[ORIGINAL CIVIL.]

Before Mr. Justice Green.

1877. March.

DHANJIBHAI BOMANJI GUGRAT (PLAINTIFF) *v.* NAVAZBA'I AND OTHERS (DEFENDANTS)*

Parsis—Distribution—Advancement—Statute of Distribution (22 & 23, Car. II., C. 10) Section 5—Indian Succession Act (X. of 1865), Section 42—Parsi Succession Act (XXI. of 1865), Section 8—Administration—Limitation—Liability of the share of one of the next of kin for a debt due by him to the intestate, but barred at the date of the death of the latter—Cause of action—Claim against estate of intestate on account of moneys paid after his death for the surviving members of his family—Married woman—Separate property.

In excluding by Section 8 of the Parsi Succession Act, from application to Parsis, Section 42 of the Indian Succession Act, which repeals the English rule as to advancement contained in the Statute of Distribution, Section 5, it was not the intention of the Legislature to preserve the last-mentioned rule in force for the Parsi community.

Semble that the rule followed by the Courts of Equity in England, whereby, notwithstanding the provisions of the Statutes of Limitation, the share of one of the next of kin in the estate of an intestate, while in the hands of the administrator, is liable for a debt due by the next of kin to the deceased, though barred at the date of the death of the latter, is to be applied in the Courts of British India. The rule laid down in *Graham* v. *Londonderry* (3 Atk. 393,) with regard to a husband's rights over ornaments, given to his wife by her father, applied to Parsis.

BOMANJI MANCHERJI GUGRAT, a Parsi, died intestate at Bombay, where also all his property was situate, on 15th February 1870, leaving him surviving, his sole heirs and next of kin, his widow Navazbái, the first defendant, and three sons, Dhanjibhai, the plaintiff, Mancherji, the second defendant, and Framji, the third defendant. Letters of administration were granted to the widow, Navazbái, on 11th February 1874. On 8th October 1875 the plaintiff filed this suit for the administration of the estate and effects of the decease, and praying for an injunction to restrain the first defendant from dealing with or intermeddling with the estate, and for the appointment of a receiver.

In this suit the plaintiff also sought to render the estate of the intestate liable for certain sums, alleged by the plaintiff to have been paid out of his own moneys, after the death of the

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intestate, for the household expenses of the widow and two younger sons of the intestate; and to recover from the widow, as administratrix, possession of a Government promissory note of the 4 per cent. loan for Rs. 700, which the plaintiff alleged he had deposited with the intestate for the purpose of defraying the funeral expenses of the plaintiff's wife, who was still alive at the date of the institution of the suit; and also possession of certain ornaments, purchased by the intestate for the wife of the plaintiff out of the proceeds of another Government promissory note of the 4 per cent. loan, previously deposited by the plaintiff with the intestate for the same purpose as the Rs. 700 note. On these minor points the learned Judge held that the moneys paid, after the death of the intestate, for the household expenses of his family, could not be charged to the estate, in the absence of any special agreement or testamentary provision to that effect, but could only be a debt due in their individual capacity by the members of the family for whom such moneys were so paid. As to the ornaments, the learned Judge held, following *Graham* v. *Londonderry*,[1] in the absence of any rule applicable to Parsis other than the English Law, that they were the separate property of the wife of the plaintiff, and that he had no right to ask to have them delivered to him. As to the promissory note for Rs. 700, the learned Judge held that the plaintiff could, on his own showing, have no right in it till after the death of his wife, and that there being no allegation that the note was not secure, there was no reason for changing its custody. There were, however, two points of law raised in the course of the case: 1st, as to the application to Parsis of the English rule relating to advancement; and, 2nd, as to the application of the Indian Limitation Act as a bar to the right of an administrator to deduct from the share of one of the next of kin in the estate of an intestate the amount of a debt due by that next of kin to the intestate, but barred at the date of the death of the latter.

The plaintiff by his plaint alleged that, at the time of the death of the intestate, the defendant Mancherji was largely indebted to the intestate, but to what precise amount the plaintiff was unable

(1) 3 Atk. 393.

to say, and that no steps had been taken by the defendant Navazbái to recover such debt, the defendant Mancherji contending that the same was barred by limitation. The plaintiff, therefore, submitted that the amount of such debt, when ascertained, ought to be deducted from the share of the defendant Mancherji in his father's estate.

The following were the further issues raised on this question:—

2. Whether, at the death of Bomanji Mancherji, the defendant Mancherji Bomanji was indebted to him in any, and what, amount.

3. Whether, in case there was at any time any such debt, the same had not, at the death of the said Bomanji Mancherji, become barred by the Limitation Act.

5. Whether the share of the defendant Mancherji Bomanji in the estate of Bomanji Mancherji is subject to any, and what, deduction, by reason of any advancement made to him by the said intestate during his life-time.

The facts material to this report, on the points above mentioned, are stated at length in the following extracts from the judgment.

Gill and *Jardine*, for the plaintiff:—It is settled that Parsis are generally, and in the absence of any rule to the contrary, governed by English Law. Therefore, previously to 1865, there can be no doubt that they would have come under the English rule as to advancement contained in the Statute of Distribution. That rule is repealed by Section 42 of the Indian Succession Act (X. of 1865); but Section 8 of the Parsi Succession Act (XXI. of 1865) expressly provides that Section 42 of the Indian Succession Act shall not apply to Parsis, and the Statute of Distribution is not repealed by the Parsi Succession Act. The English rule, as to advancement, therefore, applies to Parsis, and this case must be governed by the English cases on the point: *Gilbert* v. *Wetherell* [1], *Auster* v. *Powell*,[2] *Boyd* v. *Boyd*.[3]

As to the point of limitation, the share of a legatee or next of kin in the hands of an executor or administrator is subject to

(1) 2 Sim. and St. 254. (2) 1 DeG. J. and Sm. 99.

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deduction of the amount of a debt due by such legatee or next of kin to the testator or intestate, though the debt be barred at the time of the death of the testator or intestate: *Courtenay* v. *Williams*,(1) *In re Cordwell's Estate*.(2)

Pigot and *Lang*, for the defendants:—The whole scheme of distribution contained in the Statute of Distribution is, so far as Parsis are concerned, abrogated by the Parsi Succession Act. It is, therefore, idle to suppose that a single section of the statute is to be kept alive for the Parsis only, while the whole of the rest of the statute is, in effect, repealed by the Parsi Succession Act, and this section by the Indian Succession Act. It was not thought necessary expressly to repeal the rules contained in the Statute of Distribution by the Parsi Succession Act, because in that Act was laid down an entire scheme of distribution wholly different from that contained in the statute. The Act must, therefore, be held to have taken the place of the statute; and as there is nothing in the Act equivalent to the English rule of advancement, that rule cannot be held to apply to Parsis. The rule was expressly repealed in the Indian Succession Act, because that Act contains many provisions similar to those of the English Law, and is not, like the Parsi Succession Act, a wholly different and independent law.

The cases cited on the point of limitation do not apply, because in India the Limitation Act is binding on all the courts. In England the Courts of Equity, when they apply the provisions of the Statutes of Limitation do so by analogy only, not because they are bound by them. Hence it is that in England a Court of Equity will sometimes, as in the cases cited, give relief where the Courts of Law, which are bound by the Statutes of Limitation, would be compelled to refuse it, and in other cases will refuse it, though a Court of Law would not, because it is not barred by the letter of the statute. But in India the Limitation Act is binding on all courts alike, and must be applied to all cases.

The following judgment was delivered on the issues not already disposed of as aforesaid:—

(1) 3 Hare 539.

(2) L. R. 20 Eq. 644.

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GREEN, J.:—The 2nd, 3rd, and 5th issues may conveniently be considered together. The plaintiff did not, before the hearing, put in the form of any definite or tangible allegation what the debt of the defendant Mancherji Bomanji to the intestate was. In his plaint he merely says that the said defendant was largely indebted to the intestate. When called upon by summons in chambers to give some particulars of this alleged debt, he professed to be unable to do so. His case, as generally put forward in the first instance at the hearing, was that, at or about the time of the dissolution on the 11th November 1863 of a partnership of Govind Hari Walekar & Co., (in which the intestate, one Govind Hari, and others were partners) the defendant Mancherji Bomanji and Govind Hari (in the name of his infant son Hari Govind) had large transactions in purchasing and shipping cotton together on joint account, the share of Mancherji Bomanji in the capital embarked in such transactions being provided by crediting Hari Govind with certain sums and debiting the same against the large balance of some 80,000 or 1,00,000 rupees due to the father Bomanji Mancherji from the dissolved firm of Govind Hari Walekar & Co.; and that the amount of such sums was to some extent established by the balance of the accounts in the name of Mancherji Bomanji in the intestate's books, viz., Exhibits A, B., and C; that balance, as appearing on such accounts, being, on 20th October 1865, the sum of Rs. 84,540-0-89. The plaintiff, however, does not seek to charge the defendant Mancherji Bomanji with the whole of this sum. He contends that from the sum of Rs. 84,540-0-89 is to be deducted the sum of Rs. 23,505-8-8, appearing, as he contends, by one of the accounts marked D, to have been Mancherji's share of the loss in the transactions on joint account of Mancherji Bomanji and Govind Hari (as Hari Govind), that this share of loss ought to be borne by the defendant Mancherji, or, in other words, is the debt he owes to his father's estate, and that the balance of the Rs. 84,540-0-89 ought to be borne or accounted for by the three brothers, viz., the plaintiff, Framji, and Mancherji, in equal shares. I was unable to understand on what principle the plaintiff arrived at this result, but such as I have given it his contention was in giving his evidence. The plaintiff's counsel in reply, however,

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contended, and this contention is one that is in itself quite intelligible, that as it appeared from the evidence given on behalf of the defendants that Bomanji Mancherji, in his life-time, dealt for his own purposes with Rs. 75,000 of the balance due to him on account of his share in the partnership of Govind Hari Walekar & Co., viz., by taking shares to that extent in a certain trading company established in 1864 by Govind Hari and others under the name and style of the General Trading Company, and giving credit for that sum, as of 24th August 1864, to the firm of Hari Govind, the liability of the defendant Mancherji to his father was measured by the difference between Rs. 84,540-0-89 and Rs. 75,000, or Rs. 9,540-0-89. This, then, was the final form which the plaintiff's allegation of a debt due by the defendant Mancherji to his father assumed.

The defendant Mancherji Bomanji, however, contends that, even supposing (which he denies) that there was any debt at all due by him to his father, such debt was already barred at his father's death, on 15th February 1870, by the Limitation Act. The only dates of the alleged advances by the father, which we have in evidence, are those in Exhibits A, B, and C. Now the last item in date, except interest and balance, to the debit of the account of Mancherji Bomanji in any of those accounts, is under date 1st March 1865, and is described as a cheque for Rs. 5,000 drawn by Maneckji Limji & Co. upon the Chartered Bank and given to Mancherji Bomanji. This would be a claim for money lent, and would be barred by non-suit for three years.

All the other debit items (except for interest and balances) in the account, Exhibits A, B, and C., are of dates more than six years before the intestate's death. There is no statement of account and ascertainment of balance with the concurrence of the defendant Mancherji Bomanji alleged in evidence, which might, under the then Law of Limitation, have given a period of six years from the time of stating such account and admission of such balance, so that if we are to consider the balance appearing in the Exhibits A, B, and C, to the debit of the person named Bhai Mancherji Bomanji, to have been sums in truth then due by the defendant Mancherji Bomanji to his father, they had, at the death of the latter,

become already barred by the Limitation Act then in force, to say nothing of the period which has elapsed between 15th February 1870 and 8th October 1875, when the plaint in this suit was filed.

It was contended, however, on the plaintiff's behalf that the sums standing to the father's credit with the firms of Govind Hari Walekar & Co., or Hari Govind, which the defendant Mancherji Bomanji was, by his father's consent, allowed to have the benefit of in cotton transactions on the joint account of himself and Govind Hari (as Hari Govind), whether they were also debts or not, and whether time-barred or not, ought to be treated as an advancement by Bomanji to his son Mancherji, and ought, under Section 5 of the Statute XXII. and XXIII., Car. II., c. 10 (commonly called the Statute of Distribution), to be taken and accepted by Mancherji in lieu of, or, if less in amount than the share, on account of Mancherji's share in the estate of his father, the intestate. By Section 42 of the Indian Succession Act (X. of 1865), which came into force on 16th March 1865, it is provided that advancements to a child are not to be taken into account in estimating the distributive share of such child, or the descendant of such child in the estate of a lineal ancestor, thus repealing in effect the provision as to advancement in Section 5 of the English Statute of Distribution. By Section 8, however, of the Parsi Succession Act (XXI. of 1865), which came into force on 10th April 1865, it is enacted that certain portions of the Indian Succession Act, and in these is included Section 42, shall not apply to Parsis.

The effect of this was, it was contended, that though the whole general scheme of distribution among the widow, children, and representatives of predeceased children, and next of kin of intestates, provided by the English Statute of Distribution, is abrogated, though not expressly repealed, by Act XXI of 1865, in the case of Parsis, yet that the provisions of Section 5 of the Statute of Distributions as to advancement, not being expressly repealed, are still to attach on and limit the scheme of distribution provided for Parsis by Act XXI. of 1865.

The express abrogation contained in Section 42 of the Indian Succession Act of the English rule as to advancement, founded as

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it was on Section 5 of the English Statute of Distribution, may have been considered necessary when the scheme of distribution as contained in the Indian Succession Act (and which, though intended to apply to Indian subjects of the British Crown generally, was so intended only after excluding the vast majority of such subjects, viz., Hindus, Mahammadans, and Buddhists) was in substance, though in a developed and expanded form, the same as that provided in the English Statute of Distribution. But it is very difficult to suppose, when a scheme of distribution such as that contained in the Parsi Succession Act, differing as it does in many very essential points from that of the English Statute of Distribution, was being introduced for the regulation of the intestate succession of a particular community, it should have been in contemplation to retain a special branch or limiting proviso of the enactment, the whole basis and substantive provisions of which were being repealed.

The only reason I can suppose for excluding, by Section 8 of Act XXI. of 1865, Section 42 of Act X. of 1865 (which repealed the English rule as to advancement) with other parts of the last-named Act from having application to Parsis, was, either that the rule itself was not considered as applicable to them, and so its repeal, so far as they were concerned, was superfluous; or that it was considered that, by the effect of the scheme of distribution provided for Parsis by Act XXI. of 1865, the rule as to advancement would, of itself, fall. But for the express exclusion of Section 42 of the Indian Succession Act from application to Parsis, I should not have felt any doubt that the effect of the Parsi Succession Act of 1865 was to abrogate, so far as Parsis are concerned, the rule as to children's advancements being accounted for in distribution, if, in fact, applicable to them at all, together with the rest of the scheme of distribution established by the Statute XXII. and XXIII., Car. II., c. 10; and, for the reasons above stated, I think that Section 8 of the Parsi Succession Act, so far as it excludes the repealing clause, Section 42 of the Indian Succession Act, from applying to Parsis, may be accounted for without supposing it to have been the intention of the Legislature to preserve this rule in force for the Parsi community alone of all

the Indian subjects of the Crown. I do not, therefore, consider it necessary to discuss the cases cited by the learned counsel for the plaintiff, in reference to the question of advancement, viz., *Gilbert* v. *Wetherell*,(1) *Auster* v. *Powell*,(2) and *Boyd* v. *Boyd*;(3) though, had I considered the rule as to advancement applicable to Parsis, the cases would have had a material bearing on the present suit.

In regard, however, to two other cases, viz., *Courtenay* v. *Williams*,(4) and *In re Cordwell's Estate*,(5) cited by the same counsel, it is still necessary to consider the question whether the plaintiff has established that there was a debt, whether presently and without an account taken ascertained or not, due by the defendant Mancherji Bomanji to his father. The former case shows that in an administration suit an executor may retain so much of a legacy as is sufficient to satisfy a debt due from the legatee to the testator, though the remedy for such debt was, at the time of the testator's death, barred by the Statute of Limitation, XXI. Jac. I., c. 16; and the latter case shows that one of the next of kin of an intestate, and, as such, entitled to a distributive share in his estate, can, in an administration, require payment of such share from the administrator only after such next of kin has discharged any obligation he may be under to the estate, and that even though the remedy for recovering such obligation may have been barred to the estate. The question, then, requires a decision, whether or not the defendant Mancherji was, in fact, a debtor to his father.

The learned Judge having reviewed the evidence at considerable length as to the transaction with Govind Hari, in respect of which the plaintiff contended a debt by the defendant Mancherji Bomanji to the estate of his father, the intestate, had arisen, came to the conclusion that though in the said transactions the name of the defendant Mancherji Bomanji (the son of the intestate) was used, as also was that of Hari Govind (the infant son of Govind Hari), yet that the transactions, so far as the defendant Mancherji Bomanji was concerned, were not really his, but transactions of his father, the intestate, and that there was no debt in

(1) 2 Sim. and St. 254.
(2) 1 DeG. J. & Sm. 99.
(3) L. R. 4 Eq. 305.
(4) 3 Hare 539.
(5) L. R. 20 Eq. 644.

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fact due by the defendant Mancherji Bomanji to the estate of the intestate. This being so, the Court proceeded to pass the ordinary administration decree, but directed that the plaintiff should bear his own costs and pay the defendant's costs of the hearing, except those of the first day, and also all other costs of the suit occasioned by the introduction into the plaint of the matters the subject of the five issues, and reserved the question of the costs of the suit not provided for as aforesaid, and further directions.

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Before Sir M. R. Westropp, Knight, Chief Justice, and Sir Charles Sargent, Knight, Justice.

June 22.

WALJI KARIMJI (PLAINTIFF) *v.* JAGANA'TH PREMJI *et ux.* (DEFENDANTS).*

Jurisdiction—Court of Small Causes (Bombay)—Suit for possession of immoveable property of a value greater than Rs. 500 and less than Rs. 1,000—Act IX. of 1850—Act XXVI. of 1864.

The effect of Section 2 of Act XXVI. of 1864 is to extend the compulsory jurisdiction of the Courts of Small Causes in the presidency towns, in suits to recover property, to cases where the value of the property does not exceed Rs. 1,000.

The Court of Small Causes at Bombay has, therefore, jurisdiction to try a suit for the possession of immoveable property of a value greater than Rs. 500 and less than Rs. 1,000.

Sreemutty Shibosoondary Dossee v. *Táracknáth Pandit* (2 Ind. Jur. 145, *note*) dissented from.

THE following case was stated for the opinion of the High Court, under Section 7 of Act XXVI. of 1864, by J. O'Leary, First Judge, and Gunpatráo Bháskar, Acting Third Judge, of the Court of Small Causes at Bombay.

This was a suit to recover possession of a piece of ground, with a house situate thereon, at Bhandárwádá, outside the Fort of Bombay. See copy summons annexed.(1) The value of the premises exceeded

* Reference from the Bombay Court of Small Causes, Suit No. 14970 of 1870.

(1) The summons called on the defendants "personally to appear, &c., to answer the plaintiff in an action for the recovery of immoveable property, brought against you, to recover possession of all that, &c., of the value of Rs. 1,000, of which you unlawfully and unjustly refuse to give up possession to the plaintiff, whereby the plaintiff, &c."