CASES

DECIDED IN THE

ORIGINAL CIVIL JURISDICTION

OF THE

HIGH COURT OF BOMBAY.

Appeal Suit No. 169.

1871.
March 2.

DA'MODHAR MA'DHAVJI .....*Appellant.*

KAHA'NDA'S NA'RANDA'S .....*Respondent.*

Champerty—Maintenance—Public Policy—Void Agreement—Practice—Parties.

One M. H., being apprehensive that (in consequence of an action of trespass in the Supreme Court which M. R. and A. R. had brought against P. P.) he was in danger of being deprived of a piece of land of which he was then possessed, entered into an agreement with K. N. that he, K. N., should conduct the pending case at his own costs and necessary expenses, and that after M. H. should have proved that the piece of land was his sole property, K. N. and M. H. should erect a building on it at their joint expense, and that the rents and profits of such building should be enjoyed by K. N. and M. H. jointly during the lifetime of M. H., after whose death the property, with the building, was to be the sole and absolute property of K. N.

Held that the above agreement (when considered in connection with its surrounding circumstances) did not savour of maintenance or champerty, nor was it void as being against public policy.

The question as to how far the English law relating to maintenance and champerty is applicable to Hindús in the Presidency towns considered.

Quære whether that law was ever applicable to cases where pecuniary assistance is afforded to defendants.

Where K. N., claiming under the above agreement, sued to recover the property comprised in it from the mortgagee of the administrator of M. H., who was in possession of the property, it was held that the representatives of the mortgagor were not necessary parties to the suit.

THIS was an appeal from the judgment of BAYLEY, J., delivered on the 13th of August 1870.

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The plaintiff, under an agreement dated the 13th of September 1849, sued to recover from the defendants, six in number, the property therein described. The agreement ran as follows:—

"Know all men by these presents that I the undersigned, Munilál Harjivandás, Baniá, a Hindú inhabitant of Bombay, do hereby agree unto Sutár Kahándás Nárandás, also a Hindú inhabitant of Bombay, in the manner following, that is to say, that the piece or parcel of land situated at Bhoiwádá 3rd Row, or otherwise called Kandalla, and bounded as follows" (here follow the boundaries), "and of which at present I am the sole surviving owner and Fazandár, as it having descended to me from my deceased father, Harjivandás Vandrávandás. That the said Sutár Kahándás Nárandás shall conduct the case now pending in the Supreme Court of Judicature at Bombay (concerning the said piece or parcel of land wrongfully claimed by Mádhavráv Raghunáth and Anandráv Raghunáth, together with that of Purshotam Pránjivandás) at his own costs and necessary expenses. It is further agreed that after I have proved to the satisfaction of the Court that the said ground is my sole property, the said Sutár Kahándás Nárandás and myself should build a house, *chál*, or other building on the said ground at the joint expense of myself and the said Sutár Kahándás Nárandás, and whatever shall be realised from the building in the shape of rent or other profit shall be enjoyed by myself and Sutár Kahándás Nárandás jointly to the term of my natural life, reserving the said property in my name or in the name of my father as the same is standing. And that after my death the said piece or parcel of land, and the building that then be standing thereupon, shall and will be as the sole and absolute property of the said Kahándás Nárandás, his heirs, executors, administrators, or assigns. In witness whereof I set my hand and seal this 13th day of September in the year of Christ one thousand eight hundred and forty-nine.

Signed, sealed, and delivered in the presence of
SUTA'R GOVARDHAN KESHAVJI.
RAGHUNA'TH HARICHANDA'S.

SHA' MUNILA'L HARJIVANDA'S' signature, agreed as above; his own handwriting."

The first defendant and appellant claimed to retain the premises under an indenture of mortgage, of the 4th of September 1866, granted in his favour by Haribhái Girdharlál, the administrator of Munilál Harjivandás, to secure the sum of Rs. 10,000 and interest; and a deed of further charge, made by Haribhái Girdharlál in his favour on the 24th of August 1867, to secure a further advance of Rs. 4,000 and interest thereon.

The five other defendants were tenants of the first defendant, and did not appear at the hearing.

The circumstances under which the instrument of the 13th of September 1849 was made may, for the purpose of this report, be shortly stated. Munilál Harjivandás was at that time possessed of the land in dispute, which was unbuilt upon. His neighbour, Purshotam Pránjivan, was then engaged in building upon the adjacent land, and, with Munilál's permission, had placed a considerable quantity of building materials upon Munilál's vacant land. Whilst the building was going on, M. and A. Raghunáthji, on the 8th of September 1849, filed a plaint in trespass against Purshotam to recover damages from him for so building, and storing building materials. That suit, to which, however, Munilál was not a party, was brought in respect of Munilál's vacant land, as well the land of Purshotam. Munilál having heard of this suit, and being apprehensive that his title to the vacant land would be affected by its result, went to consult the plaintiff, Kahándás Nárandás. The latter offered to purchase the land, but Munilál was not willing to sell it, as it was ancestral property. The agreement of the 13th of September was then drawn up and executed. In pursuance of the agreement the plaintiff went to Mr. Arthur, an attorney of the Supreme Court, and instructed him to write to the plaintiffs in the trespass suit, setting up Munilál's title to the property, and paid Mr. Arthur Rs. 200 for so doing. After Mr. Arthur sent this letter, no further proceedings were taken in the trespass suit. Several attempts were subsequently made by M. and A. Raghunáthji in the Police Court to get possession of the vacant land, which were unsuccessful. The expenses incurred by Munilál in defending himself in these proceedings were defrayed by the plaintiff, who also hired a Pardesi to protect the land.

When all was quiet, the plaintiff and Munilál commenced to build upon the vacant land. The plaintiff first erected a temporary shed in 1856-57, and subsequently he and Munilál erected a substantial building in 1861-62, the plaintiff expending for that purpose Rs. 3,000, and Munilál expending Rs. 2,000, which he raised on loan by the assistance of the plaintiff. During the lifetime of Munilál he and the plaintiff jointly received the rents of this building.

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Munilál died in June 1864 intestate and without issue. The plaintiff continued in possession of the premises for five days after his death, when Diváli, the sister of Munilál, sent a notice to the tenants requiring them not to pay rent to the plaintiff. The tenants then ceased to pay rent until letters of administration should be taken out to the estate of Munilál. Diváli applied for such letters, but before she could administer the estate she died, and administration of Munilál's estate was then granted to the mortgagor of the first defendant.

The suit came on for hearing before BAYLEY, J., on the 23rd of April 1870.

Anstey and *Green* for the plaintiff.

Mayhew and *B. Tyabji* for the first defendant.

Mayhew objected that the suit was defective for want of parties, the representatives of Munilál's estate not being before the court. He contended that the instrument of the 13th of September 1849 was not a conveyance; that if it were held void for champerty the plaintiff might be entitled to be repaid the advances he had made, and that an account for that purpose could only be taken in the presence of the heir or personal representative of Munilál. He cited Daniell, Ch. Practice, 253.

Anstey, contra, contended that the instrument of September 1849 could not be deemed champertous, and was an out-and-out conveyance.

The Court took time to consider the point, and on the 26th of April decided that the plaint was not defective for want of parties, and directed the case to be proceeded with. On the 11th of June several issues were raised. The only issue material for the purpose of this report is the second, which, as subsequently amended by the learned Judge, was as follows: "Whether the instrument dated the 13th of September 1849 was illegal and void for champerty or maintenance, or as being contrary to public policy."

Anstey on this point contended that the English law of champerty was not applicable to Hindús, and that, even if it

was, the instrument in question did not savour of champerty. He cited *Panchcowree Mahtoon* v. *Kalee Churn* (*a*); *Pitchakutti Chetti* v. *Kamala* (*b*); Marshall Rep. 303; *Fischer* v. *Kamala* (*c*); *Rámráv Khanderáv* v. *Govind Pándsheṭ* (*d*); *Hilton* v. *Woods* (*e*); *Dickenson* v. *Burrell* (*f*); *Harrington* v. *Long* (*g*); *Wood* v. *Griffith* (*h*); *Cockell* v. *Taylor* (*i*); *Tyson* v. *Jackson* (*j*); *Hartley* v. *Russell* (*k*). Third parties cannot raise this objection: *Knight* v. *Bowyer* (*l*), *Williams* v. *Protheroe* (*m*).

Mayhew, contra, contended that if the intermeddling in the suit was the source of the plaintiff's claim to the property, as it was here, the plaintiff could not sue. He cited *Stephens* v. *Bagwell* (*n*); *Reynell* v. *Sprye* (*o*); *Stanley* v. *Jones* (*p*); *Earle* v. *Hopwood* (*q*); [BAYLEY, J., referred to *Grell* v. *Levy* (*r*);] *Grose* v. *Amirtamayi* (*s*). The parties here, having used an English form of instrument, must be taken to have contracted according to English law: Hyde's Calc. Rep. 159; *Webbe* v. *Lester* (*t*).

Anstey, in reply, cited as to parties *Hunter* v. *Daniel* (*u*); and as to champerty *Powell* v. *Knowler* (*v*); *Strachan* v. *Brander* (*w*); *Myers* v. *United Guarantee Assurance Co.* (*x*); *Punchanun* v. *Doorga Nath* (*y*).

Cur. adv. vult.

13th August 1870. BAYLEY, J. (after stating the facts, and the execution of the instrument of the 13th of September 1849), proceeded:—The defendant, Dámodhar Mádhavji, by his written statement alleged, in para. 6, "that the in-

(*a*) 9 Calc. W. R., Civ. R. 490. (*b*) 1 Mad. H. C. Rep. 153.
(*c*) 8 Moo. Ind. App. 170, 187. (*d*) 6 Bom. H. C. Rep., A. C. J. 63
(*e*) Law Rep. 4 Eq. 432. (*f*) 1 *Ibid.* 337.
(*g*) 2 Myl. & K. 590. (*h*) 1 Swans. 43.
(*i*) 15 Beav. 103, 115. (*j*) 30 *Ibid.* 384.
(*k*) 2 Sim. & St. 244. (*l*) 23 Beav. 609. On App. 27 L. J. Ch. 520.
(*m*) 5 Bing. 309.
(*n*) 15 Ves. 139. (*o*) 1 De G. M. & G. 660. (*p*) 7 Bing. 369.
(*q*) 30 L. J., C. P. 217. (*r*) 10 Jur. N. S. 210.
(*s*) 4 Beng. L. Rep., O. C. J. 1. (*t*) 2 Bom. H. C. Rep. 52 (2nd ed.).
(*u*) 4 Hare 420. (*v*) 2 Atk. 224. (*w*) 1 Ed. 303.
(*x*) 7 De G. M. & G. 112. (*y*) Calc. W. Rep. for 1864, 300.

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strument of the 13th of September 1849 was illegal and void for champerty, and that the same could not be enforced against him, Dámodhar Mádhavji;" and that was the real—I may say, only—defence which was seriously urged at the hearing. An issue (the second) was framed in these terms: "Whether the said instrument was illegal and void, for champerty or maintenance;" which, under the power given by the Sec. 141 of the Code of Civil Procedure, I have amended by adding the following words: "or as being contrary to public policy."

I was favoured with extremely able and elaborate arguments, and a great number of cases from the English and Indian Reports were cited by Mr. Anstey for the plaintiff, and by Mr. Mayhew for the defendant, Dámodhar Mádhavji, the former arguing very ably that the agreement between Munilál and the plaintiff of the 13th of September 1849 did not savour at all of either champerty or maintenance, assuming even that such doctrines applied to Hindús, whilst the latter contended as strenuously for the opposite view.

I have carefully examined all the authorities cited by counsel, as well as several others which were not mentioned at the bar.

Very high legal authorities in India have denied that the law of champerty and maintenance applies to the natives of this country. In a case decided by the High Court of Madras in the year 1863, *Pitchakutti Chetti* v. *Kamala Nayakkhan* (*z*), Scotland, C.J., in delivering the judgment of the Court, said: "Maintenance and champerty are made offences by the common and statute law of England, which in this respect has no application to the natives of this country, and in considering and deciding upon objections to the civil contracts of natives on the ground of maintenance or champerty we must look to the general principles as regards public policy, and the administration of justice upon which the law at present rests. To that extent we think the law can properly be adopted and applied in perfect consistency with the

(*z*) 1 Mad. H. C. Rep. 153.

Hindú law relating to contracts: see 1 Strange's Hindú Law 275. In this case the 'maintenance' is alleged to be the loan of money by the plaintiff to enable the defendant to sue and eject his tenant, Fondeclair; but that of itself is not sufficient. There should appear to be the instigation of improper litigation with a bad purpose or motive, contrary to public policy and justice." In a case decided at Calcutta by Peacock, C.J., and Jackson, J., in February 1868 (*a*), the Court, in remanding the case to the Judge of Tirhut to be tried upon the merits, said: "The Judge then says 'purchasing a suit is champerty.' But every purchase of a suit is not champerty, and the Judge does not show that the facts of this case amounted to champerty. There is no foundation whatever for the law laid down by the Judge that a chose in action is not assignable, and there are many cases (*b*) in the late Ṣadr Court, and one (*c*) in the High Court, which tend to show that champerty is not illegal in the Mofussil. In the face of those cases the Judge ought not to have laid down the law as to champerty in the positive manner in which he did lay it down. In trying the case *de novo* upon the merits, the Judge may find any facts, if any exist, which justify his assertion that this was a case of champerty, so that the parties, if they please, may have the question fully considered by this court, whether in the Mofussil a purchase amounting to champerty is illegal or not."

In the following month, namely, April 1868, the point again came before the High Court at Calcutta, the Judges being Mr. Justice Macpherson and Mr. Justice Glover, in a regular appeal from the Principal Ṣadr Amín of Pátná (*d*). Mr. Justice Glover, in the course of his judgment, said: "As champerty is not a part of our statute law, and as successive decisions of our highest court have pronounced it inapplicable to this country, I do not feel justified in reopening the matter, or in referring it to a Full Bench. The

(*a*) 9 Calc. W. Rep., Civ. R. 243.
(*b*) Ṣadr Decisions for 1847, p. 609.
„ „ 1852, p. 394.
„ „ 1859, p. 1310.
(*c*) Marshall's Rep. 303. (*d*) 9 Calc. W. Rep., Civ. R. 490.

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decision quoted by Mr. Piffard is to be be found in the Ṣadr Diváṇi Adálat Reports for 1852, p. 394. This decision was passed by a full Bench, consisting of five Judges, after reviewing the older cases on the subject, and it decided that champerty was not *per se* illegal, but that every such arrangement must stand or fall according to the peculiar nature of its conditions. In this judgment the former decisions of the Ṣadr Court were considered, and held to have been erroneous, and after full argument it was decided that as between a plaintiff and a third party an issue could properly be admitted regarding the source from which the plaintiff procured funds for defraying the expenses of his action, that is to say, a suit ought not to be at once dismissed without a hearing, merely because the plaintiffs in the cause had agreed to divide the matter sued for between them if they prevailed at law, but that every such case should be looked at in its own merits, should a suit be brought to enforce or award its conditions. * * * The later decisions of this court have not gone further than to express doubts as to the application of the doctrine of champerty to our courts, but the result has practically been a regular following of the precedent of 1852. * * * It seems to me, therefore, to have been authoritatively ruled that as between a plaintiff and defendant in this country no question of champerty can arise, and as I am not prepared to dissent from that ruling, although I confess to some doubts of its propriety, I must decide this issue against the appellants."

Mr. Justice Macpherson concurred generally in that judgment, but on the question of champerty or maintenance which had been raised and discussed at length, and the law as to which could not yet be said to have been definitely settled, so far as that court was concerned, he deemed it unnecessary to express any opinion, as he agreed with Mr. Justice Glover in thinking that the appellants had a good defence on the merits.

In the most recent reported case that I have found on the point, decided on the 3rd of May 1870 by Mr. Justice Kemp

and Mr. Justice Jackson in the High Court at Calcutta (*e*), which was a suit by a Muhammadan Mukhtiár for the specific performance of an agreement, under which he advanced money to carry on a suit by members of a Hindú family to set aside alienations made by their father, on the understanding that he was to be entitled to a share of the estate recovered from the purchasers in the event of success, it was held that the agreement savoured of champerty, and that a suit involving such interference in the affairs of a Hindú family could not be countenanced.

In Mr. Justice Kemp's judgment the following passage occurs:—"The Judge was of opinion that the case savoured of champerty, and he refers to a judgment of the learned Chief Justice Peacock to be found at page 260 of the 5th volume of the Revenue, Judicial, and Police Journal, in which that learned Judge said that, although 'he did not mean to say that the law of champerty is a law applicable to the Mofussil, still he thought that the courts would be exercising a very unsound discretion, and would be acting upon a very erroneous principle, if they would allow a stranger to interfere in family affairs on an agreement, between him and the real heirs, that if he could establish their claim he would be entitled to a share of the estate."

A very important case came before the High Court of Calcutta in 1869, on the subject of a contract which, it was alleged, was void from being of a champertous nature and contrary to public policy, and, therefore, illegal. I allude to *Grose* v. *Amirtamayi Dasi* (*f*), decided in April on the original jurisdiction side by Mr. Justice Phear, and on appeal by Peacock, C.J., and Macpherson, J., in August 1869.

There one of the issues (the third) raised by the learned Judge in the court below was: "Was the alienation to Grose absolutely void, as being contrary to public policy, within the operation of any law affecting champerty and

(*e*) 13 Calc. W. Rep., Civ. R. 427.
(*f*) 4 Beng. H. C. Rep., O. J. 1.

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maintenance?" Mr. Justice Phear says (p. 8): "As regards the third issue, it is a little difficult to say how far the English law against champerty and maintenance at present reaches." Then, after stating that still there undoubtedly does exist in England even now a law forbidding champerty and maintenance, and that the change which has taken place is not, properly speaking, in the law itself, but in the circumstances of society, which has so altered as to elevate a large class of transactions out of the mischief named champerty and maintenance, and thus to leave the subject shorn of its original dimensions, he proceeds (p. 9): "The purchase of a title pending in suit (even by a Queen's Counsel) is not now necessarily invalid, and the assignment of a *chose in action* is not of itself contrary to modern law.

"Nevertheless, as I have already said, the principle of public policy which once found action in these statutes is still operative, and the Courts, both of Law and of Equity, give effect to it as part of the Common Law of England. It is important, however, for the right understanding of its application, that it should not be confounded with any of the rules of Equity, under which a transaction between parties is judged of solely with regard to the conduct of the parties towards each other.

"The late Lord Justice Turner, in the case of *Knight* v. *Bowyer*, 27 L. J. Ch. 520, where 'objection was made on the part of the appellants to the title of some of the plaintiffs, upon the ground that their interests were acquired by means of a purchase which was illegal and invalid as being affected by the laws relating to champerty and maintenance,' said that 'in order to maintain the objection as an answer to the suit, the appellants must show that the purchase was illegal and void on principles of public policy, upon grounds far higher than the mere interests of the parties.' * * *

"So far, then" (proceeds Mr. Phear), "as the present issue is concerned, I have to look to the general nature of the transaction, and to consider it in reference to the interests

of the community at large, rather than to its merits as between the parties; and in this respect it is not nowadays a critical fact that the subject of the contract was matter in suit, or about to be put in suit: for, as Lord Justice Turner also remarked in the course of the above-cited judgment, the cases abundantly prove that property which is in litigation may be made the subject of sale and purchase. * * *

"Then, is the law which renders champerty and maintenance illegal in England part of the law which this court, in the exercise of its ordinary original jurisdiction, is bound to administer? Viewed in the light in which I have endeavoured to place it, I think it is. In other words, I think that the law which forbids and makes void all acts contrary to public policy and subversive of the general interest of society is in force at least within the presidency towns."

The decree of Mr. Justice Phear was reviewed when the case came before C.J. Peacock and Macpherson, J., on appeal, and those learned Judges, after a very full and learned argument, held that the deed of the 4th of April 1859, which in the court below had been held to be wholly void, as being without definite consideration, and, being in the nature of a gambling transaction, not valid against heirs under Hindú law, and also void as being of a champertous nature and contrary to public policy, was, so far as it related to the moiety of the property assigned to Grose absolutely, not binding on the plaintiff, or on the persons who on the death of the widow might succeed to the property of her deceased husband; that, though not void on the ground of champerty, it was an unconscionable bargain and a speculative, if not a gambling, contract, and that there was no necessity for such an alienation by the widow. But the appellate court held that, so far as regarded the assignment of the moiety as security for the advances and expenses which Grose or his assigns might reasonably and properly make and incur for the maintenance of the widow for carrying on the necessary proceedings to enforce her rights, with 12 per cent. interest on such advances, it was not void, but created a charge upon

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that moiety which was binding upon the reversionary heirs of the husband to the extent of such advances and expenses. That the agreement of April 1859 was void by English law, as being a mere gambling transaction and contrary to public policy, and illegal, and that the law which would have been applicable to the case if it had been tried by a zillá court at Hugli, where the suit was originally instituted, was practically the same as the English law, whatever might be the nationality of the parties.

All the three Judges in that case quoted and acted upon a definition given by the Lords of the Judicial Committee of the Privy Council in a case decided in 1860, on appeal from the Ṣadr Diváṇi Adálat at Madras, a definition quoted and acted upon by C.J. Scotland in the case I have cited from 1 Mad. H. C. Rep. 153, and by Chief Justice Couch in a case heard by him and Gibbs, J., in March 1869, and reported in 6 Bom. H. C. Rep., A. C. J. 63.

In the last case, which may well be cited here (6 Bom. H. C. Rep., A. C. J. 63), R. had entered into an agreement with G., that if a suit which was then about to be brought by G. for the recovery of certain land should be decided in favour of G., R. was to pay G. Rs. 85, and G. was to make over to R. half the land recovered. R. was to pay to G. Rs. 50 in certain proportions, which R. was to lose if the suit were not decided in favour of G. G. recovered the land, and then R. sued him on the above agreement.

No issue had been taken in the Munsif's Court on the question whether the agreement was void for champerty. An issue was raised on this question by the appellate Judge, the Acting District Judge of the Konkaṇ, and, no evidence being taken, was decided in favour of the defendant.

It was held by Sir Richard Couch (Gibbs, J., concurring), on special appeal, that as it was not manifestly apparent on the face of the proceedings that the agreement was against morality or public policy, the appellate Judge ought not to have held it void, and the court intimated its opinion that the agreement was not void on the ground of champerty—

at any rate, that it was capable of explanation by a consideration of the surrounding circumstances which the plaintiff should have an opportunity of giving in evidence; and the decree of the appellate court was reversed, and the suit remanded to it for rehearing.

The law was stated by the Lords* of the Judicial Committee, in *Fisher* v. *Kamala Naicker* (*g*), in the following words:—"The Court" (referring to the Ṣadr Court at Madras) "seem very properly to have considered that the champerty, or more properly the maintenance, into which they were inquiring, was something which must have the qualities attributed to champerty and maintenance by the English law; it must be something against good policy and justice, something tending to promote unnecessary litigation, something that in a legal sense is immoral, and to the constitution of which a bad motive in the same sense is necessary. It was necessary, therefore, to look at the substance of the transaction, and not merely the language of the instruments" (p. 187).

Now apply that test, which appears to be the decisive one, in questions of this nature in India in the present case. I am of opinion that in the agreement between Munilál and the plaintiff there was nothing against good policy and justice, nothing tending to promote unnecessary litigation, nothing that in a legal sense is immoral, and to the constitution of which a bad motive in the same sense existed.

The present case differs from all those cited before me, in that the party to the alleged champertous agreement to whom assistance was to be given, namely, Munilál, was neither a plaintiff nor a defendant in any suit then pending or about to be commenced.

The suit which was the cause of Munilál's application to the plaintiff had been brought against Purshotam Prán̤jivan-

* Lord Kingsdown, Lord Justice Knight-Bruce, Lord Justice Turner, Sir Edward Ryan, Sir John Coleridge, Sir Lawrence Peel, Sir James Colvile (a court of unusual strength).

(*g*) 8 Moo. Ind. App. 170.

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dás alone; it was a simple action of trespass *quare clausum fregit* brought on the Plea Side of the Supreme Court; and in those days when the old strict technical rules of pleading were in force, and which were not in fact abolished until pleadings were swept away upon the institution of the High Court in 1862, it would have been, I think, a somewhat unusual thing for a third party like Munilál to have asked that he might be joined as a defendant in such action of trespass, if indeed such an application could have been successfully made at all.

Assuming, however, that Munilál had by agreement with Purshotam prevailed on the latter to allow Kahándás, the present plaintiff, to conduct the defence of the suit, so as to obtain the object which Munilál and Kahándás apparently had in view, namely, to stop the action against Purshotam in so far as it related to any alleged or supposed claim over Munilál's vacant piece of land—an assumption hardly justified by the evidence, as Purshotam had not been served with the summons, or received notice in the proper course of business that the action had been brought against him—I do not see how such an arrangement was against public policy, or that it in any way tended to promote unnecessary litigation. The object was to stop litigation, and to procure for Munilál what he appeared to think was in danger from the action then pending, though it is difficult to see how any litigation in an action of trespass for damages brought by Mádhavráv and Anandráv Raghunáthji against Purshotam could interfere with or prejudice the right or title of Munilál to his vacant piece of land.

Munilál appears, however, rightly or wrongly, to have thought that it would, and in his penury, and in his alarm in his mistake and ignorance as to the real character and nature of the suit brought against Purshotam, hastens immediately to his friend and creditor, Kahándás Nárandás, the present plaintiff, proposes to him terms for his own protection for the future improvement of the property at their joint expense, and for the joint use and benefit of himself and

Kahándas, terms which are agreed to by Kahándás, and reduced to writing on the following day, namely, the 13th of September 1849, under the instructions of Munilál, and two days before Purshotam was served with the summons in the suit brought against him.

That the alarm felt by Munilál was greater than the facts warranted is probable from the circumstances of the immediate stopping of the proceedings in the action against Purshotam, on the receipt, by the plaintiffs, Mádhavráv and Anandráv, or their attorneys, of Mr. Arthur's letter. All interference with that suit, either by Munilál or Kahándás, then and for ever ceased, if indeed, what I much doubt, the letter of Mr. Arthur can be considered any interference or intermeddling at all. It was nothing more than a letter written by an attorney of the Supreme Court by the instructions of an outsider, who fancied his friend was aggrieved by a suit brought against A and B by C; and that the suit brought by Mádhavráv and Anandráv against Purshotam was an unfounded, and possibly a malicious one, is evident from its being forthwith abandoned on the receipt of Mr. Arthur's letter. As the Lords of the Judicial Committee say, in the passage I have cited from their judgment: "It is necessary, therefore, to look at the substance of the transaction, and not merely the language of the instrument;" and I think it clear that Munilál and the plaintiff did nothing more than concert measures to rescue the vacant piece of land, then unproductive, and which did not possess a building or even a tree upon it, from the peril they considered it to be in from the suit brought against Purshotam.

Viewed in this light, the plaintiff's assistance to his friend Munilál certainly does not appear in the least degree immoral, or against good policy and justice, or tending to promote unnecessary litigation. On the contrary, judging even of its tendency by the result produced, the plaintiff's intervention, and supply of the small sum of Rs. 200 which set Mr. Arthur in motion (an attorney does not move unless placed in funds for that purpose), had a very decided and immediate effect in arresting unnecessary litigation.

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The subsequent vexatious proceedings taken by Mádhavráv and Anandráv Raghunáthji in the Police Court, to try and get possession of the vacant piece of land, were not within the scope of the agreement of the 13th of September 1849, which was limited in terms to Kahándás Nárandás conducting the case then pending in the Supreme Court, which in fact he never did, as the suit was at once abandoned by the plaintiffs, and never came into court at all.

Then, when matters (as the plaintiff Kahándás said in his evidence) were quiet, he erected a temporary shed, paying Rs. 600 or Rs. 700 out of his own money in building it; and afterwards, in 1861 or 1862, a substantial building was jointly erected by Munilál and himself at their joint expense, the plaintiff furnishing Rs. 3,000, and Munilál, through his assistance, borrowing Rs. 2,000.

That was done in pursuance of the terms of the agreement of the 13th of September 1849, which provided that after Munilál had proved to the satisfaction of the Court that the said ground was his sole property (proof which, as it turned out, it was unnecessary for him to produce), Kahándás and he should build a house, *chál*, or other building on the said ground at their joint expense, the rents and profits whereof were to be enjoyed jointly by them during Munilál's life, and after his death the said piece or parcel of land, and building then standing thereon, were to be the sole absolute property of the plaintiff, Kahándás, his heirs, executors, administrators, and assigns, and under which provision the plaintiff now claims the property.

The agreement impugned by the defendant, Dámodhar Mádhavji, when its real nature is considered and the surrounding circumstances looked at, was not a transaction entered into in the course of "the traffic of merchandising in quarrels and huckstering in litigious discord," reprobated by Lord Justice Knight-Bruce in the case of *Reynell* v. *Sprye* (*h*). It was entered into solely for the defence, protection, and improvement of the property which Munilál considered was in danger of being taken from him.

(*h*) 21 L. J. Ch. 655.

In the cases of champerty cited at the bar in which the agreements were considered as illegal and void, the sharing of the property was the consideration of the advance or loan of money. But here Kahándás is not to have the land in consideration that he should conduct the suit pending in the Supreme Court in 1849. That is not the consideration, and the decisions as to champerty do not apply in the present case.

Munilál does not agree or promise to give the vacant land over to Kahándás directly the suit is over. Had he done so, the authorities cited on behalf of the defendant might have been more in point. When Munilál had proved to the Court (it was he, be it remarked, and not Kahándás, who proposed to furnish the proof) that the ground was the sole property of Munilál, then, and not till then, the land, which at that time was comparatively valueless and produced no rent, was to be built upon at the joint expense of both parties to the agreement, and the rents during Munilál's lifetime were to be jointly enjoyed by each: so that an entirely new and valuable consideration for the agreement is introduced, or rather, I should say, new and material considerations, moving as well from Kahándás to Munilál as from Munilál to Kahándás, each party deriving considerable and substantial benefit from the agreement if its terms were duly carried out.

In *Prosser* v. *Edmonds* (*i*) Lord Abinger said: "All our cases of maintenance and champerty are founded on the principle that no encouragement should be given to litigation by the introduction of parties to enforce those rights which others are not disposed to enforce"—a passage quoted with approbation by Williams, J., in the year 1860, in delivering the judgment of the Exchequer Chamber in *Anderson* v. *Ratcliffe* (*j*), in which judgment he said: "Champerty is a species of maintenance, being a bargain with a plaintiff or defendant to divide the land, *campum partiri*, or other matters sued for, between them, if they prevail at law, where-

(*i*) 1 Y. & C. Exch. 481.

(*j*) El. B. & E. 806, 819; 28 L. J. Q. B. 32.

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upon the champertor is to carry on the party's suit at his own expense: see Russell on Crimes, Bk. II., Ch. 20" (p. 825).

Here Kahándás was not to get the land, or any portion of it, or of the building upon it, until after Munilál's death, and the agreement, as already pointed out, expressly provided for the erection of a building on it by both of those persons at their joint expense.

That was done. The building was erected at the joint expense of Munilál and the plaintiff, and they jointly enjoyed the rents as long as Munilál was alive. In other words, the agreement was acted upon by Munilál and by the plaintiff, and without objection from the other, from the time of its execution, in September 1849, without interruption for nearly fifteen years—namely, until Munilál's death in June 1864; and I see no reason to regard it in any other light than as a perfectly valid and binding contract. The defendant, following, apparently, what is not an uncommon practice in Bombay, did not trouble himself with investigating the title of the property on the supposed security of which he lent Haribhái Girdharlál Rs. 10,000 in September 1866 and Rs. 4,000 more in August 1867. * * *

There appears, therefore, to me to be no objection to the validity of the agreement of the 13th of September 1849, under which the plaintiff claims to recover possession of the property in question, an agreement which—the parties executing it being Hindús, and the document itself one under seal, having been sealed and delivered as an English deed —seems to comply with the requirements mentioned by the Lords of the Privy Council in a judgment delivered by them in March 1869, in *Raja Sahib Prahlad Sen* v. *Budhu Sing* and four other suits on appeal from the High Court at Calcutta (*k*), where they held that it is the established practice of the courts in India, in cases of contract, to require satisfactory proof that consideration has been actually received according to the terms of the contract, and that a contract

(*k*) 2 Beng. L. Rep., P. C. 111.

under seal does not of itself in India import that there was a sufficient consideration for the agreement.

Being as I am clearly of opinion that the agreement was and is a valid and *bonâ fide* one, of which the plaintiff can claim the benefit in this suit, it becomes unnecessary to consider the point argued at the bar, whether the defendant, Dámodhar Mádhavji, who was not a party to it, can be allowed to contend that the agreement was illegal, as being of a champertous character.

From the above judgment the first defendant appealed. The appeal came on for hearing on the 2nd of March 1871, before WESTROPP, C.J., and MELVILL, J.

B. Tyabji (with him *Mayhew*), for the appellant:—The deed of 1849 is void for champerty. [WESTROPP, C.J.:—Suppose, for a moment, it savours of champerty; the executing party, *i.e.*, the vendor, took no objection to it. He induced the plaintiff to expend money in building on the land, and he himself, so long as he lived, enjoyed a share in the fruits of the money so laid out. After that, would it now be equitable to allow your client, who claims through the administrator of the vendor, to avoid the deed?] The representatives of Munilál ought to have been brought before the court. [WESTROPP, C.J.:—Why? This was not a mortgage. It was a sale out and out from the death of Munilál. Munilál's heirs have now no claim whatever to the land.]

Anstey and *McCulloch*, for the respondent, were not called upon.

WESTROPP, C.J.:—As Munilál had neither sons, grandsons, nor other issue, and did not dispute the validity of the deed, or the rights the plaintiff may have acquired under it, but induced the plaintiff to expend his money in building on the land on the faith of the deed, and enjoyed, pursuant to its terms, a share in the profits of the capital thus expended, the defendant cannot now be allowed to dispute its validity. It is not necessary for us to express any opinion as to the extent to which the law of champerty is applicable in the Presi-

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dency town, or in the Mofussil; but we may say this much, that we do not remember any case in which an agreement to advance money in defence of an existing possession of property has been held to be champertous. The decree must be affirmed.

Decree affirmed with costs.

Attorneys for the plaintiff: *Acland, Prentis, and Bishop.*

Attorney for the defendant: *C. Tyabji.*

March 9.

THE ASIATIC BANKING CORPORATION (LIMITED), in Liquidation.....*Plaintiffs.*

AMADOR VIEGAS and another, Administrators of the Estate of Amador Viegas (the younger) .....*Defendants.*

Administrator—Distribution of Assets—Knowledge of Debt—Actual Knowledge—Calls—Act X. of 1865, *Sec.* 282—*Indian Succession Act.*

Semble that an administrator who pays such debts *as he knows of* otherwise than *equally and rateably as far as the assets of the deceased will extend,* in accordance with the provisions of Sec. 282 of Act X. of 1865, is personally liable for any loss occasioned to a creditor of the deceased by such improper distribution of the assets.

In order to charge such administrator, his knowledge must be actual, as distinguished from a constructive or imputable knowledge.

A liability to pay calls is a debt within the meaning of the above section (282 of Act X. of 1865).

THE facts of this case sufficiently appear from the judgment of the Court.

The case came on for hearing before GREEN, J., on the 13th of January 1871.

Farran (with him *the Honorable A. R. Scoble,* Advocate General), for the plaintiffs:—The defendants, the administrators of Amador Viegas the younger, knew that the intestate was possessed of fifty shares in the plaintiffs' Company, for the shares are mentioned in the inventory filed by the defendants. They must also have known that the Corporation was being wound up in the early part of 1867, for it was a