

## [ORIGINAL CIVIL JURISDICTION.]

*Suit No. 478 of 1873.**Appeal No. 273.*

1875.

August 14.

E. SARSTEDT and another ... (*Plaintiffs*) *Appellants.*THE AGRA BANK, LIMITED ... (*Defendants*) *Respondents.*

*Regimental Debts' Act 1863, 26 and 27 Vic., C. 57, Sections 3, 4, 5, 6, 7, 8, 10, 12, 22, and 35—Royal Warrant, Clause 17—Committee of Adjustment—Notice—"Person"—Bona fides.*

The president of a committee of adjustment, appointed under the provisions of 26 and 27 Vic., C. 57 (Regimental Debts' Act, 1863), wrote to the bank a letter enclosing the order by which the committee had been appointed, stating that he had given over to the widow of a deceased officer the whole of the estate of her husband by direction of the Military Secretary to Government, and requesting the bank to conform to her instructions concerning the amount of deposit receipts then in charge of the bank in the name of the deceased officer. The widow had taken out no letters of administration to the estate of her husband, nor had she a preferential claim or any preferential charge against it, but she paid all the preferential charges. On receipt of the letter from the president of the committee of adjustment, the bank paid over all the moneys of the deceased officer in their hands to his widow. In a suit brought against the bank by the first plaintiff, (the grand-daughter of the deceased officer,) who had taken out letters of administration to his estate on 6th June 1873, and her husband, the second plaintiff, to recover two-thirds of the moneys so paid by the bank to the widow with interest,

*Held* that on the payment, by the widow, of the preferential charges, the whole of the property remaining in the hands of the committee was "surplus," within the meaning of Section 5 of the Regimental Debts' Act of 1863, and that, assuming the Agra Bank at Bombay to be "within the command," within the meaning of Section 7, the moneys of the deceased officer in the hands of the bank, as being part of such "surplus," should have been dealt with by the committee in accordance with the provisions of Section 10 of the Regimental Debts Act 1863 and Clause 17 of the Royal Warrant, and should have been remitted to the Military Secretary to Government.

*Held* also that the Military Secretary to Government had no authority to pay or order the payment of such "surplus" to any person except in accordance with the provisions of Section 12 of the Regimental Debts Act of 1863.

*Held* also that Section 8 of the Regimental Debts' Act of 1863 did not render it incumbent on the widow, for the purpose of ousting the jurisdiction of the committee of adjustment, to pay the preferential charges before the committee had taken any steps under Section 7. The true construction of Section 8 is that, on payment of the preferential charges, the committee of adjustment

must be regarded as *functi officio*, except for the purpose of reporting, and should make over whatever property they have, which comes under the denomination of "surplus," in accordance with the terms of Section 10.

*Held* also that the letter of the president of the committee of adjustment was a sufficient notice to the bank that the committee were *functi officio*, and that the period had arrived when the civil law stepped in to regulate the case.

*Quære*—whether the bank could be held to be a "person" within the meaning of Section 22 of the Regimental Debts Act of 1863; but, even if it could,

*Held* that the bank were not protected by that section, the payment by them not having been made to a "representative" as defined in the Act.

*Held* also that the bank were not protected by Section 35 of the Regimental Debts Act, the payment not having been made "in pursuance" of the Act, and the carelessness of the bank in paying the money having been such as to amount to positive negligence, and debar them from pleading that they acted under the *bond fide* belief that the payment was made in pursuance of the Act.

*Pemberton v. Chapman* (7 El. and Bl. 210) distinguished.

**J**OHNSON Osborne, an Honorary Ensign in the Bombay Army, and Deputy Assistant Commissary of Ordnance, died intestate at Neemuch on 21st December 1868, leaving him surviving his widow and a grand-daughter, the first plaintiff, then an infant and unmarried. At the time of his decease there were standing in his name in the Agra Bank various sums of money, aggregating about Rs. 4,000, there deposited by him from time to time on deposit account at five per cent per annum. On the day of his death, 21st December 1868, a committee of adjustment was appointed under the provisions of the Regimental Debts' Act 1863, 26 and 27 Vic., C. 57, and proceeded to take steps for securing the effects of Mr. Osborne. On 12th January 1869 the president of the committee wrote the following letter to the Manager of the Agra Bank:—"I have the honour to inform you that I have, by direction of the Secretary to Government in the Military Department, given over the whole of the estate of the late Ensign John Osborne to his widow, Mrs. Maria Osborne, whose signature is attached, and request you will conform to any instructions she may give you concerning the amount of deposit receipts, &c., you have in charge in the name of John Osborne." Enclosed in this letter was

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1875. the order appointing the committee. Mrs. Osborne took out  
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 AND ANOTHER v. paid all the preferential charges. On receipt of the letter of  
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 name of the deceased John Osborne on deposit account.  
 This suit was brought by John Osborne's grand-daughter,  
 Elizabeth Sarstedt, (who had taken out letters of administra-  
 tion to the estate of her grand-father on 6th June 1873,) and her husband, to recover from the bank two-thirds of the money so paid over by the bank to Mrs. Osborne, together with interest at 5 per cent per annum. The suit came on for hearing originally before Sir C. Sargent, J., who passed a decree in favour of the defendants with costs on the 28th September 1874. Against this decree the plaintiffs appealed, and the appeal was argued before WESTROPP, C.J., and BAYLEY, J.

*Scoble*, Advocate General (with whom was *Pigot*), for the appellants.—Under the provisions of Section 8 of the Regimental Debts' Act (*a*) the widow having paid the preferential charges, the committee of adjustment were not entitled further to interfere in relation to the property of the deceased, and, therefore, the letter of 12th January 1869 was not a valid authority to the bank to pay over any money of the deceased in their hands to the widow.

(*a*) Provided that if the representative of the deceased, or his widow (if any), or any of his next of kin, pays in full the preferential charges, the committee of adjustment shall not further interfere in relation to the property.

If such payment is not made, then, within one month after the death, the committee of adjustment may and shall, without any representation taken out, and as if they were the representatives of the deceased, and to the exclusion of all other authorities and persons whomsoever, sell or convert into money such parts of the effects of the deceased as do not consist of money,—and also, where the death occurs out of the United Kingdom, get in and give receipts (which shall be effectual discharges) for all or any of the credits forming part of the estate of the deceased, and being payable or recoverable in India or in the colony, or possession, in which the deceased was quartered (as the case may be), and, if they think fit, sue for and recover any of such credits—and, after paying thereout the expenses attending the discharge of their duties, shall pay thereout the preferential charges and secure the surplus of the effect, or effects and credits, as the case may be, remaining over after all such payments.

*Inverarity* (*Farran* with him) for the respondents.—There is no evidence that the widow did pay the preferential charges, and, if she did, it was not such payment as is contemplated by Section 8 of the Act, for the proviso at the commencement of that section refers back to Section 7, so that to oust the jurisdiction of the committee the payment by the widow of the preferential charges should have been made immediately on the death of her husband. The committee had power on 12th January 1869 to claim payment themselves of the money of the deceased deposited with the bank. The payment by the bank to Mrs. Osborne was not a payment to her *qua* the widow of the deceased but *qua* the agent of the committee. Possibly the committee may be responsible, but not the bank. Even if the committee were acting *ultra vires* in ordering the payment to the widow, the bank, on receiving the letter of 12th January, signed by the president in his character of president of the committee, and enclosing the order appointing the committee, were entitled to presume that the committee were acting within their powers, and were justified in paying the money of the deceased in their hands to the widow or any one else empowered by the committee to receive it, without seeing to the application of it: *Pemberton v. Chapman* (b). If the bank had been put upon enquiry by receipt of the letter of 12th January, they would only have referred to Sections 6 and 22 of the Regimental Debts' Act, and there is nothing in the letter to lead the bank to suppose that any of the conditions in either of those two sections had not been complied with. Act XIV. of 1873, Sections 5 and 6, in substance reproduce Section 8 of the Regimental Debts' Act. The policy of both these enactments is the speedy collection of the estate, and this policy would manifestly be defeated if a debtor were to be allowed to question the authority of the committee to receive payment themselves or to order it to their nominee. Section 35 of the Act protects the bank as well as the committee.

*Scoble* (Advocate General) in reply.—The report of the committee of adjustment shows that the widow did pay the pre-

(b) 7 El. and Bl, 210.

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ferential charges, and there is no evidence to the contrary. From the terms of the letter of 12th January 1869 it is clear that the payment was made to Mrs. Osborne *qua* the widow of the deceased and not *qua* the agent of the committee. In fact, the letter amounts to a notice that the committee is *functi officio*, and is rather a request than an order; the bank, therefore, could not avail themselves of any protection of which the committee might have availed themselves before they had concluded their duties, but ought to have insisted on the widow taking out letters of administration to the estate of her husband before they made over to her any of his property in their hands.

WESTROPP, C.J.:—This suit is brought by Elizabeth Sarstedt and her husband to recover from the Agra Bank certain moneys which were deposited there by John Osborne in his life-time. John Osborne was an honorary ensign in the Indian Army, and held the appointment of Deputy Assistant Commissary of Ordnance at Neemuch, and in our observations regarding him the fact must be borne in mind that he belonged to Her Majesty's Indian Army as distinguished from Her Majesty's Army at large—a distinction which is taken in the Regimental Debts Act 1863. Elizabeth Sarstedt is the administratrix of John Osborne, who appears to have died intestate. She was his grand-daughter, and at the time of his death she would appear to have been a girl, and unmarried, in the school at Byculla. John Osborne had a wife, who would appear to have been his second or third wife, but not the mother of Mrs. Sarstedt's mother. John Osborne's death occurred on the 21st of December 1868. No doubt, if the widow had applied for letters of administration to this Court, she could have obtained them, but she seems never to have made any such application. Therefore she was not armed with such authority as the ordinary civil law would confer on her to give an acquittance to the Agra Bank for this money. The bank, however, as a matter of fact, did make over the whole of the money to her on some date subsequent to the 12th January 1869, and they seek to defend themselves against this claim

by saying that they paid the money to her by order of the committee of adjustment, which assembled on the death of John Osborne under the Regimental Debts' Act 1863. The question is, whether the committee of adjustment had any authority to give such a direction as they did. It was not contended that the widow held what is called a preferential claim, or had preferential charges upon the estate of John Osborne, either to the extent of the money paid her by the bank, or to any other extent, or that he was in any way indebted to her. The report furnished by the committee to Government, which has been put in evidence here by the plaintiffs, states that the preferential charges had been all paid by the widow. I do not know that it is a very material circumstance in this case whether they had been so paid by her or whether they had not, because, even if they had been paid by her, we fail to perceive the authority in the Act for making over this property to her. My impression is, that, in the absence of evidence to the contrary, we ought to take it that the committee had performed their duty as they stated they had done, and that the preferential charges were paid. What these preferential charges are, is stated in the 4th section of the Regimental Debts' Act 1863. They are payable in preference to all other debts and liabilities, and are [1] expenses of last illness and funeral; [2] military debts, namely, sums due in respect of quarters, mess, band, and other regimental accounts, military clothing, appointments and equipments, not exceeding a sum equal to six months' pay of the deceased, and having become due within eighteen months before his death, including sums due to any agent or to any paymaster, quartermaster, or other officer, on any such account, or on account of any advance made for any such purpose; to which shall be added, where the death occurs out of the United Kingdom, [3] servants' wages, not exceeding two months' wages to each servant; [4] household expenses incurred within a month before the death, or after the last issue of pay to the deceased, whichever is the shorter period. "The surplus only," the 5th section states, "of the personal property of an officer or soldier dying on service, remaining over after payment of

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preferential charges, shall be considered personal estate of the deceased, with reference to the calculation of probate duty, or of any other tax or percentage, or for any of the purposes of administration or distribution," so that that section is important in this way, showing that the surplus means whatever personal property is left remaining over after payment of preferential charges. If, therefore, we take it that the whole of the preferential charges were paid by the widow as we are bound to take it [in accordance with the evidence contained in the report of the committee], the whole of the property remaining in the hands of the committee was surplus. Now, the next section to which it is important to refer, is Section 7: it says that, "immediately on the death of an officer or soldier on service, such committee of officers as may be prescribed by Royal Warrant, according to the circumstances of different cases, hereinafter called the Committee of Adjustment, shall secure all such of his effects as, where the death occurs in the United Kingdom, are in camp or quarters: and where the death occurs out of the United Kingdom, are within the station, colony, or command." Now, we are willing to assume for the defendants, for the purposes of this case, that this money lying in the Agra Bank in the city of Bombay was within the command, and was such property as the committee of adjustment might have secured under this section. The committee, it appears, on the 23rd December 1868 wrote to the Military Secretary to Government, Colonel Macdonald, to ascertain whether, on the widow paying the preferential charges, the property of the deceased, John Osborne, might be made over to her, and were informed in reply by the Military Secretary to Government that that could be done. Now, we fail to find any authority in the Act for doing what the Military Secretary to Government informed the committee of adjustment might be done. We think that the contention that the property in the hands of the committee of adjustment, inasmuch as they had not paid the preferential charges, could not be regarded as surplus, is not sustainable. We think that the whole of the property in their hands, after the preferential charges were

paid by them or the widow or the next of kin, would be surplus, and being surplus must be disposed of as the Act directs. The 10th section states how the surplus is to be disposed of. It is this:—"The Committee of Adjustment shall, according to the circumstances of the case, remit or lodge the surplus aforesaid to or in the hands of such paymaster or officer or person, at such time or times, in such manner, and together with such accounts, vouchers, reports, and information as may be prescribed by Royal Warrant." Then we turn to the Royal Warrant. The clause of the Royal Warrant applicable to such a case as the present is Clause-17, which is as follows:—"Where the death occurs in India, the deceased not being a soldier of Her Majesty's Army"—(which was the case here; he was in Her Majesty's Indian Army; the distinction is taken throughout the Act)—"the Committee of Adjustment are to remit the surplus to the Military Secretary to the Government of the Presidency in which the deceased was quartered." Then it may be said that they being so directed by the Royal Warrant, if the Military Secretary authorized the payment of this money to the widow, that would be a sufficient protection to the Agra Bank for paying to her the money in their hands; but the answer to that is, that what the Military Secretary has to do, is expressly provided by the Act. It is in Section 12. We here find the same term "or other officer or person" as is used in the 10th section. This is what the 12th section says:—"Where the death occurs in India, the deceased not being a soldier of Her Majesty's Army, the following provisions shall take effect:—(1) The paymaster or other officer" (that is, the Military Secretary) "or person aforesaid shall, as soon as may be, after receiving the surplus aforesaid, publish such notice (stating the amount of the surplus, and other particulars respecting the deceased and his property,) as may be prescribed by Royal Warrant, together with a notice stating that all claims by creditors against the property of the deceased are to be lodged with such paymaster or other officer or person, who shall retain the surplus for two months after the first publication of such *Gazette* notice aforesaid, and

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1875. shall receive and record all claims lodged with him accordingly. (2) If claims are so lodged, not exceeding in the whole such absolute amount or such proportion of the surplus as may be prescribed by Royal Warrant, according to the circumstances of different cases, then such paymaster or other officer or person shall, at the expiration of the said two months, proceed to discharge the demands of the claimants who have lodged claims with him, unless under the special circumstances of the case of the deceased it appears to him inexpedient or unjust to do so" (but nothing of that kind seems to have been done in this case by the Military Secretary). " (3) In that case, or in case the claims lodged exceed in the whole the absolute amount or the proportion aforesaid, then such paymaster or other officer or person shall, without discharging those claims, or any of them, transfer the surplus aforesaid to the Administrator General for the Presidency. (4) Where such paymaster or other officer or person does not so transfer the surplus, he shall dispose thereof, or of so much thereof as remains after the discharge of any claims, as follows:—Where the amount exceeds £100, he shall pay it over to the representative of the deceased in India, if any; where the amount does not exceed £100, it shall not be necessary for any purpose that representation to the deceased be taken out in India, but if representation is taken out there, such paymaster or officer or other person shall pay the amount over to the representative in India; where the amount does not exceed £100, and representation in India is not taken out, such paymaster or other officer or person shall dispose of the amount, or part thereof, in India, (in such manner as may be prescribed by Royal Warrant for such cases,) for the benefit of the widow and of the children or other near relatives (if any) of the deceased, or of some of such persons, being in India." It is very clear that the Military Secretary, or paymaster, or other officer, where the assets exceed £100, has no authority to make any payment either to the widow or next of kin unless they are creditors, and here the assets did considerably exceed £100. They seem to have

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amounted to about Rs. 16,000. There was not that amount in the bank, but the bank had upwards of Rs. 4,000 belonging to the deceased. We do not find that the Military Secretary has in any respect followed the course prescribed for him. We have no evidence that he published any notice, no evidence that he proceeded to discharge the demands of the claimants, and we have no evidence that he made the moneys over to the Administrator General: in fact he did not. That would seem to have been his proper course if he had assets in his hands which he had not applied in payment of debts. The very provision that, in cases where the assets were less than £100, payment might be made by the proper authority to the widow or next of kin, is an exclusion of the right to make such payment in any other case, unless they claim as representatives. I now go back to Section 8. The argument is that, unless the preferential charges are paid immediately on the death by the widow or next of kin, and before the committee of adjustment have taken any steps under Section 7, they will not be bound to retire from the representation, but that does not appear to us to be the true construction of Section 8. We think that whenever the preferential charges are paid, the intention of Section 8 is that the committee of adjustment shall not further interfere in relation to the property. Now, the word "further" has been relied upon as referring expressly to Section 7, but the word "interfere" is coupled with it, and "interfere" is a word of very wide extent. It would include either a collection of assets or a distribution of assets; either would be an interference, and we think that, as soon as the preferential debts had been paid, the committee of adjustment must, except for the purpose of reporting, be regarded as *functi officio*, and that they ought then to have made over whatever property they had, which would come under the denomination of surplus, to the Military Secretary to Government. We have already stated that the Military Secretary is the "other person" pointed out by the Act. There is no authority for him, when the assets exceed £100, to pay to the widow or next of kin except upon letters of administration, probate, or certificate

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of administration—some authority, in fact, which is sufficient. However, it is said that this Act is so very obscure and ambiguous that, inasmuch as the committee of adjustment appear to have been acting up to the 13th of March 1869, the date on which they sent in their report, that fact would entitle us to suppose that the committee were authorized to direct the application of the money in the hands of the Agra Bank for such purposes as they might think proper, and that, if both parties acted *bonâ fide* (and there was no reason to suppose the contrary), the bank would be justified in paying the money over by order of the committee of adjustment. Now, we do not think that that is a sound argument. We think that the very fact, that such a letter as that of the 12th January 1869 was written by the president of the committee to the bank, was sufficient to warn the latter that the period had arrived when the civil law stepped in to regulate the case; notifying, as it did, that the committee had denuded themselves of the property of the deceased completely, and made it over to the widow. It is true that they said they did so under the authority of the Military Secretary to Government, but he had no power under the circumstances to confer such authority, and they had nothing left on which they could operate. The mere fact that their report remained unmade, did not leave them an existing body for the purpose of dealing with the assets. Section 22 has been relied upon for the protection of the bank in connection with the order of the Military Secretary. This section is as follows:—“Any property of an officer or soldier dying on service coming, under this Act, to the hands of any paymaster or other officer or person, shall not, by reason of so coming, be deemed assets or effects at the place in which that paymaster or other officer or person is stationed or resides, and it shall not be necessary by reason thereof that representation should be taken out in respect of that property for that place. When, under this Act, any such property is to be paid or delivered over to the representative of a deceased officer or soldier or other person entitled to receive the same—if such payment or delivery is to

be made in India, then the Military Secretary to the Government of the Presidency in which the deceased was quartered ; and if such payment is to be made elsewhere than in India, then the Secretary of State for War, or the Secretary of State for India in Council, as the case may be, may order that such property be transmitted to any other place where the same can be more conveniently paid or delivered over as aforesaid; and the obedience to any such order by any paymaster or other officer or person in whose hands such property is, shall be a sufficient discharge to him, and he shall not be liable in any manner by reason of such property having been in his hands and having been transmitted under any such order.”

The first thing that strikes one here is, that the payment which this section contemplates is a payment to the representative of the deceased officer or soldier, and there has been no payment on this case to the representative. The representative, we find in the Act, means any person taking out representation. It means the person armed with probate, letters of administration, or certificate of administration, so that that section cannot possibly protect the bank even if they came within the words “a person.” But we very much doubt whether the bank does come within these words. A special meaning is given to them. It will be found in the 10th section. It means paymaster, officer, or person designated in the Royal Warrant ; and the person designated in the Royal Warrant in this case for receiving assets is the Military Secretary to Government. But, even if the words did cover the bank (it is unnecessary for us to determine that), the payment referred to is to a representative, and the bank, therefore, can claim no protection under it. Lastly, we come to Section 35, which says : “ Every payment, or application of money and every sale or other disposition of property, made by the Secretary of State for War, or by the Secretary of State for India in Council, or by any Committee of Adjustment, or by any paymaster or other officer or person, in pursuance of this Act, or of any Royal Warrant for carrying this Act into effect, shall be good and valid as against all persons whomsoever ; and every such Secretary of State, and every officer

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1875. belonging to any such committee, and every such paymaster, officer, or person as aforesaid, shall be, by virtue of this Act, absolutely discharged from all liability in respect of the money or other property so paid, applied, or disposed of." It is a payment or application of money in pursuance of the Act which is spoken of. We are willing, as far as this suit is concerned, to give this section—without saying that is the true construction to give it—the most liberal construction it can bear, which would be that these words mean any payment, application, or act *bonâ fide* believed by the party paying it to be in pursuance of the Act, albeit really it might not be so. But there can be no *bona fides* where there is carelessness—where there is such carelessness as amounts to positive negligence. Here, if the bank had looked into the Act; they would have seen that neither the committee of adjustment nor the Military Secretary to Government had any right to make over these assets, exceeding, as they did, £100 in value, to the widow or next of kin, unless they were armed with probate or letters of administration, or a certificate of administration, for the direction is positive as to what is to be done with the assets. Whether the preferential charges were paid or were not paid, there is no authority in the Act for the payment over by either the committee of adjustment or the Military Secretary to Government, of the assets, or any portion of them, to the widow or next of kin in such a case as the present, unless they filled the character of creditors, preferential creditors, or representatives. This was not the case here; and, although the widow might have become the representative if she pleased, she did not do so, and was not in the position of the executrix in the case of *Pemberton v. Chapman* (c), which has been cited. The executrix there, even though she had not taken out probate, had authority under the will. Here the widow was quite differently situated, having no authority whatever. For these reasons we think that the decree of the learned Judge must be reversed; and as the plaintiffs have behaved

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very moderately in claiming only two-thirds of the deposit, we think they are entitled to recover two-thirds of the sum paid over to the widow, with simple interest at 5 per cent from the date of such payment till payment by the Bank to the plaintiffs. We think, too, having regard to all the circumstances of the case, and especially to the fact that the bank displayed such very great readiness to arrest the second plaintiff, by issuing execution against him on the decree of the Division Court, and bringing him down all the way from Jamalpore to Bombay while an appeal was actually pending, the plaintiffs must have all their costs in both Courts. The decree will be for the plaintiffs for Rs. 3,444-15-8, with interest at 5 per cent per annum on Rs. 3,242-4-10 from the 11th February 1869 until judgment, with costs of the suit and appeal, and interest on the judgment at 6 per cent per annum until payment.

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BAYLEY, J. :—I entirely concur in the judgment and in all the remarks of my lord.

[APPELLATE CIVIL JURISDICTION.]

*Special Appeal No. 316 of 1872.*

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SHIVJI HA'SAM and others ... (*Defendants*) *Appellants.*

DATU MA'VJI KHOJA' ..... (*Plaintiff*) *Respondent.*

*Bombay Minors' Act XX. of 1864, Section 1—Bengal Minors' Act XL. of 1858, Section 2—Age of majority—Charge of minors' property—Custom among Khojds—Joint Hindu family.*

Under Act XX. of 1864, Section 1, it is the charge of a minor's property and not the property itself which shall vest in the Civil Court—a distinction which has been overlooked in *Bái Kesar v. Bái Gangá* (8 Bom H.C. Rep. A. C. J. 33).

The meaning of the 1st Section of Act XX. of 1864, when regarded in connection with the sequel thereof (which provides, for the information of the Civil Court, no such means, regarding the deaths of persons leaving infant children, as would enable the Court to act *ex mero motu* in every such case), is that the care of the persons of all minors (not being European British subjects) and the charge of their property shall be, as expressly