petitioners, I think, would be an Act declaring the law which is to be considered as having been hitherto applicable to Párs, and providing that such law shall in future apply to them. The sort of statute of limitations suggested by the petitioners would perhaps prove a very insufficient expedient; and as they intend such Act should apply only where no fraud has been practised by the parties to a transaction, I imagine the operation of the proposed statute would be very limited indeed."

The Bombay Government, on the 6th of June 1836, forwarded the petition and Mr. Roper's opinion to the Government of India, and supported the prayer of the petition. The Government of India, on the 4th of July 1836, laid those documents before the Indian Law Commission. The draft

of the Act prepared by the Commissioners, *verbatim* as the Act now stands, was transmitted, in January 1837, by the Government of India to that of Bombay, and by the latter published in the Gazette of that Government, which Government also laid a copy of the draft before the petitioners, requesting the opinion of the Pársi community upon it. The petitioners, by letter of the 6th of April 1837, replied to the Bombay Government, that "the proposed enactment entirely and most completely meets the views and wishes of the Pársi community, and they have no objections whatever to urge against it."

Had the doctrine of Sir A. Anstruther been law, and had freeholds of inheritance and the law of real property no place in Bombay, Sir Henry Roper would not have advised Government that there was any necessity, by legislation, to exclude the application of the English rules of inheritance to immoveable estate of Pársis, nor would the Commissioners have permitted the Legislature to cumber the Statute Book of India with an unnecessary Act.

That Act has no operation in rendering immoveable property of the nature of chattels real, save "so far as regards the transmission of such property on the death and intestacy of any Pársi having a beneficial interest in the same, or by the last will of any such Pársi."

In a case some six or seven years ago before our late Chief Justice, Sir M. SAUSSE, in which Mr. White was counsel on one side and I was counsel upon the other, I contended that where the lands, in this island, of a Pársi who died intestate before the 1st of June 1837, appeared to have continued after his death in the possession of the eldest of several sons of the intestate, they must be taken to have descended upon him by the English rule of primogeniture. The cause was allowed to stand over until next day, in order to permit my learned friend Mr. White to consider the point, which he did, and on that day contended, with his wonted vigour, that the property must be taken to have been chattel real, and to have been divisible amongst the next of kin; and he

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relied strongly on the words "to have been" in the first section of Act IX. of 1837; but the Chief Justice, referring to the words "from the 1st day of June 1837" in that section, and to the second section *passim*, ruled in my favour, and said he never had any doubt upon the matter. On one occasion, at least, in the Recorder's Court of Bombay, the law appears to have been administered to Pársis on the same principles as in the Mofussil. That was the case of the "*Gheestas*," in which Sir James Mackintosh, just before leaving India (in 1811), was induced, on evidence that such was Pársi usage, to admit to the right of inheritance the illegitimate son of an intestate Pársi, because he had been invested with the sacred badge. This decision, which caused a great sensation among the Pársi community at the time, was reversed by Sir John Newbold (Sir James Mackintosh's immediate acting successor) (*o*).

If the 5th section of the Statute of Frauds, requiring at least three witnesses to a will of real estate, had no application in Bombay before the passing of Act XXV. of 1838, (the Wills Act); if *Gardiner* v. *Fell* were no authority here, and there were no real estate in Bombay, the toilsome inquiry as to the practice relating to the wills of Hindús affecting immoveable property, directed by Sir M. *Sausse*, C.J., and Sir J. *Arnould*, J., in 1863, in *Muncherjee Pestonjee* v. *Narayen Luxamonjee* (*p*), was quite superfluous.

In the cause of *Pedro Laurence de Monte* v. *Hussein Bibi*, the plaintiff was a younger son of Manoel de Monte, who died on the 15th of September 1844, leaving immoveable property (a house in which he had an estate in perpetuity) situated in Girgaum, in this island. Manoel de Monte left surviving him his eldest son, John de Monte, who died in 1847, leaving two sons, Francis and Felix, and a daughter and widow. In 1847, after the death of John de Monte, the plaintiff proved the will of his father, Manoel de Monte. Subsequently Francis de Monte died, leaving his brother Felix surviving him, and he was alive at the trial of the suit

(*o*) Pársi Law Commission Report, pp. 1 and 2.
(*p*) 1 Bom. H. C. Rep. 77.

which was brought in 1863 by the plaintiff, as executor of Manoel de Monte, to recover possession of the house from the defendant. By his will, Manoel de Monte directed his executor to sell the house, but did not devise the house to him for that purpose. On the hearing before our brother *Arnould*, Mr. Dunbar, for the defendant, objected that the plaintiff, not being heir at law, and being executor only, could not maintain ejectment, the will containing no devise to him, and nothing but a bare power to sell, and he cited *Doe d. Hampton* v. *Shotter* (*q*), 1 Sugden on Powers 229, 6th edn. 1 Wms. on Executors, p. 549, 4th edn. After hearing Mr. Scoble on behalf of the plaintiff, our brother Arnould, on the 7th of September 1863, dismissed the suit with costs, "on the ground that there was no devise of the house in the will, but merely a power, coupled with a direction to sell." That is in effect a clear decision that the property was real, and not personal.

Sedgwick v. *Colley and others* was a suit instituted at the Equity side of the Supreme Court in 1862, and arose upon the Will of General Browrigg, made in 1808, which was penned in language both informal and involved. Subject to certain annuities, he devised his immoveable property, of considerable value, situated within the Fort walls of Bombay, in which he had an estate in perpetuity, upon trust (subject to certain annuities) to Thomas Smith in tail, with remainder over to the plaintiff, as she contended, in tail, but, as the heir at law of the testator contended, for life only, if the devise to her were not altogether void for remoteness. Thomas Smith, in 1838, executed a disentailing deed, under Stat. 3 & 4 Wm. IV., c. 74 (Fines and Recoveries Eng. Act), and enrolled it in England and Ireland. He, by his will, devised the property to trustees in trust for the defendant, Colley, for life, remainder over. Subsequently to the death of Thomas Smith without issue, the plaintiff, on the 4th of November 1857, executed a disentailing deed of the same property, under the Indian Act XXXI. of 1854. The plaintiff filed her bill for a declaration of her rights. The defendant,

(*q*) 8 Ad. and E. 905.

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Colley, by his answer, alleged that whether the property were regarded as real or personal estate, Smith had power to devise it; if real, because, as tenant in tail under the General's Will, he had, by the disentailing Deed of 1838, acquired the fee; and if personal, because the devise in the Will in that case gave to Smith an absolute interest. Sir M. *Sausse*, C.J., at the hearing of the cause in 1866, speaking of Colley's attempt in his answer to uphold the disentailing Deed of 1838, on the ground that Bombay was holden by the East India Company as of the manor of East Greenwich, said: "It is the first time that such a proposition has been advanced in Bombay. It appears to be quite untenable, and was properly abandoned at the bar by counsel for the devisee (Colley), as not capable of being supported. If Bombay were held to be an integral part of East Greenwich, any statute passed in England and having operation in East Greenwich should be in force in Bombay. That point, however, having been abandoned, I do not further refer to it." The Chief Justice by his decree, declared the plaintiff, under the Will of General Brownrigg and in the events which had happened, entitled to the *fee and inheritance* in possession of his immoveable property in Bombay, from the death of Thomas Smith, in 1856, and ordered Colley to pay to the plaintiff her costs of the suit. That decree now stands for rehearing on the petition of the defendant, Giles Brownrigg, the heir at law of General Brownrigg, but he of course, as well as his adversary, the plaintiff, maintains that the property is real estate. Colley has made no attempt to disturb the decree.

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We find nothing in Act XXIX. of 1839 for the amendment of the law of Dower, or in Act XXX. of 1839 for the amendment of the law of Inheritance, or in Act XXXI. of 1854 for the abolition of real actions and fines and recoveries, which exclude their operation in Bombay. In *Sedgwick* v. *Colley* the application of the last of those Acts to Bombay was not denied on behalf of any of the parties in the cause at the hearing, and it is manifest that the clauses relating

to the acknowledgment of Deeds by married women applied to all of Her Majesty's Courts in India.

That most, though not all, of the lands in Bombay are held in perpetuity, will be seen by reference to Governor Aungier's Convention in 1672, Mr. Warden's Report in 1814, and No. III. of the New Series of the Bombay Government Records, containing, amongst other papers, Mr. Le Messurier's Report of the 23rd of December 1843 on the Foras Lands (*r*), and Act VI. of 1851. The preamble of that Act, it is important to observe, recited that the East India Company were then "legally entitled to the *freehold reversion*" of certain foras lands, the outline of which was delineated in a plan mentioned in the Act. The second section, reserving a part of those lands required for public purposes, extinguished the "rights of the Company" in the residue of them, *in favour of the tenants*, who were the immediate rent-payers to the Company, saving the rent and "all rights of forfeiture and escheat in respect of want of heirs or representatives, or of felonies committed, or otherwise in respect of attainder." Supposing the freehold reversion to have been vested in the East India Company, as recited (*s*), Act VI. of 1851 would appear to have vested it in the tenants (*t*). To estates *in which the possessors had a permanent interest*, we find that all of the three schools which we have mentioned, have applied, when the possessors are British subjects, the English law of inheritance. The Com-

(*r*) Salt batty grounds reclaimed from the sea, chiefly, but not wholly, by the building of the causeway or vellard near Breach Candy in 1776-1780, during the time of Governor Hornby. A good account of the condition of the island of Bombay at the time of the cession to the English will be found in Fryer, Letter II., chap. i., pp. 66, 67. There were reclamations on a small scale before 1776 of what the Court of Directors were wont to term in their despatches "the drowned lands."

(*s*) If the opinion of Mr. Advocate General Macklin, mentioned in Mr. Le Messurier's Report, and the opinion of Mr. LeMessurier, were correct, the recital was not true, and the reversion, instead of being in the Company, was in the tenants, and the Company was, according to *Doe d. Whittick* v. *Johnson*, Gow's N. P. Rep. 173, cited by Mr. Le Messurier, entitled to the foras (or quit) rent only, and not to the land.

(*t*) As to waste lands, see *Doe d. E. I. Company* v. *Hirabai*, Perry's Oriental Cases 480.

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missioners, including Mr. Amos, admitted that such was the rule within the Presidency Towns (*u*), and that, to render the rule otherwise in the Mofussil, legislation was necessary. Master Stephen and Lord Lyndhurst, whose opinions in a great measure coincide with those in the *Lex Loci* Report as to the modified introduction of English Law, held that the English canon of descent must prevail amongst British subjects as to land in Calcutta. The Judges of the Supreme Court at Calcutta have been, with one exception, unanimous on the point, and the Mofussil courts, by a different road, arrive at the same result as to lands in the Mofussil. We see no reason for adopting an opposite doctrine in Bombay, whether we look to the Treaty of 1661; the original charter of 1668 to the East India Company, conferring a fee upon that Company, and conversant of hereditaments; Aungier's Convention, which nominates the estates, with which it deals, estates of inheritance—an ancient and remarkable specimen of which was the manor of Mazagon; or to the other charters, including the Mayor's Court, the Recorder's Court, and the Supreme Court Charters. The two latter expressly take the distinction between real and personal estate: "all pleas and actions," mentioned in the charters of the Mayor's Court, are sufficient to comprise real actions, and the Supreme Court of Bombay is by statute expressly enjoined to exercise all the jurisdictions and powers of the Supreme Court at Calcutta, which is, in words, empowered to try real actions. The conveyances and Bombay authorities referred to, the statute of Geo. IV., and the Indian Acts IX. of 1837, VI. of 1851, and XXXI. of 1854, admit of no other conclusion than that, at the time the judgment under appeal in this case was given, there were, in Bombay, freehold estates of inheritance, in the English acceptation of the term.

(*u*) See, however, as to special legislation for Madras, which would preclude or limit the operation of the rule there, the observations of Sir A. Anstruther, 2 Morley's Dig. 271.

The judgment of Mr. Justice HOME in the Division Court, and against which the above appeal was made (after briefly stating the facts of the case), proceeded as follows:—

Now the contract which the plaintiffs ask the court to compel the defendant specifically to perform, is to be collected from these three letters (*v*), and the lease to which those letters refer; and the questions which I have to decide are whether there is evidence of a contract to grant a further lease, and, if so, whether the defendant can, and ought to be compelled to perform it.

The defence set up was, first, that there is no contract, or memorandum of a contract, in writing sufficient to satisfy the 4th section of the Statute of Frauds; and secondly, if there is, that the defendant is unable to fulfil his contract, on account of the mortgagee, Hirjibhái Hormasji, and the defendant's wife, A'imáye, refusing to concur in granting a further lease.

Upon the first point, it appears to me that the three letters, taken in connection with the expired lease, form as complete a contract as can possibly be constituted by means of unconnected documents, or by documents unconnected except so far as they refer to each other; and it is well settled that contracts thus constituted are sufficient to satisfy the Statute of Frauds. The three letters refer to each other; they refer to the property as already held under lease, and as occupied by the plaintiffs; they mention the period for which they are to be let, and the time from which the renewed tenancy is to commence; they refer to the rent, and conditions mentioned and contained in the former least, as the rent and conditions to be paid and observed under the extended tenancy; and it is clear that parol evidence is admissible to show what the lease referred to is, in order, by connecting the letters and lease together, to constitute one entire contract in writing, and thus satisfy the requirements of the Statute of Frauds: *Ridgway* v. *Wharton* (*w*). The docu-

(*v*) Printed *suprà*, pp. 3, 4.
(*w*) 4 Jur. N. S. H. L., 173.

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ments, in fact, describe most fully all the terms upon which the property to be let is intended to be held; and the only discussion upon them was with reference to the persons to whom the renewed lease was to be granted, whether to all the plaintiffs or to the plaintiff Henry Rogers alone. But when we look to the letter of the 8th of March, addressed to the defendant by the plaintiffs (Rogers & Co.), in which particular mention is made of "our Mr. Rogers," and in which it is stated that "we agree" to do so and so, and that "we would be glad if you would confirm the terms in writing," and then find the defendant, in his answer of the 22nd of April, saying "I agree to the terms you propose," there can I think, be little or no doubt that the defendant did intend and agree to grant the lease to all the plaintiffs, and not to the plaintiff Henry Rogers only. The question, however, is of very little moment, as the plaintiffs, in their plaint, offer to accept the lease either in their own names, or in the name of Henry Rogers alone. I am of opinion, therefore, that the defendant did enter into a contract in writing sufficient to satisfy the Statute of Frauds.

Is he, then, able, and if so, ought he to be compelled, to fulfil the contract which he has thus entered into? A considerable part of the argument on both sides was addressed to the two questions: first, what was the legal position of the defendant after the execution of the mortgage to Hirjibhái, whether he was tenant at sufferance, or in what capacity he stood with reference to him as mortgagee; and, secondly, whether the property was re-demised to the defendant and his wife, by the indenture of mortgage of the 14th of February 1859. I must confess that I was unable at the hearing, and still am unable, to appreciate the force and weight of these arguments. For with reference to the first, whatever he may be called, or whatever estate-holder he may be assimilated to (and I consider that he strictly represents the character neither of a tenant at will nor of a tenant at sufferance), the rights, powers, and liabilities of a mortgagor in possession are now well ascertained and settled by authority; and it is clear that where a person in actual possession of land mort-

gages it, and subsequently demises it at a rent, although the demise is absolutely void against the mortgagee, it is nevertheless good as between the mortgagor and his tenant, until the mortgagee interferes: until eviction, either actual or constructive, by the mortgagee, the mortgagor is entitled to recover the rent for his own absolute use, and to distrain for it in his own name, if not paid when due: *Wheeler* v. *Branscombe* (*x*), *Trent* v. *Hunt* (*y*); and as to the re-demise, had any been created, it could only have extended, under the clause in the mortgage-deed, down to the 14th day of February 1862; and if the defendant's power to grant an extended lease was acquired under such re-demise, that power ceased long before the termination of the old lease, and, therefore, could not have availed or enabled the defendant to grant the lease in question. But in reality the mortgage created no re-demise, for to constitute a re-demise, not only must the time during which the mortgagor is to hold be terminate and certain (which was the case here), but there must be (what was wanting here) an affirmative covenant or agreement that the mortgagor shall hold for a determinate period: *Doe d. Roylance* v. *Lightfoot* (*z*), *Doe d. Parsley* v. *Day* (*a*). In the mortgage before the court, the covenant by Hirjibhái Hormasji, that he would not call in or compel payment of the principal money, or of the rents and profits, until the 14th day of February 1862, is a negative covenant merely, and does not amount to a lease or re-demise.

The question still remains, does the refusal of the defendant's wife and of Hirjibhái Hormasji, or of either of them, prevent the defendant's fulfilling his contract, or ought such refusal to deter the Court from enforcing its performance? On this part of the case it was contended for the plaintiffs: 1st, that the property in question is chattels real or personal property, and having been conveyed to Náoroji Berámji and A'imáye his wife, that it vested in the former absolutely and solely; 2ndly, that if the property is to be regarded as freehold of inheritance or real estate,

(*x*) 5 Q.B. 373. (*y*) 9 Exch. 14.
(*z*) 8 M. and W. 564. (*a*) 2 Q. B. 147; 1 Smith L. C. 446, 4th ed.

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the conveyance to Náoroji Berámji and A'imáye his wife made them tenants by entireties, and that the former has consequently the power, independently of his wife, to grant a lease for five years, provided he and his wife so long live, the plaintiffs being willing to accept the lease so conditionally limited; and 3rdly, that the non-concurrence of Hirjibhái Hormasji is immaterial, inasmuch as the plaintiffs are willing, and by their plaint offer, to redeem his mortgage.

The first part of this argument raises the very important question, What is the nature of landed or immoveable property in the island of Bombay? Had that question been one "of first impression," one that has hitherto remained undecided by any court of competent jurisdiction, I should certainly have been very reluctant to express any opinion of my own on the subject, without first hearing a much more comprehensive and exhaustive argument than that I was favoured with at the trial of this suit. As it is, the question was settled nearly half a century ago, by the very able and elaborate judgment of Sir Alexander Anstruther, the then Recorder of Bombay; and I am not aware of any subsequent case in which the correctness of that decision has in any measure been impeached or questioned. Not only do I consider myself bound by that judgment, but I entirely approve of that part of it which confines itself strictly to the nature of immoveable property, considering that portion, at least, to be based on good reasoning and sound principles. The case to which I refer is *Doe d. Antonia de Silveira* v. *S. B. Texeira* (*b*).

"But I also think," says the learned Judge (*c*), "that the claim of the plaintiff would be valid under the law of succession of English subjects here. The whole existing practice of this place is inconsistent with the title to real property being the same here as in England. From the uniformity of the practice here, I have no doubt that the course of decisions, from the earliest time, has proceeded upon the principle of the succession to all property, whether real or personal being governed by one law, the law of succession to per-

(*b*) 2 Mor. Dig. 247. (*c*) *Ibid.*, p. 254.

sonal estate; but it is not even confined to succession. The law of all property here is, throughout, the law of personal property, and was so long before it was apparently legalised by the Charter under which we now act as to execution. Such being the admitted fact, the only question is, whether this course of decision could have had a legal commencement. If it could be legal, we must presume it was so: it might commence by charter, or by proclamation of the king, or by regulation of the company under the legislative authority given by the king's charter. From the time of Charles the Second there appears to have been a legal judicature here, under the original sanction of the king's charters, and acting, as I presume, upon some legislative provisions which the East India Company was empowered to make from time to time. If no such legislative power had been vested in the Company, and if the power of making laws for this island had remained wholly in the Crown, I think the Court ought not to hesitate in presuming the necessary authority of the Crown to have originated and sanctioned a course now established by usage, and, as I think, highly beneficial and expedient.

"The privilege of real property, of not being taken in execution under a *fieri facias*, and of not being liable to simple contract debts of a deceased owner, is naturally so unjust, and so unfit for a colonial establishment, that it has been, I believe, universally rejected in the plantations. The general rule that the law of the mother-country is not to be carried into a colony, except so far as it is fit for the state of the colony, explains, and fully warrants, this part of the old practice of former Courts of Judicature here, or would give legality to any legislative provisions of the Company, supported by such manifest grounds of expediency. The same principle will justify the deviation from the English law as to the whole character of real property in India.

"When the Courts of Judicature were first called upon to decide upon the rights of succession; or when the East India Company were first called upon to determine by regulation what law of succession as to lands should be followed in Bombay; the general question may be supposed to have

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been, whether the law of freehold property in England should or should not be introduced here. And the inconveniences of such a rule, as to legal executions for debt, and as to immunity of the lands of a deceased from his simple contract debts, are so obvious, that no one can be surprised at its not being adopted. In both those points, more particularly, the English law of real property is wholly contrary to the principles of mercantile law; and commerce must be considered as the basis, as it is manifestly the principal object, of all distant plantations and colonies of a mercantile people. Bombay was obtained expressly for the purpose of English commerce. * * * *

"The only general and consistent principle which could be established here, so as to protect the usages of the natives, and also to prevent the unjust effects of the English law of real property as to debts; and which has accordingly been established in practice, from the evident reason of the thing, long before and independently of the statutes establishing the King's Courts, and appearing to sanction in part the established custom, is, that the law of property in land here cannot, consistently with the state of this society, be permitted to follow and depend upon the land, as in England; that the property in lands here must, therefore, follow the law of property of the person, or, to use a more familiar expression, that it must, like leaseholds in England, become personal property, for the purpose of succession, and of liability for debts by execution or otherwise, and in other matters of title, and must, therefore, be as variable as the laws of the various castes who compose this society."

But independently of this authority, and even if the case before the Court were *res integra*, I should myself be disposed, on general principles, to hold that immoveable property in Bombay is of the nature of chattels real, and not of the nature of freehold of inheritance.

It is a well known and indisputable rule of law, that whenever a settlement is obtained in an inhabited country, either by conquest or by cession from another power, the law of that country continues the same until the paramount power

(the Crown or Legislature) intervenes, and introduces a change. Now the island of Bombay at the time of its cession to the Crown of England was occupied, almost entirely, by Hindús, Muhammadans, and Portuguese, to whom the broad distinction that exists in England between real and personal estate was entirely unknown; all property, according to their respective laws, descending alike, to the same persons, in a manner totally different to the descent of real property, but much more closely resembling that of personal property, in England. So unsuitable to the state, wants, and circumstances of such people would the English law of real property appear, that a governing body, like the East India Company, having power to legislate for the inhabitants of Bombay, instead of introducing such a law, would rather hasten to repeal it, if any law so objectionable was found to exist. It is an undoubted and admitted fact, that English law is the *lex loci* of Bombay, and it is also admitted that all Her Majesty's subjects here, with the exception of Hindús and Muhammadans, are amenable to that law; but there is nothing, as far as I can discover, to lead us to the conclusion that that branch of English law which we call real property law, or any part of it, has ever been introduced into this island. On the contrary, immoveable property in Bombay, since the British rule, appears to have been all along treated in a manner wholly inconsistent with the idea of its being real estate. No single instance is known of the succession to houses or lands held by an eldest to the exclusion of younger sons. Executors and administrators, in their capacity of personal representatives, were in the habit of selling immoveable property long before such sales were legalised by any Act of the Legislature. Lands and houses were held available for the payment of simple contract debts, in the absence, and without the sanction, of any express enactment on the subject, long before they were made so liable in a Court of Equity in England. Houses and lands were also sold by the sheriff under writs of *fieri facias*, long before such sales were legalised by the king's charters. Such property, in former times, was transferred, not by feoffment, or by lease and release, but by a simple

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writing, expressive of the intention of the parties, and in later years (prior to Act XXXI. of 1854, for simplifying the modes of conveyancing) it was most generally transferred by a conveyance assuming the form of a release only, without reference to Act IX. of 1842 (for rendering a release as effectual for the conveyance of freehold estates as a lease and release by the same parties). It also appears from Sir Alexander Anstruther's judgment, that although the right of an eldest son to succeed to landed property as heir at law, to the exclusion of other sons, had been contested on two different occasions, the claims had failed and been disallowed.

During my own experience, which I believe to be greater than that of any other person now in Bombay, I have never heard of property here having been transferred by feoffment, nor of a fine having been levied, nor of a recovery having been suffered, nor have I once seen a conveyance by a lease and release. And Sir Erskine Perry's judgment in *Doe d. M'Kenzie* v. *Pestonjee Dadabhai* (*d*), in my opinion, tends most strongly to show that immoveable property has always been considered to be of the nature of personal estate. At page 534 he says, "Although English law has been introduced into this Island, to the supersession of the Portuguese feudal law, which appears to have prevailed at the period of the cession, the forms of English conveyancing have never been in use, and the oldest practioners have never heard of a fine or recovery. Land, therefore, passes from hand to hand with all the simplicity of a transaction not fettered by forms; and all that we see in Courts of Justice on such occasions is a simple writing, not under seal, expressive of the intention of the parties." Had lands in Bombay been freehold of inheritance, it would in former times, prior to the year 1842, have been conveyed either by feoffment, or by lease and release, and latterly, in the interval between the passing of Act IX. of 1842 and Act XXXI. of 1854, by deed of release, referring to the former of those Acts; and as such assurances as feoffments and deeds of lease and release are entirely unknown to Bombay, and as

(*d*) Or. Ca. 531.

conveyances executed since the passing of Act IX. of 1842 very seldom refer to that Act (although they occasionally do), and as immoveable property here has been allowed to assume (as I have shown) all the characteristics of personal estate, it seems to follow, almost conclusively, that such property has always been regarded, and that it in fact is, of the nature of chattels real or personal estate.

Freeman v. *Fairlie* (*e*), which was relied on by the defendant, appears to me to be of no authority in his favour. The same Judges who, on the evidence and circumstances before them in that case, decided that lands in Calcutta were of the nature of freeholds of inheritance, would, in my opinion, upon the evidence and under the circumstances appearing in this case, hold that lands in Bombay are of the nature of personal estate, the evidence and circumstances in the former being the very reverse of what they are in this. Lord Lyndhurst, in his judgment (*f*), says, "I think it beyond all doubt that property of this description has, from the period of the year 1774 (the date of the Charter of Justice), been constantly conveyed by *deeds of lease and release*, in the form in which Oldham took the property in question. It is proved also, and by one of the officers of the Court, that of land of this description *fines* are levied. It is proved by all these persons that it has been the *constant course* of the Supreme Court of Calcutta, when ejectments are brought by the heir at law, on establishing the possession and title of the ancestor, and proving the claimant is the heir at law, in such ejectments, the heir has always recovered." Lord Brougham, in the *Mayor of Lyons* v. *The East India Company* (*g*), states that the grounds of decision in *Freeman* v. *Fairlie* "were chiefly the practice of the settlement in regard to the mode of conveyances, viz., by lease and release, with the course of succession, and also the Charter of the Company, with the Acts of Parliament referring to them, the charter of the 13 Geo. I. being the one principally

(*e*) 1 Moo. Ind. App. 305. (*f*) *Ibid.* 344.
(*g*) 1 Moo. Ind. App. 282.

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cited," and at page 284 he says, "the introduction of English law is proved by showing that the mode of conveyance is adopted by lease and release, that is, upon the Statute of Uses. But in perusing the decision itself it will be found that Lord Lyndhurst rested it entirely upon the practice and decisions that had prevailed and been passed in Calcutta; and that the Charters and Acts of Parliament were referred to solely for the purpose of ascertaining whether that practice could have had a legal origin.

No circumstances in any degree similar to those referred to in *Freeman* v. *Fairlie* were relied on before me; and the only argument of any weight that was urged, was with reference to Act IX. of 1837, whereby it is enacted that all immoveable property within the jurisdiction of any of the Supreme Courts belonging to Pársis, as far as regards its transmission on the death of the owner, should be taken to be and to have been of the nature of chattels real, and not freehold; and it was contended on the one hand, that the immoveable property of Pársis in Bombay was by this Act made to be of the nature of chattels real for all purposes, and not for the purpose of transmission on death only, an argument which I consider to be wholly untenable; and on the other hand, that if immoveable property in Bombay was, before the passing of an Act, of the nature of chattels real, the Act itself was unnecessary and wholly inoperative so far as Bombay was concerned. It is understood that the Act was passed at the instance of certain Pársis residing in Bombay, who were apprehensive that the English law of real property was *for the first time* about to be applied, or might be applied, in a case which had lately arisen, and in which a young Pársi had preferred a claim to be entitled to certain property as heir at law, to the exclusion of the other next of kin. But it must be borne in mind that the Act was passed with reference to the property of Pársis situate in all the presidency towns, and not in the town of Bombay only; that it was passed by a Legislature whose deliberations were conducted in a town where the English law of real property prevailed; and that, although Pársis had, for

very many years prior to its promulgation, occupied and possessed, as owners, a large portion of the land in Bombay, the claim which gave rise to the Act was the first, and the only one of the kind that has come to our knowledge. But even if other and far weightier arguments could be adduced in favour of the defendant's position (and I dare say that some unknown to me may exist), none, in my opinion, ought, at this late day, to be allowed to prevail against the solemn and deliberate decision of a learned Judge, who at the time presided over the highest Court of Judicature in the Island, more especially as the law pronounced in that judgment is evidently the law which has regulated the law of succession to immoveable property in Bombay for the last forty or fifty years at least.

I quite agree with the opinion expressed by Sir Erskine Perry in *Doe d. Dorabji* v. *The Bishop of Bombay* (*h*), that it is peculiarly incumbent upon the Judges of this Court "to follow humbly the steps of their predecessors in questions which do not depend upon principles of universal jurisprudence." Even if the decision of Sir Alexander Anstruther could, for any reason, be regarded as erroneous, I should nevertheless, it has so long been acquiesced in, feel myself bound to adopt and follow it; and I doubt much whether a Court of Appeal even would feel itself justified in overuling it: see *Daly* v. *The India and London Life In-Company* (*i*), where Parke, B., says: "Though we are quite satisfied that the case of *Godsall and Boldero* was founded on a mistaken analogy, and wrong, we should hesitate to overrule it, though sitting in a Court of Error, if it had been constantly approved and followed, and not questioned, though many opportunities had been offered to question it."

For these reasons I am of opinion that immoveable property in the island of Bombay is of the nature of chattels real or personal estate; and that, as the property in question was conveyed to the defendant and his wife, and as marriage,

(*h*) Or. Ca. 506. (i) 15 C.B. 392.

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according to English law, operates as a gift to the husband of all the wife's chattels real, the defendant is competent to let it, or to dispose of it in any way he may think fit, without the concurrence of his wife.

Secondly, assuming the property in question to be freehold of inheritance, and not chattels real, *as I have decided it to be*, as it was conveyed to the defendant and his wife A'imâye during coverture, it became vested in them as tenants by entireties. The husband being seised of the whole estate during coverture, at least, either in his own right or *jure uxoris*, can of course dispose of that entire interest: Co. Lit. 287 *a*; Com. Dig. Baron and Feme D. 2. But his conveyance alone would have no effect against his wife surviving. The effect of the conveyance to the two would be to place the ownership for the coverture entirely in the husband's power, so as to entitle him to alienate it at pleasure, and to pass the limited freehold or any lesser interest without the wife's coöperation: Wat. Conv. 170; Macq. Hus. and W. 27. Even supposing, then, that the property is real estate, the defendant would be able to grant it on lease for five years, provided he and his wife should so long live; and as the plaintiffs are willing to accept a lease on these conditions, I think they are entitled to demand it, provided the refusal of Hirjibhái Hormasji constitutes no bar to that right.

Thirdly, does the refusal of the mortgagee to concur in the lease, present an obstacle in the way of the fulfilment of the contract by the defendant, or justify him in refusing to fulfil it? In my opinion it does not. All that Hirjibhái Hormasji, as mortgagee, is entitled to, is the payment of his principal and interest; as soon as that is satisfied, his title ceases. The amount due to him was not only tendered to him at the trial, but the plaintiffs made him an offer to redeem his mortgage before the suit was instituted. Had the defendant been unable to discharge the mortgage debt the case would be different. No such difficulty has been alleged; and the defendant has not been called to prove that, for any reason whatever, either on account of his wife's refusal, or

of that of the mortgagee, to join in the lease, or on account of his inability to redeem the mortgages, he is unable to perform the contract. The only question, then, is whether, in order to remove the difficulty *suggested* on the defendant's behalf—that Hirjibhái Hormasji refuses to join him in granting, or to allow him to grant, the lease—the plaintiffs have not a right to require the defendant to redeem the mortgage himself, or to allow them to redeem it. And this question seems to me to be settled by authority in the affirmative. In *Keech* v. *Hall*. (*j*) Lord *Mansfield* lays down the rule, that where a lease is a beneficial one (and the lease in this case clearly is so), "the tenant may put himself in the place of the mortgagor, and either redeem it himself or get a friend to do it." In *Costigan* v. *Hastler* (*k*) Lord *Redesdale* says that if a person undertakes to do a thing which he can himself do, or has the means of making others do, the court compels him to do it, or procure it to be done, unless the circumstances of the case make it highly unreasonable to do so. And this decision was approved of and followed by Sir John Stuart, V.C., in *Hutton* v. *Breton*. (*l*)

I am, therefore, of opinion that if Hirjibhái Hormasji still refuses to concur with the defendant in granting the lease to the plaintiffs, the defendant must be compelled either to redeem the mortgage himself, or to allow the plaintiffs to do so. On the whole, I consider that the plaintiffs are entitled to a specific performance of the contract which the defendant has entered into with them; and that the issues, so far as they are not hereinbefore virtually answered, must be decided in the plaintiff's favour.

The Decree will therefore be as follows :—

Declare that the agreement in the plaintiffs' plaint mentioned or referred to, ought to be carried into execution, and decree the same accordingly. Let the defendant execute to the plaintiffs a lease of the piece of land and messuage in the said agreement referred to for the term therein mentioned, and let such clauses and conditions be inserted in the

(*j*) Doug. 21. (*k*) 2 Sch. and Lef. 166.
(*l*) 9 Jur. N. S. 1310.

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said lease as are contained in the lease of the 4th of October 1859 in the said plaint mentioned, or clauses and conditions as nearly similar thereto as the circumstances of the case will admit of; such lease to be settled by the Commissioner in case the parties differ. Let the plaintiffs execute to the defendant a counterpart of the said lease; such lease and counterpart to be at the equal expense of the plaintiffs and defendant. Defendant to pay plaintiffs' costs of suit, to be taxed. Liberty to apply.

Attorneys for appellant:—*Keir, Prescot, and Winter.*

Attorneys for respondent:—*Cleveland and Peile.*

NOTE.—With reference to the statement, in Mr. Justice Westropp's judgment in the above case, that he had been unable to discover whether the Judges of the Supreme Court had been consulted on the petition of the Pársis, presented in March 1836 to the Bombay Government, praying for legislative relief with regard to the descent of immoveable property, the Editor of these Reports is authorised by Mr. Justice Westropp to say that, since the delivery of that judgment, he has received a communication from Sir John Awdry, informing him that the idea of affording to Pársis, the relief which they sought from the English law of inheritance of real (freehold) property, by applying to the transmission of their immoveable property, in cases of death and intestacy, the English law of succession to chattels real, originated with Sir John Awdry, and the draft of Act IX. of 1837 (subsequently laid before the Indian Law Commissioners and the Indian Legislature) was prepared by him for that purpose. After stating that the question of inheritance according to the English law of freehold property did arise amongst the Pársis, and, after referring to Act IX. of 1837, he writes: "No doubt Mr. Roper, as Acting Advocate General, would be consulted upon it. But the idea of *thus* cutting the knot was mine, and the draft, which was passed with only trifling alterations, was by me. I had been in communication with some of the leading Pársis in order to get a scheme of inheritance in accordance with their usages. But none was proposed which would be either *certain* or *reasonable* in the apprehension of an English lawyer. I felt that, if the property were divisible, it would be substantially what they required, and that it was better to adopt wholesale a well matured system than to legislate *de novo*. All this fixes indelibly on my memory that I held that Pársi inheritance was governed by English law." In a previous part of the same letter Sir John Awdry wrote: "I do not believe I ever heard of Sir A. Anstruther's doctrine in *Doe d. De Silveira* v. *Texeira*; if I ever did, it was so clearly not the doctrine held in my time that it made no impression." Sir John Awdry sat as a Puisne Justice of the Supreme Court from the 31st of December 1830 until the 29th of January 1839, when he became Chief Justice. The latter office he held until the 2nd of March 1841.

Although *Doe d. De Silveira* v. *Texeira* was decided in 1817, it was not published until 1849, and then by Mr. Morley in the 2nd volume of his Digest.—ED.