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really that the trustee shall be made liable for the money that he has improperly taken, and the money is to be considered as if it still belonged to the Association. It is money of the bank which is in the hands of the trustee, who cannot be allowed to say that he has made use of it in breach of his trust.

The order of the learned Judge must be reversed; the Trustees of the estate of Kharsedji Fardunji must be prohibited from parting with all the assets until this claim is decided, and the costs of the Liquidators must be paid out of the estate of Kharsedji Fardunji.

*Order reversed.*

Attorney for the appellant: *J. S. Hurrell.*

Attorneys for the respondent: *Keir, Prescott, and Winter.*

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JOAO MARIANO LOPES ..... *Plaintiff.*  
FRANCISCO LOPES ..... *Defendant.*

*Portuguese Law—Primogeniture amongst Portuguese Inhabitants of Bombay—Cession of Bombay to the English—English Law introduced into Bombay.*

The Portuguese inhabitants of the Town and Island of Bombay, not having had their laws, and usages having the force of laws, preserved to them by the Treaty by which Bombay was (A.D. 1661) ceded to the English, are subject to English law, so far as the same has been introduced into Bombay, and has not since been varied by legislation.

Where a Portuguese inhabitant of Bombay being entitled to certain immoveable estate in perpetuity died intestate before the 1st of January 1866 (on which day the Indian Succession Act, 1865, came into force), leaving two nephews by a sister as his next of kin, it was held that the elder of them, as heir at law of the intestate, was entitled to succeed solely to such immoveable estate.

THE facts of this case sufficiently appear in the judgment of the Court. The arguments of counsel, and the examination of witnesses, extended over ten days.

*Edward Howard* (with whom was *Scoble*), for the plaintiff, cited or commented on *Doc d. De Silveira v. Teixeira (a)*; *Campbell v. Hall (b)*; *Calvin's Case (c)*; *The Attorney General v. Stewart (d)*; *The Mayor of Lyons v. The East India Company (e)*; *Anonymous (f)*; *The Indian Chief (g)*; 2 Bruce's Annals,

(a) 2 Mor. Dig. 247. (b) Cowper 204. (c) 4 Rep. 2a, 17b.

(d) 2 Meriv. 143, 158. (e) 1 Moo. Ind. App. 175, 271, 274.

(f) 2 P. Wms. 75. (g) 3 C. Rob. 22.

242, 271, 279, 385, 407, 417, 512, 538; Statutes 13 Geo. III., c. 63; 21 Geo. III., c. 70; 37 Geo. III., c. 142, ss. 8, 10, 12, 13; 39 & 40 Geo. III., s. 79, s. 13; 53 Geo. III., c. 155, s. 105; 2 Morley's Dig. 503, 504; *The Advocate General v. Ranees Surnomoye Dossee* (h); *Abraham v. Abraham* (i); *Blankard v. Gaddy* (j); *Maltass v. Maltass* (k); *The Slave Grace* (l); *Ruding v. Smith* (m); *Heathfield v. Chilton* (n); *Wilson v. Marryat* (o); *Sibchunder Doss v. Sibkissen Bonnerjee* (p); *Musleah v. Musleah* (q); Charters of Recorder's and Supreme Courts; Treaty of Cession, 1661; *Lex Loci* Report of 1840.

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*Pigot and Green*, for the defendant, quoted Perry's Oriental Cases 60, 62, 119, 331, 332, 335; *Jebb v. Lefevre* (r); *Burton's Real Property*, Appx. 522 *et seq.*; *Gardiner v. Fell* (s); *Cumming v. Forester* (t); Acts IX. of 1837 and IX. of 1842; *Furlong's Landlord and Tenant* 11, 12, 13; *De Monte v. Hussein Bibi* (u); *Doe d. Savage v. Tagore* (v); *Joseph v. Ronald* (w); *Freeman v. Fairlie* (x); Charter of 1668, granting Bombay to the East India Company. They contended that *Doe d. De Silveira v. Texeira* was bad law, and had never been followed in the Supreme Court; and they commented upon an admission made by the plaintiff in his evidence, as showing that there could not have been any general belief, even amongst the Portuguese inhabitants themselves, that the Portuguese law was of force in Bombay. That admission was that he had never until recently claimed a share in his uncle's property *as a matter of right*, when he had been advised by counsel that the Portuguese law gave him that right.

(h) 9 Moo. Ind. App. 387. (i) *Ibid.* 195.

(j) 2 Salk. 411. (k) 1 Robertson 76, per Dr. Lushington.

(l) 2 Hagg. Adm. R. 76, per Lord Stowell.

(m) 2 Hagg. Con. R. 381. (n) 4 Burr: 2016, per Lord Mansfield.

(o) 8 T. R. 31. (p) Boulnois R. 74, per Peel, C.J.

(q) *Ibid.* 239, per Colvile, C.J.

(r) Clarke's Addl. Rules and Cases 56, and see 4 Bom. H. C. Rep., O. C. J. 68.

(s) 1 Jac. & W. 22; S. C., 1 Moo. Ind. App. 299.

(t) 2 Jac. & W. 334.

(u) *Coram Arnould*, J., 7th Sept. 1863: see 4 Bom. H. C. Rep., O. C. J. 100.

(v) Morton R. 70.

(w) Cited 1 Moo. Ind. App. 310, 313, 314, 315, 320, 345.

(x) 1 Moo. Ind. App. 305.

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October 9. WESTROPP, J.:—This case has been well argued on both sides. One of the learned counsel, whose argument showed great research and ability, has since, to the deep regret of his own profession and of the Court, been removed from amongst us by a deplorable and fatal accident. To the memory of one who so highly distinguished himself this passing tribute is justly due.

The facts of this case lie within a narrow compass. Daniel de Silva died in February 1864 intestate and without leaving issue. He had been married, and had a son who died, in the lifetime of the intestate, unmarried and without issue. The intestate's wife had also died in his lifetime, as had his only brother, João Antonio de Silva, without leaving issue. The intestate's only sister, Antonia, the wife of Pascoal Lopes, and her husband, had also predeceased the intestate; but she left two sons, the elder of whom is the defendant, Francisco Lopes, and the younger the plaintiff, João Mariano Lopes. According to English law these two nephews of the intestate Daniel de Silva would be his next of kin, and the defendant, as the elder, would be heir at law. The immoveable property left by the intestate in this island consisted of two lots, viz., a piece of land in an *oart* called Ambrám, at Girgáin, liable to the usual annual payment of pension and tax to Government, and a bungalow upon it, which land and bungalow had been, for a sum of Rs. 1,225, purchased by the intestate from, and were, under an indenture of the 13th of March 1850 in the nature of a deed of bargain and sale, conveyed by, Govindji Jivanji, a Hindú, to the intestate "Daniel de Silva, his heirs, executors, administrators, and assigns for ever." This is clearly an estate in perpetuity. The second lot was a piece of land situate in the Máhim district, and correctly described, in the receipt of the Collector of Land Revenue, as "forás freehold new salt batty ground," which is liable to a small *forás* or quit-rent payable to Government. It also is an estate held in perpetuity.

On the death of Daniel de Silva the defendant entered into possession of all of his immoveable estate above mentioned. The plaintiff has brought this suit for partition, and for the allotment to him of a moiety of that estate, to which he asserts himself to be entitled "according to the laws and usages regulating the descent of property amongst the Portuguese inhabitants of Bombay." The seventh paragraph of the plaint is as follows:—The said Daniel de Silva and the

plaintiff and defendant are descended from Portuguese families resident in Bombay at the time of the cession of the island to the Crown of England." That allegation Mr. E. Howard, for the plaintiff, admitted that he was unable to prove.

The defendant, in his written statement, contends that the immoveable estate of Daniel de Silva was, as regards both lots, an estate of inheritance in fee simple in possession, and that he (the defendant) is entitled and did succeed to it as his sole heir. In reply to the 7th paragraph of the plaint he says: "The plaintiff and defendant bear Portuguese names, profess the Roman Catholic religion, speak the Portuguese language, and dress in the European manner, and, so far as the defendant knows to the contrary (though, so far as the same may be material in this suit, he calls upon the plaintiff to prove the same), the said intestate was, and the plaintiff and defendant are, descended from Portuguese families resident in Bombay at the time of the cession of the island to the Crown of England;" and he submits that the property in question being in the nature of freehold of inheritance, the descent of it is governed by the English law of intestate succession to property of like nature, and not by any supposed laws and usages regulating the descent of property amongst the Portuguese inhabitants of Bombay, and that the plaintiff is not entitled to any relief.

A matter not mentioned in the plaint or written statement, and not made the subject of an issue, but touched upon in the evidence, and in argument, was an alleged promise by the defendant to divide the immoveable property of Daniel de Silva equally between himself and the plaintiff, and that the defendant refused to execute a deed which he had instructed Mr. Prentis to prepare for the purpose of carrying out that promise, an engrossment and copy of which proposed deed were produced. The defendant, however, denied that he made any such promise, or gave any such instructions, and stated that the engrossment was prepared, in the manner in which it was drawn, on the instructions of the plaintiff himself; that the plaintiff, on the defendant refusing to execute the deed, prepared a letter (No. 1) addressed to Messrs. Acland and Prentis, which he requested the defendant to sign, but the defendant refused so to do. That letter proposed to alter the deed so as to give the plaintiff a moiety in the house only. It is worthy of remark that both the deed and the letter treat the defendant as having succeeded to the whole of Daniel de Silva's immoveable property in Bombay as heir at law.

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The defendant said that he was at one time willing to allow to the plaintiff, as a matter of favour, and not as a matter of right, a fourth of the rents of the house at Girgám, and that he would after his death continue that allowance to his children; but as the plaintiff was not satisfied with that, and insisted on obtaining a moiety of the whole of the immoveable estate of Daniel de Silva, the defendant now declined to give him any share whatever in it, and stood on his rights. I am clearly of opinion that no agreement binding on the defendant for the division of the property, or for the allotment of any part of it to the plaintiff, has been proved; and on that branch of this case I must say that I have great doubts as to the straightforwardness and *bona fides* of the plaintiff's conduct.

The issues are—

(1) Whether the plaintiff is entitled to a moiety of the immoveable property, or any part thereof, in the plaint mentioned.

(2) Whether Daniel de Silva was descended from Portuguese families, or a Portuguese family, resident in Bombay at the time of the cession of the island of Bombay to the Crown of England.

(3) Whether Daniel de Silva was a Portuguese by descent, and if being so, but not descended from Portuguese families, or a Portuguese family, resident in the said island at the time of the cession aforesaid, his immoveable property, or any part thereof, in the plaint mentioned, descended according to Portuguese law.

(4) Whether the plaintiff and defendant are the heirs of the said Daniel de Silva.

(5) Whether the defendant is the sole heir of Daniel de Silva, as being the eldest son of Antonia, the sister of the said Daniel de Silva, or on any other ground.

(6) Whether the said Daniel de Silva was a member of a race or community amongst whom the descent of immoveable property in Bombay was, by custom having the force of law, regulated in conformity with the Portuguese law of succession.

These six issues may be reduced to two questions, viz., Is the English rule of primogeniture applicable in this case; and if not, what rule of descent is so.

The law which the High Court is bound to administer in this case is the law which would have been applied by the Supreme Court (y).

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It was agreed by counsel on each side, that, subject to the result of an inquiry as to the doctrine of that Court upon the question involved here, the plaintiff should be permitted to give evidence of the custom alleged in his plaint. I did not at the hearing conceal from counsel my strong impression that the Supreme Court never had sanctioned such a custom, and had invariably in its decisions between Portuguese applied to the Portuguese inhabitants of Bombay the English law. As I then promised to do, and with the consent of counsel on both sides, I have communicated with Mr. LeMessurier and Sir John Awdry on the subject. That circumstance and others have necessarily much retarded the disposal of this case. Mr. LeMessurier was formerly Advocate General at Bombay, and his practice at the bar extended from the year 1822, *i. e.*, two years before the Recorder's Court was closed and the Supreme Court opened, down to August 1854. My own acquaintance with the Supreme Court dates from February 1854, so that our united experiences cover the whole period of the Court's sitting, from May 1824 to August 1862. I have also communicated with Sir John Awdry, whose experience as a Puisne Justice of the Supreme Court was from the 31st of December 1830 to the 29th of January 1839, when he became Chief Justice, and so continued until his departure from India on the 2nd of March 1841. Both of these gentlemen have most kindly favoured me with replies, of which I shall presently state the substance.

Although in *Naoroji Berámji v. Rogers* (z) the Court of Appeal abstained from giving any opinion upon the presumption made by Sir A. Anstruther of an enactment rendering the immoveable property of Portuguese in Bombay transmissible as personal estate, and on which presumption he finally rested his decision in *Doe d. De Silveira v. Teixeira* (a), many of the statutes, charters, documents, and authorities referred to in *Naoroji Berámji v. Rogers*, and the view there taken by the Court of Appeal, bear strongly upon the present case, and render it unnecessary for me to speak at such length as were I now to discuss those matters for the first time.

(y) Charter, High Court, 26th June, 26 Vict. (1862), s. 18; and Charter, High Court, 23rd December, 29 Vict. (1865), s. 19.

(z) 4 Bom. H. C. Rep., O. C. J. l. (a) 2 Mor. Dig. 247, 265.

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Regarding the law of descent which generally prevailed in Bombay amongst landholders while it was Portuguese territory, we have not any conclusive information. There is reason to doubt that, with the holders of the principal estates at least, the principle of partibility of the lands of an intestate amongst sons and daughters, or next of kin, prevailed. The Portuguese were during their earlier career in India an aggressive race, constantly engaged in war. They, therefore, in the absence of a standing army, almost necessarily, resorted to feudal tenure (*b*). The tenants-in-chief of the Crown were expected to be constantly ready to render military service. Their liability to render such service continued for fifty-seven years after the cession to Charles II. in 1661, and was eventually, in 1718, commuted by the East India Company for an annual tax (*c*). The same feudal reasons, which in Europe (*d*) gave rise or assisted in giving rise to the rule of primogeniture, existed for its introduction into Bombay whilst under Portuguese sway.

The 2nd article in Aungier's Convention (*e*), entered into on the 12th of November 1672, which article stipulated for the grant of new patents by the East India Company, tends to show that the landholders had previously held under patents from the Portuguese Government. As already stated in *Naoroji Berámji v. Rogers*, I have not been able to discover whether any new patents were made out in pursuance of that 2nd article, and with the exception of the patent of the manor of Mazagon, bearing date in 1637 (*f*), and reciting former patents of the same district, of which the earliest bore date in 1572, I have not succeeded in obtaining any information as to patents of dates prior to the cession in 1661 of the island to Charles II. In using the phrase "manor" as applicable to Mazagon, I do so because it is employed in the Patent (*g*), Humphrey Cook's Treaty (*h*), and Aungier's Convention (*i*), and has been popularly applied. But I do not venture to say whether Mazagon could be considered a manor within the technical meaning of that term according to English law,

(*b*) See the references to Warden's Report; Bruce's Annals; The London Company's despatch of the 18th of March 1691; and Perry's Or. Ca. made in *Naoroji Berámji v. Rogers*, 4 Bom. H. C. Rep., O. C. J. 82.

(*c*) *Ibid.*      (*d*) Maine's Ancient Law 229 *et seq.*, 2nd ed.

(*e*) 4 Bom. H. C. Rep., O. C. J. 39, 42.      (*f*) *Ibid.* pp. 83-85.

(*g*) 4 Bom. H. C. Rep., O. C. J. 85.      (*h*) *Ibid.* 86.      (*i*) *Ibid.* 87.

*e. g.*, as carrying with it the right to hold a court baron and other such privileges. The patent of Mazagon shows that Mazagon was granted in *emphyteusis*, and was descendible according to the rule of primogeniture: and so it would appear to have continued to descend in the family of the original grantee, until its sale, with the consent of the Governor of Bombay, in 1731, by the then tenant, Martinho de Silveira de Menezes, in which sale his son Joaõ Vicente, and wife, as concurring parties, joined, which concurrence may have been an attempt of an irregular kind to bar what may perhaps be called a species of entail created by the patent, and the dower of the wife. The quit-rent payable to the lord (*dominus emphyteuseos*) by the tenant (*emphyteuta*) is technically known to the Civil Law as *pensio* (which word I admit to have been sometimes of old popularly employed to signify any payment): and though it is impossible now to say with certainty that many, or any, other lands in Bombay than those of Mazagon were held, before the cession to Charles II., in *emphyteusis*, the circumstance that the other lands would appear to have been held by letters patent, the feudal motives already suggested, the continual necessity for military organisation, and the undoubted fact that the quit-rent payable to the Portuguese Government for a large part of the island, probably the whole of it, which was in occupation or cultivation at the time of cession, bore the same ancient name of *pensio* (*pensaõ*, pension), render it far from improbable that the six other districts in the island, beside Mazagon, or several of them, were also held in *emphyteusis*, and were accordingly descendible according to the rule of primogeniture (j). If the supposition be well founded, the introduction of English law when the island became British territory would not have wrought any alteration in the general course of descent of the principal estates in the island.

Assuming, however, that this was not so, and that, except the manor of Mazagon, lands were, before the cession to Charles II., partible amongst the sons and daughters, or other next of kin, of a deceased intestate, it is necessary to consider whether that rule of descent, differing as it does from English law, was preserved to the Portuguese.

It certainly was not so preserved by the marriage treaty of 1661. The cession, which thereby was made of Tangier

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(j) 4 Bom. H. C. Rep., O. C. J. 86, 87.

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and Bombay to Charles II., was not a *cessio simpliciter*, but a *cessio cum conditionibus*—what was reserved was expressed. To the inhabitants of the town and castle of Tangier were reserved “the free exercise of the Roman Catholic religion,” and that, obeying the King of Great Britain in all civil matters, “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.” But to the inhabitants of Bombay was reserved only the free exercise of the Roman Catholic religion. The treaty is completely silent as to their laws and customs. I adhere to the reason assigned by the Court of Appeal in *Naoroji Berámji v. Rogers* for this marked distinction made by the treaty between Tangier and Bombay (*k*). It is a case strongly calling for the application of the rule *expressio unius, exclusio alterius*. That the policy of the British Crown, in entering into that treaty, was not to continue to the inhabitants of Bombay the laws and customs which prevailed while the island was under Portuguese dominion, is, I think, perfectly clear on the face of the treaty. A passage (*l*) in Humphrey Cook’s treaty reads like an effort to reverse that policy, but his treaty was unauthorised, repudiated, and never of any force (*m*). The fixed determination of the British Government to abide by their policy, of substituting in Bombay the laws of England for those of Portugal, was clearly manifested in the Charter of 1668, by which Bombay was transferred to the East India Company. It reserved to the inhabitants 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 at the time of the surrender of the said Port and Island to Us as aforesaid, or at any time since.” The words “properties, privileges, and advantages” do not comprise laws, or customs having the force of laws. As to that passage in the Charter of 1668, I adhere to the view expressed in *Naoroji Berámji v. Rogers*, “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

(*k*) 4 Bom. H. C. Rep., O. C. J. 31, 39.

(*l*) Quoted 4 Bom. H. C. Rep., O. C. J. 33. (*m*) *Ibid.* 34.

of Charles II.” (n). The restriction in that Charter of the power of legislation given to the East India Company for the good government and other use of the “Port and Island of Bombay, and the inhabitants thereof,” to such laws as should be “not repugnant or contrary, but as near as may be agreeable, to the laws of this Our realm of England,” and the power to establish Courts of Justice “like unto those established and used in this Our realm of England,” the laws and ordinances for the regulation of which, and the proceedings in which, should be “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 the declaration that it should be lawful for the Company and their agents, factors, and servants to exercise in Bombay the *jurisdictions* conferred upon them by an earlier Charter, 13 Car. II. (3rd April 1661), amongst which was a power for the Governor in Council of any places which the Company then had or should have in India to judge all persons belonging to the Company, “or that shall live under them, in all causes, whether civil or criminal, according to the laws of this kingdom” (England), “and to execute judgment accordingly” (o), are conclusive as to the continuance of the policy of the marriage treaty of 1661.

In his work on Colonial Law (p), Mr. Clark, referring to the authorities, lays it down that in cases of conquest or cession the conquered or ceded country retains its former laws until they are changed by competent authority; that the power of changing the laws of a conquered country resides in the King in council; that the cases of cession and conquest are in this respect not distinguishable, unless the right is restricted by compact with the ceding party; and that when the change is partial only, it is said that the former customs of the country will still be in force as to all matters not otherwise provided for (q), adds “but when by royal commission a new legal constitution has been granted to a colony, establishing a legislature, 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 as

(n) 4 Bom. H. C. Rep., O. C. J. 36.

(o) See the remarks on the Charter 13 Car. II. (3rd April 1661) in *Naoroji Berámji v. Rogers*, 4 Bom. H. C. Rep., O. C. J. 28, 29, 38, 39.

(p) pp. 4, 6, 7.

(q) For which he cites *Blankhard v. Galdy*, 4 Mod. 222; and see 2 Salk. 411.

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agrecable 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" (r).

A Charter (13 Geo. II.) under the Great Seal of England instituted in the conquered colony of Gibraltar a court of judicature, and provided that the laws of England should be the measure of justice between the parties, which court was empowered to hold pleas of what nature and kind soever, and to issue warrants of execution for putting parties into possession of houses, lands, tenements, or other things, under its decrees. It was held by the Privy Council in *Jephson v. Riera* (s) that the effect of that Charter was to substitute the English law of real property in Gibraltar, and, therefore, that a widow was entitled to dower out of lands of her late husband situated in that colony.

Governor Aungier's Convention, entered into on the 12th of November 1672 and re-affirmed on the 16th of July 1674, was the settlement of a dispute, which arose between Government and the inhabitants, as to what lands belonged to the latter, and what had belonged to the Crown of Portugal, and did not affect in any way to regulate the course of descent of lands held by the inhabitants (t). It speaks of the lands as "lands of inheritance," and it mentions "the heirs" of the owners, and is not in any point inconsistent with the existence at that time of the English canons of descent amongst the inhabitants of Bombay. Although the landholders were then chiefly Portuguese or Indo-Portuguese, they were not exclusively so (u).

Dr. Fryer (whose Indian experience extended from 1673 to 1681, and who spent a considerable time in Bombay), in describing the Common Law as in force in Bombay amongst freemen, makes no exception in favour of Portuguese (v).

An attempt made in 1699-1700 by the Portuguese to induce the Government of Bombay to recognise the unauthorised treaty of Humphrey Cook was unsuccessful (w).

(r) Clark's Col. Law, p. 7, note 9, and see pp. 25, 26.

(s) 3 Knapp P. C. C. 130. (t) 4 Bom. H. C. Rep., O. C. J. 42.

(u) See note (o) to p. 45 of 4 Bom. H. C. Rep., O. C. J., and p. 41, showing that there were then some English landholders.

(v) Fryer's Travels, pp. 87, 88; 4 Bom. H. C. Rep., O. C. J. 49, 51.

(w) 4 Bom. H. C. Rep., O. C. J. 35, and note (y) *ibid*.

In 1726 the Mayor's Court Charter was granted, and if it cannot be regarded as introducing the English law into Bombay, inasmuch as it had been long before introduced there, it at least recognised it as the existing law of the island (a), and neither made, nor suggested that there was already in existence, any exception in favour of any law or custom of the Portuguese inhabitants. The powers of legislation given by that Charter to the Governors in Council, and by the subsequent Mayor's Court Charter of 1753 to the Governors in Council and to the Court of Directors, provide that such legislation shall not be contrary to the laws and statutes of England. The Charter of 1753 in the main agrees with the Charter of 1726, but contains the earliest trace (in royal charters) of a reservation to the natives resident in our territories in India of their laws and customs, by excepting "Indian Natives" from the civil jurisdiction of the Mayors' Courts in suits between themselves, unless they consented to submit their suits to the determination of those courts. Mr. Morley (y), as to that, says: "This, however, was merely an exception to the jurisdiction; nor indeed does it appear that the native inhabitants of *Bombay* were ever actually exempted from the jurisdiction of the Mayor's court, or that any peculiar laws were administered to them in that court." Subsequent enactments, as well for the Mofussil as for the Presidency Towns, throw some light on the meaning of the phrase "Indian Natives." Bengal Reg. I. of 1780, s. 27, enacted "that in all suits regarding inheritance, marriage, and caste, and other religious usages or institutions, the laws of the Koran with respect to Muhammadans, and those of the Shaster with respect to Gentus, shall be invariably adhered to." This section was by Beng. Jud. Reg. VI. of 1781, s. 37, re-enacted in the following year with the addition of the word "succession." The Stat. 21 Geo. III., c. 70, passed in 1781 for the purpose of settling questions which arose as to the scope of the jurisdiction of the Supreme Court at Fort William (established in 1774 under the Stat. 13 Geo. III., c. 63, passed 1773) expressly provided by Sec. 17, that "their inheritance and succession to lands, rents, and goods, and all

(a) See *Freeman v. Fairlie*, 1 Moo. Ind. App. 305; *The Advocate General of Bengal v. Rancee Surnomoye Dossee*, 9 Moo. Ind. App. 394, 420, 427; 4 Bom. H. C. Rep., O. C. J. 54, 56.

(y) Mor. Dig., Vol. I., p. clxix. See Sir E. Perry's remarks on the words "Indian Natives" as used in that Charter: Or. Ca. 66, 67, 2 M. Dig. 343.

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matters of contract and dealing between party and party, shall be determined, in the case of Muhammadans, by the laws and usages of Muhammadans; and in the case of Gentús, by the laws and usages of Gentús; and where only one of the parties shall be Muhammadan or Gentú, by the laws and usages of the defendant." The Stat. 37 Geo. III. (A.D. 1796), c. 142 (which authorised the establishment of the Recorders' Courts at Madras and Bombay), contained a nearly similar provision (Sec. 13): "their inheritance and succession to lands, rents, and goods, and all matters of contract and dealing between party and party, shall be determined, in the case of Muhammadans, by the laws and usages of the Muhammadans, 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 Muhammadan or Gentú, by the laws and usages of the defendant," &c. &c. By its Charter (1798) the Recorder's Court at Bombay had "full power to hear and determine all suits and actions that may be brought against the inhabitants of Bombay, yet, nevertheless, in the case of Muhammadans or Gentús, their inheritance to lands, rents, and goods, and all matters of contract and dealing between party and party, shall be determined, in the case of Muhammadans, by the laws and usages of the Muhammadans; 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," &c.

The Charter of the Supreme Court of Bombay (1823) contained a precisely similar provision, with the addition of the words "and succession" after "inheritance."

Mr. Edward Howard, in his argument on behalf of the plaintiff, coupling the recital of the Stat. 21 Geo. III., c. 70, that it is expedient "that the inhabitants should be maintained and protected in the enjoyment of all their ancient laws, usages, rights, and privileges," with the 17th and 18th sections of that statute, contended that the word "Gentús" must be interpreted as including all natives of India other than Mussalmáns, and that it must have an equally wide meaning in the Charters of the Recorder's and Supreme Courts at Bombay, and, therefore, would here include the so-called Portuguese or Indo-Portuguese community of Bom-

bay, and Pársis, Jews, Armenians, Native Christians, &c. No doubt it has here always been held to include Jains, as well as Hindús properly so called. Sir Edward Hyde East, in a paper on the condition of the Native population within the jurisdiction of the Supreme Court of Calcutta in respect to laws and usages, which he furnished in 1830 to a Committee of the House of Lords, before which he was examined as a witness, states that while he was in Calcutta questions arose "concerning the inheritance and succession of Sikhs, depending on questions of marriage and adoption, the forms of which are different from those of Hindús in general; yet in that instance the difficulty was gotten over by considering the Sikhs as a sect of Gentús or Hindús, of which they were a dissenting branch" (z).

In the paper already mentioned, Sir Edward Hyde East treats Portuguese, Armenians, and other Christians of native or foreign extraction, and Pársis, Chinese, and Jews, as not within the pale represented by the term "Gentús" (a). In Humphrey Cook's Treaty that term is used in direct antithesis to "Portuguese," thus:—"Gentús in charge of property belonging to Portuguese or other subjects of the King of Portugal" (b). Fryer says "the Gentues, the Portugal idiom for Gentiles, are the aborigines, who enjoyed their freedom till the Moors or Scythian Tartars (whether mediately from Persia, or immediately from that overflow of Tamerlane into these parts, is not material, since they both pretend to the same extract, and that will be fitter declared in another place), undermining them, took advantage of their civil commotions" (c). He then subdivides the Gentús into Bráhmans, Rashpoots (Rájputs), &c., and rarely, if ever, mentions the term "Hindú," but throughout his book he uses "Gentú" (d) and "Gentile" (e) as synonymous terms, frequently contrasting them with the Moors (f) (Mussalmáns), and occasionally with the Pársis (g) and "Portugals" (h), as

(z) Evidence, quarto ed., p. 140. (a) *Ibid.* pp. 134, 140, 141, *et seq.*

(b) See 4 Bom. II. C. Rep., O. C. J. 33; Warden's Report on Land Tenures, Appx. p., 69.

(c) Fryer's Travels, pp. 27, 189, 190, 193.

(d) *Ibid.*, "Gentu," pp. 29, 31, 32, 33, 34, 40, 112, 117, 118, 124, 138, 143, 174, 189, 190, 191, 194, 199.

(e) *Ibid.*, "Gentile," pp. 56, 72, 81, 95, 111, 112, 158.

(f) *Ibid.* 118, 139, 174, 191, 194.

(g) *Ibid.* 117, 189, 197.

(h) *Ibid.* 81.

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he usually calls the Portuguese. It is particularly important to observe that, not only in the early days when Fryer wrote, and in the more modern days of Sir E. H. East, but also about the year 1781, in which the first of the statutes making an exception in favour of Muhammadans and Gentús was passed, the English by the name Gentú understood that Hindú was meant. The name which Mr. Halhed has given to his English rendering, published in 1777, of a Persian translation of a compilation in Sanskrit of Hindú law, is "A Code of Gentoo laws or ordinations of the Pundits." In his preliminary letter to the Directors, dated 6th August 1775, and in his dedicatory letter to Warren Hastings, then Governor General, and in the letter of Warren Hastings, dated 27th March 1775, transmitting Mr. Halhed's work to the Directors for publication, the term "Gentoo" is applied to the Hindú Code. In Sec. 27 of the Bengal Reg. I. of 1780, already quoted, we find the Shástr named in immediate connexion with the Gentús as the guide for the Courts of Justice which that Regulation concerned. This is conclusive that by "Gentús" Hindús were there meant, but Hindús, no doubt, in a large and liberal sense of that term. For these reasons it would, if the question were not already closed by authority, be impossible to support Mr. Edward Howard's view, that the term "Gentú" is sufficiently large to include Portuguese, Indo-Portuguese, Native Christians, Pársis, Jews, or Armenians. Had that term been so extensive, the law could not have been laid down as it was in *Jebb v. Lefevre* (i), *Emin v. Emin* (j), *Musleah v. Musleah* (k), *De Monte v. Hussein Bibi* (l), and other cases. Even in *Doe d. De Silveira v. Teixeira* (m), Sir Alexander Anstruther did not venture on the proposition that Portuguese or Indo-Portuguese could be treated as Gentús within the meaning of the Charter of the Recorder's Court, and he admitted that the Portuguese laws had not been reserved to the Portuguese on the cession of the island (n).

That case, however, has, on other grounds, been strongly relied upon in the argument for the plaintiff.

Sir A. Anstruther there permitted the administratrix of a Portuguese intestate, who was not, according to English law,

(i) Clarke's Addl. Rules and Cases 56; 4 Bom. II. C. Rep., O. C. J. 63; and see 1 Mor. Dig., p. 300, pl. 97.

(j) Fulton R. 227; 4 Bom. II. C. Rep., O. C. J. 79.

(k) Fulton R. 423, 441; Boulnois R. 234.

(l) 4 Bom. II. C. Rep., O. C. J. 100. (m) 2 Mor. Dig. 247.

(n) *Ibid.* 251, 252.

his heir, to recover, in ejectment, lands, in which the deceased had a perpetual estate, from the eldest grandson of the eldest uncle of the deceased, which defendant was the heir, according to English law, of the deceased *ex parte paternâ*, but the lands had descended upon the deceased *ex parte maternâ*. The lessor of the plaintiff had obtained letters of administration to the deceased as his next of kin, and, Sir A. Anstruther said, insisted that she was "one of the heirs of the deceased according to the Portuguese laws, and more near than the defendant to the line of ancestors through whom the property came. But she is of half-blood in that line, and, therefore, never could inherit according to the English laws of descent." The defendant set up a title, under the Portuguese law, to half of the property in right of his wife. Sir A. Anstruther thought that, according to the English law of inheritance, the titles of both parties were defective, but, partly upon evidence and partly upon admissions of counsel (o), arrived at the opinion that by custom prevalent not only amongst the descendants of the Portuguese inhabitants, but also amongst all of the Christian subjects of the King, the succession to lands in Bombay went in the same channel with personal property; and he, therefore, expressed an opinion that in the case of English, and indeed of all Christian, subjects of the King, he might presume, and in fact with regard to Portuguese subjects he did presume, that an enactment had been made either by the East India Company or the Crown, which conferred a legal origin on that supposed custom (p). At the date of that decision (31st March 1817) Sir A. Anstruther had been only three years in Bombay, and there was very little business in his Court, so that his experience must have been very limited. The next point for observation is that the admissions attributed by him to the counsel on both sides (q) are not deserving of much weight. It was the interest alike of the lessor of the plaintiff and of the defendant to deny the application of English law; neither of them had a good title according to that law. The combination of the parties to set up the Portuguese law, and so to exclude the title of the Crown or East India Company by escheat, deprives the admissions of any value. Neither the Crown nor the East India Company appears to have been at all represented upon that occasion. What the evidence may have been I do not know, but it very pro-

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bably was not unlike that which has been given in this case. In *Naoroji Berámji v. Rogers (r)* the inferences which Sir A. Anstruther drew from the right to sell real estate in Bombay by way of execution were pointed out by the Court of Appeal as inconsistent with *Freeman v. Fairlie (s)*, *Gardiner v. Fell (t)*, *Jebb v. Lefevre*, and other cases, and shown to be erroneous.

Sir A. Anstruther altogether failed to appreciate the force of the special dispensation from English law given to Muhammadans and Gentús in the Stat. 37 Geo. III., c. 142, s. 13, and in the Charter of the Recorder's Court. If there were any exception in favour of Portuguese law, as presumed by Sir A. Anstruther, it is strange that the statutes and charters relating to the Recorder's and Supreme Courts, which carefully repeat the exception in favour of Muhammadans and Gentús, so completely have ignored the Portuguese exception. The frequent presence of the one, and the unbroken absence of the other, seem to speak with a distinct voice. With the aid of a dangerously facile admission at the bar (*u*), Sir A. Anstruther concluded that the provision as to Muhammadans and Gentús (which latter term he renders by the word "Hindus") is not an exception out of a contrary general rule, but rather a legislative recognition of the legality and correctness of a general principle equally applicable to all other Asiatic tribes. But of that exception Sir B. Malkin said: "The benefit, if it be one, is confined to Mahomedans and Hindus, and is limited to certain classes of rights and privileges" (*v*). And of the similar provision made in 1781 for the Supreme Court in Calcutta by the Stat. 21 Geo. III., c. 70, s. 17, that excellent lawyer Sir Henry Seton, J., in *Musleah v. Musleah*, while speaking of *Emin v. Emin*, in which, pursuant to the English law of real estate, the Supreme Court at Calcutta decreed, in favour of the widow of an Armenian, dower out of the lands of her deceased husband in the Mofussil, said (*w*) it "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

(*r*) 4 Bom. H. C. Rep. 77.

(*s*) 1 Moo. Ind. App. 305. (*t*) *Ibid.* 299, S. C., 1 Jac. & W. 22.

(*u*) 2 Mor. Dig. 256, 257.

(*v*) Morton's Rep. 19, 20, 4 Bom. H. C. Rep. O. C. J. 78, 79.

(*w*) Fulton R. 423, 441; see 4 Bom. H. C. Rep. O. C. J. 79, (80, 18.

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. 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." In the case in which Sir Henry Seton thus spoke, it was held that lands situated in the Bengal Mofussil belonging to a Jew who died domiciled in Calcutta, as well as land in Calcutta, must by the Supreme Court be held to descend according to English law, and accordingly descended on the eldest son as heir at law. In the same case Sir L. Peel, C. J., concurring with Sir H. Seton, J., after pointing out the jurisdiction of the Supreme Court to try causes relating to lands in Bengal, Bahár, and Orissá, said: "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 the very exceptions proves the general rule.*" Grant, J., dissented from that decision as regarded the lands in the Mofussil, but assented to it as regarded the lands in Calcutta. On a rehearing of the same cause in 1857 before Colville, C. J., Buller, J., and Jackson, J., the decree of Peel, C. J., and Seton, J., made in 1844, was unanimously affirmed (*u*). The principles laid down in that case were quite as applicable to the Recorder's Court in Bombay, over which Sir A. Anstruther presided, and the Supreme Court of Bombay, as to the Supreme Court at Calcutta, which two latter Courts had precisely the same jurisdiction (Stat. 4 Geo. IV., c. 71, s. 17). And that this was so, the passing of Act IX. of 1837, to emancipate the Pársis from the English law of succession to real property, conclusively showed. There would not have

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(*u*) Boulois R. 234 ; and see 4 Bom. H. C. Rep., O. C. J. 79, 80, 81.

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been any necessity for that Act had the law been as it was laid down by Sir A. Anstruther in *Doc d. De Silveira v. Texeira*, for he treated the property in Bombay as personal property. Sir M. Sausse, C.J., as we have fully mentioned in *Naoroji Berámji v. Rogers (v)*, held in a case before him, that where the lands 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.

Previously to the legislation of 1865 the law applicable to Pársis was the English law, except so far as it was varied by Act IX. of 1837, and except as to marriage, bigamy, and since the decision of the Privy Council in *Ardascer Chursetjee v. Perozabae (w)*, except as to matrimonial suits at the Ecclesiastical side of the Court.

As an example of the strictness with which the Supreme Court applied English law to Pársis, I may refer to a case decided on the 12th of February 1856 (*Rutunbaee, wife of Framji Bomonji Bhundari, v. Bomonji Manockji Bhundari*), which was an action of trover at the Plea side of the Supreme Court, brought by a Pársi woman to recover certain jewels and wearing apparel, which she alleged in her plaint to be her separate property. In the plaint she also described herself as a married woman. The defendant demurred, assigning as cause of demurrer that a Pársi woman cannot sue without her husband, even for her separate property. *William Howard*, Advocate General, supported the demurrer, and *Lowndes* argued against it on behalf of the plaintiff. *Yardley, C.J.*, allowed the demurrer, on the ground assigned.

Even admitting with Peel, C. J., as he did in *Storm v. Homfray (x)* and *Sibchunder Doss v. Sibkissen Bonnerjee (y)*, 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, yet that does not aid the plaintiff here; because the alleged custom which he seeks to enforce is, as pointed out in the communication with which Sir J. Awdry has favoured me (extracts from which I shall presently

(w) 4 Bom. H. C. Rep., A.C.J. 99. (y) 6 Moo. Ind. App. 348.

(x) 1 Taylor & Bell 49, 331. (y) Boulhois R. 74, and see *bid* 239.

read), not a local custom, but a custom personal to some class of Portuguese or Indo-Portuguese, a class, too, which it would be next to impossible to ascertain. If it be limited to the descendants of the Portuguese or Indo-Portuguese families resident or holding lands in Bombay at the time of the cession, the plaintiff must fail: for he has not shown, and the defendant has not admitted, that Daniel de Silva, the intestate, through whom the plaintiff claims, was descended from one of those families. The constant ingress of Portuguese and Indo-Portuguese to Bombay from Goa, Diu, Damaun, Choul, Karanjá, Salsette, and other places, and their egress from Bombay to those localities, have brought matters to such a pass as to make it doubtful whether any Portuguese or Indo-Portuguese now resident in Bombay could prove his descent from a family resident or holding land in Bombay at the time of the cession. Again, if a Portuguese or Indo-Portuguese descended from such a family sold his lands in Bombay, and went to reside in a Portuguese or other foreign settlement, would he or his descendants, on returning to Bombay, and acquiring new lands there, be entitled to the benefit of the alleged custom? The charters, in their frequently reiterated mention of the English law as the guide for legislation and judicial decision, the isolated exceptions in favour of Muhammadans and Gentús, and the historical facts to which I have referred, are not in accordance with the passing of the enactment presumed by Sir A. Anstruther. There is not, in fact, any reason to believe that any such enactment was made. The population of the island at the time of the cession does not appear to have exceeded ten thousand: such of these as were landholders must have been chiefly Portuguese or Indo-Portuguese. The fact that the Portuguese did not tolerate the exercise of any religion except the Roman Catholic (z), Dr. Fryer seems to think deterred natives of other parts of India or Asia from immigrating into the Portuguese settlements, and it may have been a main, though not perhaps the sole, cause of their want of growth, and ultimate decadence into obscurity. The English removed all restrictions on the free exercise of the religion of Hindús, Muhammadans, and other nations of the East, who resided in or came to Bombay, and the consequence undoubtedly was a great and rapid increase in the influx of Asiatics of all kinds into Bombay. Dr. Fryer, who came to

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(z) Fryer's Travels 73, 75,

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Bombay only eight or nine years after it had passed into the possession of the English (though the Treaty dates in 1661, the possession was not given up until 1664), and four years after it was made over to the East India Company, thus describes the population as he then found it: "The people that live here are a mixture of most of the neighbouring countries, most of them fugitives and vagabonds, no account being here taken of them; others perhaps invited hither (and of them a great number) by the liberty granted them in their several religions; which here are solemnized with variety of fopperies, (a toleration consistent enough with the rules of gain, though both Moors and Portugals despise us for it;) here licensed out of policy, as the old Numidians, to build up the greatest empire in the world. Of these, one among another, may be reckoned 60,000 souls; more by 50,000 than the Portugals ever could. For which number this island is not able to find provisions, it being most of it a rock above water, and of that which is overflowed little hopes to recover it. However, it is well supplied from abroad with corn and meat at reasonable rates; and there is more flesh killed for all the English alone here in one month, than in Surat for a year for all the Moors in that populous city." (a)

The change in the population produced a proportionately rapid change in the proprietorship of the land. The new comers, Hindús, Muhammadans, Pársis, and others, including some English, but especially the Pársis and Hindús, owing to their commercial activity and success, became extensively purchasers of property.

This alteration in the population and proprietorship was so speedy and so great, as soon to reduce the Portuguese and Indo-Portuguese inhabitants to a comparatively unimportant position with regard both to land and commerce, and in a great degree to account for the absence of any special measures, or the creation of any exceptions from the English law for *their* benefit; and, having regard to the indisposition, from the earliest period, manifested by the Crown in its charters to make any such exceptions, renders it additionally improbable that such would have been made.

The only support by a Judge of the Supreme Court which I have found for the doctrine of Sir Alexander Anstruther is in the evidence given by the late Sir Ralph Rice before

(a) *Ibid.*, p. 68.

a Committee of the House of Lords in 1830. He was for about seven years Recorder of Prince of Wales' Island, and a Puisne Justice of the Supreme Court of Bombay from the 27th of October 1824 until the 27th of November 1827,

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I have made the following extract from the quarto volume containing his evidence and that of the other witnesses examined before the Committee.

"1439. With respect to the Civil law, on what principle was that administered ?

"The same as the English law, but no alterations have taken place which have taken place in the Civil law in this country, unless as altered by Act of Parliament, or by Rules and Regulations which they have the power of making in that country, subject to their approval in this.

"1440. Is the Civil law applied to the interests of the natives without any exception as to the law of succession and contract ?

"By the charter, the natives of Bombay, the Mahomedans and Hindus, are entitled to have all their questions of Civil right tried by their respective laws. With regard to the Portuguese who are there, they have the law administered, where it differs, according to Civil law, which is commonly called the Civil law which existed under the Portuguese Government ; but I never knew a case to occur in my time as to the Portuguese.

"1441. When you state that the Court administer the Civil law of England, you mean in the *cases of English European subjects only* ?

"Quite so in that respect, *according to the words of the charter*. There has been a great difficulty with regard to the Parsis, who are a very opulent body of men there ; but they having adopted, generally speaking, the laws of the Hindus, they have been regulated, where there has been no custom to the contrary, by the laws of the Hindus, and not by those of the Mahomedans.

"1442. Next to the English law the Hindu law is the one you were most frequently called upon to administer at Bombay ?

"I think it has been by custom more than by the strict Hindy law."

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Sir Ralph Rice would appear to have had an imperfect recollection of the Charter, and to have confounded its 28th with its 29th clause. The 28th clause, it is true, specially related to "British subjects" residing in any of the factories subject to or dependent upon the Government of Bombay &c. But the 29th clause gave the Supreme Court full power to administer civil justice to the "inhabitants of Bombay" at large, reserving to Muhammadans and Gentús only, their laws and usages relating to inheritance, succession, and contract, and thus implying that as to all other inhabitants of Bombay, English law should be the rule in civil matters. He admits that he knew of no Portuguese case in his time. This seriously diminishes the value of his evidence. He probably spoke only from a vague recollection or tradition of the decision of Sir A. Anstruther (b). What he says as to the administration of Hindú law to Pársis is quite contrary to what every practitioner in, and Judge of, the Supreme Court know to have been the rule of that Court, and also contrary to the report of the Pársi Law Commission. I observe that Sir B. Malkin (c) impeached the accuracy of Sir R. Rice's evidence as to the Recorder's Court of Prince of Wales' Island, and it is impossible to attribute much importance to his above-quoted evidence with regard to Bombay, opposed as it and Sir A. Anstruther's judgment are to the current of authority.

I now proceed to refer to Mr. LeMessurier's communication. After stating that he commenced practice in the Recorder's Court in June 1822, he says that he then found it to be "the general opinion of the profession, that in the descent of lands, to all but Muhammadans and Hindús, the English law of primogeniture prevailed;" that this also was the opinion of the Bench, and he specially instances Sir Herbert Compton (Chief Justice from 1st December 1831 to 2nd January 1839), who, he says, "having had an experience of forty years as an Advocate in the Madras and Calcutta Courts, was thoroughly acquainted with their practice in regard to the laws of inheritance of all classes of Natives besides Hindús and Muhammadans, and he always held that, with the exception of these two classes, the English law of primogeniture was the law to govern the Court," but that he and the other Judges of the Supreme Court, knowing that law to be uncon-

(b) It was not published until 1849.

(c) *In the Goods of Abdulla deceased*, Morton Rep. 19, 20. (

genial to the practice and habits of natives, as far as possible evaded enforcement of it, by encouraging private arrangements out of court, and when these had been clearly acquiesced in, acted upon such acquiescence. This completely agrees with the statements in the opinion, referred to in *Naoroji Berámji v. Rogers (d)*, given by Sir Henry Roper with regard to Pársis at the time the passing of Act IX. of 1837 was proposed. Mr. LeMessurier adds that Sir Alexander "Anstruther's judgment was not thought good law," and that Sir Ralph Rice was on the Bench in Bombay for about three years, during nearly one year of which he was absent on a tour in the Upper Provinces, and that his evidence did not carry "any weight."

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In the judgment in appeal in *Naoroji Berámji v. Rogers (e)* it was stated that I 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. Since then, however, I have learned, both from Mr. LeMessurier and Sir John Awdry, that Sir Herbert Compton and Sir John Awdry were consulted, and that they both felt the necessity for legislation. Sir John Awdry has informed me that the idea of affording to Pársis the relief which they sought from the English law of inheritance of real 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 him, 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

(d) 4 Bom. H. C. Rep., O. C. J. 97, 98.

(e) 4 Bom. H. C. Rep., O. C. J. 97.

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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 his letter Sir John Awdry writes :

"I do not believe I ever heard of Sir A. Anstruther's decision 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. I have a dim notion that Sir R. Rice, probably in evidence before some Commission on some occasion, said they tried to follow the 'Portuguese Civil Law;' but nothing of the kind was in my experience. Between the testamentary power, and the system of compromise or reference to a *forum domesticum* such as you mention, and which the Court, in its apprehension that the law would conflict with the habits of the people, favoured, questions of inheritance were kept from legal decision."

As to the enactment which Sir A. Anstruther presumed in favour of Portuguese inhabitants of Bombay, Sir J. Awdry says—

"In regard to Sir A. Anstruther's second ground, the Court would have been anxious to presume a legal origin of a consistent and reasonable usage (Lord Mansfield somewhere says an Act of Parliament) : therefore, it might not be impossible to presume a legislative Act, though not to be found. Nor do I think that a tenure in the nature of gavelkind need be held contrary to the laws of England. It is clearly recognised as a part, though an exceptional part, of those laws. But no such usage can be proved. The very expedients to which they are reduced in order to keep these questions out of court are a disproof of anything sustainable as a special custom. It is not annexed to the land. If it be personal, how shall we define the line between those entitled to and bound by it, and those Christian populations external to it? The only Portuguese usage in relation to land which, as far as I am aware, has been recognised, has been local, and irrespective of the caste of the parties interested. I speak of the Fazendaree tenure. I believe my opinion on it has been overruled by Sir E. Perry, Sir W. Yardley, I believe, dissenting; but I am not informed of the ultimate result of the case (*f*) in which

(*f*) *Doe d. Dorahji v. The Bishop of Bombay*, Or. Ca. 498.

the question arose. My belief is that it is a license given by the Fazendar, or lord of the manor, to put a structure (probably in its origin a *cadjan hãt*) on the waste—that it was not revocable when it had been acted on, and consequently gave the licensee a sort of base fee in the structure as long as it stood without substantial repairs, but that nothing could be done to alter its character, or add to its durability, without a fresh agreement. But, whether I am right or wrong in the details, it would give no support to a separate law of inheritance for the Portuguese. *1stly*, It was local, and not personal. *2ndly*, Whatever doubts might result from the ignorance of the Judges, it was often asserted *in invitum*. *3rdly*, If I am right, it was no special custom at all, but merely an application to land, situated where an interest equal in duration to freehold could pass without livery, of the rule of law that a license executed cannot be revoked to the detriment of the licensee. The recovery of 1842 (*g*) could hardly have passed *sub silentio*, and, therefore, is strong proof of the state of opinion. On the whole I entirely concur in your conclusion, that the Portuguese in Bombay have been in all respects liable to English law, including the law of inheritance. I have no recollection of this having ever been seriously doubted in my time. The effect of this is the stronger, because there was such a sense of the hardship which might occasionally result from the rule, that any serious ground of doubt would have been respectfully considered. I also concur in your reasons.

“Nor do I consider that the hardship would be much lessened by overruling the doctrine. How would you define the class entitled to the exception? You cannot include every man popularly called a Portuguese.

“Is a Goa man entitled to the name, an exception? Surely he can only come in on the same terms as any other alien. But how often at this distance of time can unbroken descent from the residents at the time of the cession be found? If found, will intermediate alienage, so likely where some members of the same family may have been resident at Goa and in other Portuguese territories, or elsewhere, vitiate the right, &c. &c. The value of all Máhim woods may be wasted in litigation many times over before all such questions can be settled.”

(*g*) Mentioned in *Naoroji Berámji v. Rogers*, 4 Bom. H. C. Rep., O. C. J. 93 and *infrà*.

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A recovery with double vouchers was suffered in the Supreme Court of Bombay, the proceedings in which commenced on the 10th of February 1842, and terminated by judgment on the 25th of June 1842. 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 Jose Maria de Ga and Manoel Murzello. The property consisted of seven *oarts* and several other pieces of land, situated in Girgám, two messuages, dwelling-houses, and a church, also situated in Girgám. This recovery, resorted to in the case of the immoveable property in Bombay of a Portuguese or Indo-Portuguese, was a proceeding applicable only to real estate.

Sir E. Perry, in *Perozeboye v. Ardaseer Cursetjee (h)*, referring to "that numerous class of Her Majesty's subjects settled in Bombay, comprising Parsis, Portuguese, Native Christians, Jews, &c.," speaks of them as "exclusively governed by English law;" and again, in *The Advocate General v. Richmond (i)*, says: "there is not the least vestige of Portuguese law or courts at any time after the cession by the King of Portugal," and adds "there is no doubt that English law was the law of the place."

Mr. Morley published in 1849 *Doc d. De Silveira v. Teixeira*, which had been decided in 1817. He obtained it from Sir Erskine Perry, who did not publish his own volume of Oriental Cases until 1853. If he attached any weight to that decision, he would surely have noticed it in the notes of the two cases from which I have cited his *dicta* as to the Portuguese.

I have recently had an opportunity of ascertaining from Sir Charles Jackson that during his experience as a Puisne Justice of the Supreme Court, from February 1853 to November 1855, none but English law was administered to Portuguese, and that he considered that the English law of descent of real estate was the only law which the Supreme Courts could have applied to the transmission of an estate in perpetuity held by a Portuguese either in Bombay or Calcutta.

I have more than once heard Sir Matthew Sausse (who from 1856 to 1859 was a Puisne Justice of the Supreme

Court, and thence until its close in August 1862 was Chief Justice of that Court, and afterwards Chief Justice of the High Court from that time until (April 1866) state that the course adopted and views held by him were the same as those which I have just mentioned as those of Sir Charles Jackson.

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Sir Joseph Arnould (who was one of the Judges of the Supreme Court from 1859 to 1862) has since decided in the High Court the following case, which sufficiently shows what is his view of the law.

It was the cause of *Pedro Laurence de Monte v. Hussein Bibi (j)*, the plaintiff in which was a younger son of Manoel de Monte, a Portuguese, who died on the 15th of September 1844, leaving immoveable property (a house in which he had an estate in perpetuity) situated in Girgám, in this island. Manoel de Monte left surviving him his eldest son, Joaõ de Monte, who died in 1847, leaving two sons, Francis and Felix and a daughter and widow. In 1847, after the death of Joaõ de Monte, the plaintiff proved the Will of his father, Manoel de Monte. Subsequently Francis de Monte died, leaving his brother, Felix, surviving him; Felix was alive at the trial of the suit, 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 (k)*; 1 Sugden on Powers 229, 6th ed.; 1 Wms. on Executors, p. 549, 4th ed. After hearing Mr. Scoble, on behalf of the plaintiff, Sir Joseph 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, and is in direct opposition to Sir A. Anstruther's ruling in *Doe d. De Silveira v. Texeira*; that the administratrix might recover in ejectment immoveable property in which the intestate had an estate equivalent

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in interest to what is known in English law as freehold estate of inheritance. And, so well understood was it in the profession that the Portuguese are liable to English law only, no attempt, I believe, was made before him to resuscitate *Doe d. De Silveira v. Tezeira*, or to argue that Portuguese law had any place in Bombay.

Upon the authorities quoted, upon the inquiry which I have made of those who had opportunity of being acquainted with the doctrine of the Supreme Court, and upon my own experience of the course of that Court, during which I have never known any law but English to be applied to Portuguese (and I have been counsel in many Portuguese cases), and for the reasons which I have stated, I have no doubt that the Supreme Court would have decided this case according to the English law of real property, and that, accordingly, I am so bound to decide it. But assuming that the law was unsettled in 1864, when Daniel de Silva died, and that it became important to look at the evidence of the alleged custom, that evidence is not of such a nature as would enable me to decide this case in favour of the plaintiff, on whom the burden lay to establish the custom. It did not lie on the defendant to disprove it. No doubt the plaintiff has given evidence of several cases in which immovable property of Portuguese or Indo-Portuguese intestates, chiefly but not wholly situated at Máhim, has, by the intervention of the parish clergyman, or other clergymen, or of friends or relatives of the next of kin, or by arbitrators, been divided either amongst the male, or the male and female, next of kin of the intestate. It is not a local custom attached to the land, that is say, it is no part of the *lex loci rei sitæ*. If merely personal, there is no certainty in the evidence as to what persons it extends. If it be a custom for the descendants of the families resident in Bombay at the cession, the plaintiff has not proved that Daniel de Silva, or the plaintiff or defendant, is descended from any such family. Nor has it been shown clearly to what share a daughter would be entitled, though most of the plaintiff's witnesses agree in thinking that she would be entitled to some share if she were not otherwise provided for. If it be a custom for Portuguese or Indo-Portuguese inhabitants of Bombay, there is no evidence to show how long they must have been resident in Bombay in order to bring them within the description of inhabitants of Bombay. The alleged custom never appears to have been recognised by the Supreme Court, and

cannot be said to have been recognised by the Recorder's Court. Sir A. Anstruther abstained from deciding the question as to the shares into which the estate should be divided, and in point of law only decided that the administratrix might recover the property as personalty, and left the question open as to the proportions of the division. But supposing that he did judicially recognise the custom, his decision has never been followed by the Supreme Court, and rests, as I think has been shown, upon unsound reasoning, and is opposed to authority. The attempt to establish a *quasi* estoppel against the defendant from disputing the custom, because a division was made of his father's immoveable property, quite failed. Nothing could be more irregular than the transaction. After the death of his father, Pascoal Lopes, intestate, his widow, Serafina, step-mother of the plaintiff and defendant, by a writing, affected to appoint the plaintiff's and defendant's uncle to be the executor of her husband, Pascoal Lopes, and that so-called executor divided the property of Pascoal Lopes between the plaintiff and defendant and their elder half-brother, Elias Lopes, who was then an adult, the defendant then being only nine years old, and the plaintiff still younger.

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The plaintiff has failed, both in law and in evidence of the alleged custom, to establish his case. The questions which he has raised, although not without interest, are not nearly of so much importance as they would have been had not the Indian Succession Act (X. of 1865, which applies to wills made or intestacies occurring since the 1st of January 1866) been passed.

The first four issues and the sixth issue must be found in the negative and for the defendant. The fifth issue, "whether the defendant is the sole heir of Daniel de Silva, as being the eldest son of Antonia, the sister of Daniel de Silva," must be found in the affirmative, and for the defendant.

The defendant, to his honour, does not ask for costs against his brother. The decree accordingly will be for the defendant without costs.

The Court and the legal profession are much indebted to Sir John Awdry and Mr. LeMessurier for the valuable information which they have so courteously furnished with respect to the doctrine of the Supreme Court as to Portuguese.)