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against them (1)." The principle is equally valid as applied to either party in the cause. The Court (2) is to frame the issues according to allegations made in the plaint or in the written statements tendered in the suit, which here contain a full assertion and admission of the execution of the document A by the defendant Muncherji. But the issues, as they stand, were suggested by the defendant's counsel. They waive controversy as to the actual execution of the document, assume it to have been executed, and raise questions only that depend for their pertinence on that assumption. Under such circumstances the plaintiff is not, I think, called on to prove the execution of the document or to put it in evidence. If the document being pronounced absolutely invalid for some purpose on considerations of public policy, it were sought to defeat the law through the effect usually given to an admission in pleading, such an attempt could not be allowed to succeed, but for its proposed purpose in this case it is not invalid. It may serve as a ground for claiming the conveyance it promises, though unregistered; while as unregistered it is not itself an operative conveyance. It is embodied by reference in the plaint and admitted in the answer. It remains to be seen whether the objections, raised on behalf of the defendant to the fulfilment of the contract thus ascertained, are supported by the evidence. [His Lordship then commented upon the evidence, and passed a decree for the plaintiff, with costs.]

Decree for the plaintiff.

Attorneys for the plaintiff.—Messrs. *Shapurji and Thakurdas.*
Attorneys for the defendant.—Messrs. *Payne and Gilbert.*

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Before Mr. Justice West.

IN THE MATTER OF THE PETITION OF KAHANDAS NARRANDAS.

[20th December, 1880 and 11th January, 1881.]

Indian Trustee Act (XXVII of 1866), ss. 3, 35, 53—Equitable jurisdiction of High Court—Trusts—Appointment of new trustee—Letters Patent, 1823, Cls. 29, 33, 41.

The High Court may exercise the summary powers conferred upon it by the Indian Trustee Act (XXVII of 1866) in the case of Hindu trusts.

Section 3 of the Indian Trustee Act, which provides that the power and authority given, by the Act to the High Court shall be exercised only "in cases to which English law is applicable," cannot be intended to limit the operation of the Act only to cases to which, in their whole extent, the law prevailing in England applies without qualification or reserve, as this would virtually exclude the Act in any case on which an Act of the Indian Legislature has any bearing. The cases referred to in the section must be cases to which the English law is *in some measure* applicable, but in what measure is not indicated in the Act. English law must be regarded as applicable in the sense intended if the principles recognized by the English Equity Courts are applicable.

At the date of the grant of the charter to the Supreme Court of Bombay in the year 1823, English equity had become a system which would deal with a body of *quasi*, common law in a scientific manner and in obedience to known and uniform rules. When it applied its method to the determination or the constitution of a right, even based on the Hindu or Mahomedan law, it administered English law. In this sense "English law was applicable" at the

(1) *Brawne* v. *Mc Clintock*, 6 Eng. & Ir Ap. at p. 453.
(2) Civil Procedure Code, Act X of 1877, s. 147.

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date of the passing of the Indian Trustee Act of 1866 to all cases in which peculiarly equitable doctrines had obtained recognition in the relations between the native inhabitants of Bombay. Those doctrines could not be employed to subvert the native substantive laws, but they afforded a means of ameliorating them by a system of rules borrowed from the English Court of Equity.

Trusts are recognized in the Hindu as well as in the English system of law. But while the substantive Hindu law insists strongly on the suppression of fraud and the fulfilment of promises, it fails to furnish the detailed rules by which effect is to be given to its principles in cases of trust. If the Court is called on to give effect to a trust in any given case, it looks to the Hindu law of property to determine the estate of the trustee, but with reference to the duties of trustee and the rights of beneficiaries it is governed by the rules of English equity. There are no others that it can apply. In meeting an exigency, or in taking cognizance of a form of right not directly provided for in the Sastras, the Court in exercising its jurisdiction under s. 41 of the charter of 1823 may apply Hindu Law. But, taking Hindu law as one of its *data*, it applies "English law" also in the form of equity to all or nearly all the questions that arise.

[N.F., 37 C. 870 (873)=7 Ind. Cas. 33; R., 11 B. 666 (676); 21 B. 48 (52); 36 B. 214 (223)=13 Bom. L.R. 717=12 Ind. Cas. 225; 3 Bom. L.R. 905 (909); 9 C. W.N. 79 (80); 6 O.C. 305 (311, 319).]

PETITION for the appointment of a new trustee.

[155] In the year 1863 the petitioner set apart certain lands and a large sum of money to be applied to religious and charitable purposes duly set forth in a Gujarati writing bearing date the 15th December 1863.

The first clause of the said writing appointed two trustees, and was in the following words:—

"To Sha Premchand Raichand and Sha Tulsidas Ramdas written by Sha Kahandas Narrandas. To wit: This day I, of my own free will and pleasure, having set aside the undermentioned estate and money, have been made over the same to you in trust to be applied to good objects. You are to execute this (trust) according to the undermentioned conditions and arrangements. Out of you (two) Sha Premchand Raichand is appointed managing trustee, and Sha Tulsidas Ramdas is appointed trustee during my lifetime; and in the event of my decease, my wife Bai Gulalvahu is appointed trustee in place of Sha Tulsidas Ramdas. Should it be necessary during my lifetime to appoint another trustee in place of Sha Tulsidas Ramdas, Sha Premchand Raichand may duly appoint a trustee with my consent."

The document then set out the various purposes to which the trust funds were to be applied, and the concluding clause was as follows:—

"No one of my heirs shall have any right whatever thereto, save the only rights to go on a pilgrimage as far as Shri Jaggannathji according to the above-mentioned particulars, and with the exception of that should any of my heirs, after my decease, raise a dispute, it is all null and void. I myself of my own free will and pleasure, having made this above-named determination, have made over the said estate and money to Shet Premchand Raichand, the managing trustee of this fund. He and Sha Tulsidas Ramdas are appointed as aforesaid managing trustees; therefore no one of my heirs has any claim or right to this trust (property). However, my heirs have a right to go on a pilgrimage as far as Shri Jagganathji according to the above-mentioned arrangement. Further be it known as follows:—The whole authority to carry out the said works is given to Shet Premchand Raichand, and after his decease to such person as he may during his lifetime appoint and [156] entrust to. Further, if the amount of my fund from amongst the sums (set apart) for the said good works, shall be found deficient while being expended, it may be supplied out of the surplus,

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if there be any, of any of the sums for the other expenses. The whole authority in regard to all these things belongs to my said trustees who are now existing, and to the trustee or trustees who may be hereafter appointed. Further, having affixed to this writing my signature and seal, that is '*mohor*' I have delivered it, Bombay, in the Samvat 1920, Magsar Sud the 6th, at and the day of the week Wednesday, 16th December, in the Christian year 1863."

The petition stated that after the execution of the said trust deed the said Premchand Raichand and Tulsidas Ramdas entered into possession and management of the trust premises and trust funds; that the said Tulsidas Ramdas died on the 11th November 1879 intestate, leaving him surviving a widow named Dewalibai; that during the lifetime of the said Tulsidas Ramdas some portion of the said trust funds remained in his custody and the other portions remained in the custody of the said Premchand Raichand; that the said Tulsidas Ramdas during his lifetime sometimes deposited with the petitioner, for safe custody, some portions of the said trust funds, and some time previous to his death the said Tulsidas Ramdas deposited with the petitioner Government promissory notes of the value of Rs. 29,000, belonging to the said trust funds.

The petition further stated that Government paper belonging to the said trust funds, of the value of Rs. 42,000 or thereabouts, then was or should be in the possession of the said Premchand Raichand in addition to a large sum of money consisting of cash or Government paper belonging to the said trust fund; that the petitioner had repeatedly called upon the said Premchand Raichand to join with the petitioner in appointing a new trustee in the room of the said Tulsidas Ramdas, deceased, pursuant to the provisions of the writing of the 15th December 1863 but he from time to time put off the petitioner with excuses; that the petitioner had lately, through his solicitors, called upon the said Premchand Raichand to appoint a new trustee, but he alleged that it [157] was not necessary then to appoint a new trustee, and had called upon the petitioner to hand over the said Government promissory notes for Rs. 29,000 to him as the sole continuing trustee; that the petitioner had informed him, in reply, that he was willing to hand over the said notes to the said Premchand Raichand and a new trustee when appointed, and had expressed his willingness to appoint one, but the said Premchand Raichand was not willing to have a new trustee appointed as his co-trustee, and wished to remain alone as sole trustee, and to have all the funds in his sole possession and control; that the petitioner was not willing to allow the said Premchand Raichand to manage the said trust premises alone. The petition prayed that some fit and proper person might be appointed as trustee in the place of the said Tulsidas Ramdas, deceased. Such new trustee to be selected with the consent of the petitioner.

Latham appeared for the petitioner.

Farran, for Premchand Raichand.

Inverarity, for Narrandas Kahandas.

The Advocate-General (Honourable *J. Marriott*) appeared on behalf of the charity.

Latham, for the petitioner.—The Court will never, if possible, allow one trustee to have possession of trust property: Lewin on Trusts (6th ed., 1875), p. 38, pl. 9; *Ibid.*, p. 690 (ch. 28, pl. 1). It is clear that before the Trustee Act this application would have been granted. The

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difficulty now arises for the Indian Trustee Act XXVII of 1866, which is declared by s. III to be applicable only "in cases to which English law is applicable." This application is made under s. 35 of the Act.

The position of those who deny the jurisdiction of this Court in a case of this kind, must be that English law is only exceptionally applicable, —that is applicable only to class, *e.g.*, to those domiciled in England, the law generally administered by this Court being some other law. We submit that the law generally administered by Courts in India is English law, and that other law is only applied in particular cases. This question is discussed at length by Markby, J., in *The Secretary of State* v. *The Administrator-General of Bengal* (1).

[158] The Hindu in India must resort to English law in all matters relating to trusts. The Hindu law has provided no machinery for dealing with such cases. In *Haridas Purshotum* v. *Henry Gamble* (2), which was a case of insurance, it was held that, in the absence of Hindu law upon the question, English law applied.

The Letters Patent, 1823, are still in force as to the equitable jurisdiction of the Courts, and it is clear from cl. 41 that this equitable jurisdiction is to be applied to natives

It is not disputed that, if we filed a suit, the Court could appoint a trustee. The only question is whether the summary jurisdiction given by the Trustee Act is applicable to natives. The equitable jurisdiction exercised in a case of a suit, would be derived from cl. 41 of the Letters Patent, 1823. If that is so, it is only reasonable to hold that the powers given by the Trustee Act of 1866, which were given for the purpose of simplifying the procedure, are exercisable in all the cases in which that procedure was adopted. To hold otherwise would be to render the Act nugatory which was passed to enable Courts to exercise summarily and inexpensively the jurisdiction they already possessed.

It may be urged that this case comes within s. 29 of the Charter of 1823. If Hindus had a law and usage relating to trusts, this section would preserve these, but not having them the section does not apply. That section would apply to suits as well as to an application like the present. English law has always been applied to suits filed for this purpose. It would be a hardship to refuse to apply English law in its improved form, while no objection is made to applying it in the more lengthy and expensive proceeding of a suit.

Farran for the surviving trustee.—There are two questions to be decided: 1st, assuming the Indian Trustee Act to be applicable, is this a case in which it should be applied; 2nd, is the Act applicable at all? As to the first point, I contend the Court ought not to interfere. This is an attempt to oust Premchand Raichand from the right of appointing a co-trustee which is conferred on him by the deed. He is willing to exercise that power. The **[159]** Court, therefore, cannot interfere: *Hodsons settlement* (3). The mere fact that he has allowed a year to elapse without making an appointment, is not material.

The second question is, whether the Court can exercise the powers given by the Act in the case of a charity created by a Hindu and by a deed in the Hindu form. I admit that in a suit the Court can appoint trustees in a case of Hindu trust. But it has not as yet exercised its summary jurisdiction in cases not under Hindu law. The Act which governs proceedings like the present is adjective law. Adjective law is applicable

(1) 1 B.L.R. O.C.J. 87. (2) 12 B.H.C.R. 23 (32). (3) 9 Hare 118.

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to all classes, unless it is limited in its application by some express provision. But s. 3 of the Indian Trustee Act clearly excludes some classes of the community from the operation of the Act. It may be taken to enact that this part of the adjective law is not to apply except in those cases in which the substantive law to which it refers is applicable. The question, then, is narrowed to this—what is the law to be applied to this trust created between Hindus? I contend that the law must be Hindu law.

Some of the exceptions referred to in cl. 41 of the charter of 1823 are those already indicated in cl. 29.

In the *Tagore Will Case* (1) it was laid down that trusts are not unknown to Hindu law. [WEST, J.—Is a case of trust to be regarded as a contract within cl. 29 of the charter of 1823 ?] It would appear so, for this section was applied in the *Tagore Will Case*, so that the Court must have considered the trusts there to come within the section. Rights arising under a written instrument may be taken to fall within the term contract.

The only reason suggested for applying English law is, that the Hindu law has no specific rules applying to the particular case. That is not sufficient to justify in saying that English law applies. The law applicable is the Hindu law, and where it is defective in special rules required in any branch, we may take such rules as may be approved of from English law or some **[160]** other system of law, and modify them so as to suit the case. It is not, however, as English law that they are so made applicable.

Latham in reply.—The *Tagore Case* is not in point. There an endeavour was made to alter the Hindu law of succession. The Court prevented that, but it did not apply the law of trusts. It applied the law of succession. The law of trusts is a law of machinery, and if so, s. 29 of the charter does not apply.

11th January, 1881. WEST, J.—In the present case Kahandas Narrandas in December 1863 executed an instrument whereby he transferred to Premchand Raichand and Tulsidas Ramdas property worth about two lakhs of rupees on trusts chiefly of a religious character. The validity of the trusts is not in question. Premchand was assigned the principal authority as managing trustee, though the language of the document on this point is not altogether self-consistent. In the event of Tulsidas's death during Kahandas's life the direction given by Kahandas is that Premchand is in his stead " duly to appoint a trustee with my consent." Tulsidas died in October or November 1879, and a correspondence followed in which Premchand, demanding certain moneys or securities left with Kahandas, was met by a declaration that Kahandas was willing to appoint a new trustee and then hand over the money. Premchand thought that the nomination rested not only in his power but in his discretion as to an appointment being made or not. He has not proposed a new trustee for Kahandas's approval, and apparently does not intend to do so, unless there is an opinion expressed by this Court to that effect.

Under these circumstances I am asked to appoint a trustee in the place of Tulsidas. That the jurisdiction to make such an appointment exists, requiring only to be invoked in the proper way, is admitted on behalf of Premchand. But that way and the only way, it is contended, is by a suit, and at present the Court is moved only by an application. For Kahandas, reference is made to s. 35 of the Indian

(1) *Ganendra Mohan Tagore* v. *Jatindra Mohan Tagore*, 9 B. L. R. 377 ; 1 I.A. 387.

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Trustee Act XXVII of 1866, and by s. 53 of that Act, any order made, under its provisions has the same effect as a decree, and is to be executed in the same way as a decree. Whether the conclusion of the Court should be arrived at by means of a suit or an application would seem, therefore, to be [161] immaterial as regards the substance of the case; but the parties are Hindus, the trusts are for objects of a kind that are regarded as calling for protection by the Hindu law, but not by the English law, except so far as that law may in this country embrace and effectuate the Hindu law.

Now, s. 3 of the Act says that "the powers and authorities given by the Act to the High Court shall and may be exercised only in cases to which English law is applicable, and may be exercised with respect to property within the local limits of the extraordinary original civil jurisdiction of the said Courts respectively." The present, it is said, is not a case "to which English law is applicable." The Court has not jurisdiction to deal with it under the Act, and the application ought to be rejected.

On the question thus raised, the learned counsel on the one side and the other have referred by memory or tradition to decisions said to have been given in opposite senses by different Judges of this Court. The judgments, however, are not forthcoming, and in the absence of them I am not on mere conjecture to suppose that the one or the other was supported by the more conclusive reasoning. The authorities being evenly balanced, my mind, as affected by them, must be balanced too.

In support of the proposition that the case is one to which English law is applicable, Mr. Latham relied much on the case of *The Secretary of State* v. *The Administrator General of Bengal* (1). That case was one in which a declaration was sought that the estate of one H. T. Dodsworth, deceased, had escheated for want of heirs, though he had left several children by two concubines. The deceased and his father did "in a general way profess the Christian religion," but this was thought "unimportant" by the learned Judge, Markby, J., who disposed of the case. After an elaborate discussion of several theories he arrived at the conclusion (p. 112 of the report) "that there exists in this country English law which is not due to the charters creating the Supreme Court, and which is not personal law. Nor is it possible to suggest, as far as I am aware, any ground for the existence of that law, except [162] that when this country was brought under English rule the English law became the territorial law of the country, applicable, it is true, in very few instances, because of the very large number of persons who had a personal law of their own and only in the same modified form in which it is applicable within the city of Calcutta, but still a territorial law." By English law, however, the learned Judge did not mean English law pure and simple, but "that modified form of English law which is usually applied in this Court, and which, I think, Mr. Justice Phear in *Hogg* v. *Greenway* (2) has aptly described as Indo-English law."

In answer, then, to the question "whether the right of the Crown as *ultimus hæres* is part of the Indo-English law," he says (p. 113): "I think it is. The Privy Council certainly so consider it in the case of *The Collector of Musulipatam* v. *Cavaly Venkata Narainapah* (3); and though the Succession Act of 1865 is not directly applicable to this case, it can hardly be contended that this part of the English law is by its very nature inapplicable to this country, since s. 28 of that Act provides that

(1) 1 B.L.R.O.C.J. 87. (2) Coryton 97. (3) 8 M.I.A. 500 (524).

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if a person has left none who are of kindred to him his estate shall go to the Crown."

On this reference to the case of *The Collector of Masulipatam* v. *Cavaly Venkata Narainapah* (1) I have to observe that, if Indo-English law is taken according to the learned Judge's definition, the ground of the decision of the Privy Council seems to have been mistaken. After determining that, even according to Hindu law, there was an escheat to the State, the judgment of the Judicial Committee proceeds (1): "Their Lordships, however, are not satisfied that the Sadar Court was not in error when it treated the appellant's claim as wholly and merely determinable by Hindu law. They conceive that the title which he sets up may rest on grounds of general or universal law." A decision grounded on "general or universal law" is not grounded on such a very special compound as the Indo-English law.

In the case of *Barlow* v. *Orde* (2) the *status* of the parties seem to have been of the same description as in *The Secretary of State* [163] v. *The Administrator-General of Bengal* (3). Colonel Skinner, like Dodsworth, was an illegitimate son and the father of illegitimate children. He devised his estates to his children and their children, and the Courts in India applied the English law to the determination of what was meant by "children." Before the Judicial Committee, counsel for the respondent asked "if the English law is not to govern the rule of construction, what law is?" To this the judgment delivered by Lord Westbury (p. 307 of the report) answers: "The construction and effect of the will, therefore, must depend on the law of the domicile, if that can be ascertained. At the time of the colonel's death there was no *lex loci* of the province in which he was domiciled, and the law applicable to the succession of any individual depended on his personal *status*, which again mainly depended on his religion. Thus the succession of a Hindu would, as a general rule, fall to be regulated by Hindu law and of a Mahomedan by Mahomedan law, and of an East Indian Christian by English law; but in every case, for the purpose of determining the *status personalis*, regard was to be had to the mode of life and habits of the individual and to the usages of the class or family to which he belonged . . . . . There is nothing to indicate the religious belief or profession of the colonel or his family, or what were their habits or usages."

"His origin is unknown; being illegitimate he belonged to no family, and all that can be collected is that he was probably a soldier of fortune, who rose by his courage and military skill to a certain rank and distinction in the service of the East India Company."

"It is impossible, under these circumstances, to affirm that any particular law is applicable to the construction of the colonel's will or the regulation of his succession. Any questions that may arise respecting them must, therefore, be determined by the principles of natural justice."

This is the law of justice, equity and good conscience (4) which in *The Secretary of State* v. *The Administrator-General of Bengal* is expressly refused recognition (3). Of the English law, which as [164] a territorial law Markby, J., thought must govern all cases not covered by a special personal law (5), the Judicial Committee say it "has no application" (6).

(1) 8 M.I.A. 500 (524).
(2) 13 M I. A. 277.
(3) 1 B.L.R. O.C.J. 87 (93).
(4) *Per* Lord Westbury, 13 M.I.A. at p. 307.
(5) 1 B.L.R.O.C.J. 112 (113).
(6) 13 M. I. A., at p. 317.

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The case of *Abraham* v. *Abraham* (1), which is referred to in both the cases that I have been considering, seems to have been differently understood in each. In the Calcutta case (2) it is said "all that I understand the Privy Council to have done in *Abraham* v. *Abraham* is to affirm this mixim," namely, that "*in pactionibus et conventionibus unusquisque se sua lege defenbere potest.*" In the Privy Council "the Regulations as explained in the Abraham case " go, it is determined, to support the proposition as to personal *status* as subjecting to one or another system of law which I have already quoted. In the Calcutta case it is said that the relations, *inter se*, of a joint Hindu family are " a matter *quod ad voluntatem spectat* (2). The Judicial Committee do not hint at such a doctrine as a ground for their decision. Savigny, whose history of the Roman law in the Middle Ages established the correction of Raynonard and others (3) as to the free choice of a personal law (4), to which the learned Judge refers, points out in the same work that the laws of inheritance are specially of a public character removed from the domain of individual will (5). In the Introduction to his Law of Obligations Savigny specifies the laws of the family and of succession as those allowing the least scope to free action, and in his system (s. 105) he says expressly that these laws are not modifiable by the disposition of any person. This is, indeed, the main principle of the *Tagore Case* (6). The *dicta* of the Judicial Committee as to the voluntary character of customs in *Abraham* v. *Abraham* (1) imply a multiplicity of persons as well as of acts, and though they allow a man to transfer himself from the [165] class to which he has hitherto belonged to another class, do not in either class permit him to make a law for himself different from that which governs his fellows. Such a permission would, in fact, be inconsistent with any rational notion of a law.

I should not, therefore, on the authority of *The Secretary of State* v. *The Administrator-General of Bengal* (7) feel warranted in saying even that the English law or the Indo-English law is the territorial law of India in the sense intended in that case. But the judgment itself seems (8) to recognize that after our acquisition of this country the general Mahomedan law as the personal law of Mahomedans and the general Hindu law as the personal law of Hindus was still in existence. In the present case the parties are Hindus, and if the general proposition could be accepted it would as to them be excluded by the exception.

The parties are, moreover, residents within the original jurisdiction of this Court. It may well be that English settlers allowed expressly or tacitly to use their own laws within the limits of a factory become as members of the distinct community thus marked off subject generally to the English law apart from any special legislation to that effect. Even Christian foreigners who become members of such a community, as they have a common basis of sentiment with it must, by association, share its legal consciousness and may properly be subjected to identical rules. But this principle as ruled in *The Administrator-General of Bengal* v. *Ranee Surnomoyee Dosee* (9), does not extend to the natives assembled

(1) 9 M.I.A. 195. (2) 1 B.L.R. O.C.J. 87 (103).
(3) Hist. duDroit Municipal, T. I., p. 274.
(4) Guizot, Civilisation en France, Leg. II. 25; Hallam's Middle Ages, Ch. II, notes 4, 5 and the references.
(5) Geschichte, &c., pp. 128, 130, 138. (6) 1 I. A. 387.
(7) 1 B. L. R. O. C. J. 87. (8) See p. 110. (9) 9 M. I. A. 387.

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within the same limits. Between the two classes there are such essential and fundamental divergences of opinion that their thoughts and desires cannot unite on the main points of a legal system. This has been recognized by the British Legislature. The jurisdiction of the Supreme Court of Judicature at Fort William, established by Statute 13, G. III, cap. 63, was controlled by ss. 17—20 of Statute 21, G. III, cap. 70. These provide for the preservation of the Mahomedan and Hindu laws of succession and contract and, in a measure, of family relations. The Court, too, is to frame process and make rules for execution [166] which will guard, as far as possible, against outrages on the religious and social sensibilities of the natives. The Statute 4, G. IV, cap. 71, under ss. 7 and 17 of which the Supreme Court of Bombay was constituted, while enabling the same jurisdiction to be given to it as that enjoyed by the Supreme Court of Bengal subjected the jurisdiction to the same restrictions. On this rests the charter of the late Supreme Court which, in the points we have now to consider, reproduces the terms of the Statute 21, G. III, cap. 70, s. 17.

For a full comprehension of the later charter and the statute authorizing it, we are thus thrown back on the earlier legislation, which itself has to be construed by the light of the history of the Supreme Court of Bengal. The Statute 21, G. III, cap. 70, s. 17, was intended to provide against specific mischiefs which had arisen in the exercise of the Supreme Court's jurisdiction. Like the Bill of Rights and similar statutes it is to be interpreted not as exhausting by enumeration the classes of rights which it specifically guards, but rather as thus recognizing the larger general principles on which these rights stand, by forbidding any such encroachments on them for the future as actual experience had in the past shown to be possible. In *The Secretary of State* v. *The Administrator-General of Bengal* it is shown that though the Bengal regulations provide in terms for the preservation of the Hindu and Mahomedan laws only as to some particular subjects, yet the Courts have given to those laws a distinctly wider operation. The Judges saw, in fact, that the intention was to allow the population to retain their own laws and customs throughout the sphere of which particular portions only had been expressly indicated, so far, at least, as this retention was compatible with the public law involved in the sovereignty of the British Crown and with the principles of natural justice brought as far as possible into harmonious working with the settled rules of personal law (1), from which divergence was legally impossible. So in the charter of the late Supreme Court the specification of matters of succession and matters of contract as matters to be governed by native laws and usages might be construed as [167] an indication of a wider operation of those laws and usages intended to be secured by the statute. In the minds of some lawyers the principles of inheritance and of contract, as they are connected with every institution of the private law, occupy almost the whole of that province. Domat, in his great work on the Civil law, has contrived to bring all private legal relations under the two heads of Successions and Engagements. The provision, too, in favour of the native laws is introduced in the charter, though not by the words "provided that," yet strictly as a proviso on the preceding affirmative grant of jurisdiction. The Court it is said "shall have full power to hear and determine all suits and actions that may be brought against the inhabitants of Bombay." This judicial authority is as consistent with the prevalence

(1) Personal law is here used in a sense somewhat different from that usual amongst jurist. See Bruge. Com. I, 12.

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of any one system of substantive law as of another. Judgment is to be given "according to justice and right (1), not according to the peculiar rules of the English law, except where that law may on independent grounds be properly applicable. But it being perceived almost intutively that the law of actions and of procedure reacts in the absence of precaution most powerfully on the substance of the rights submitted to adjudication, this consequence is guarded against by the proviso in the classes of cases in which it was most likely to arise. It would, however, be opposed to all sound principles of construction to make out of a mere limitation on a rule of jurisdiction a positive primary law and then to apply to the substantive rule thus arrived at the principle of *expressum facit cessare tacitum*. The intention as to be gathered from the mere language of the charter was not at all to codify the native laws of the Island of Bombay in six lines, but merely to guard against a possible overriding, in particular classes of cases, of the substantive law of Hindus and Mahomedans by the law of actions, as this might, it was apprehended, be put in force by the new Court. The general rule that the private law of a community is not affected by a change of rulers, is too well established to need any illustration. There are points in which it comes into contact with the public law, and there it has to yield, but the establishment of a Court to administer the law "according to justice and right" does not of itself imply any [168] change in the law to be thus administered. The substantive law of Bombay, so far as affected by s. 29 of the charter of 1823, remained, after the institution of the Supreme Court, what it had been before it.

Section 41 of the same charter referring to s. 29 says that "the said Supreme Court of Judicature at Bombay shall also be a Court of Equity and have equitable jurisdiction over the person or persons hereinbefore described and specified or limited for its ordinary civil jurisdiction as aforesaid subject to the restrictions and exceptions hereinbefore in that behalf expressed and contained and not otherwise, and shall and may have full power and authority to administer justice in a summary manner, according or as near as may be to the rules or proceeding of our High Court of Chancery in Great Britain; and upon a bill filed to issue subpœnas and other process under the seal of the said Court to compel the appearance and answer upon oath of the parties therein complained against and obedience to the decree and orders of the said Court of Equity in such manner and form and to such effect as the High Chancellor of Great Britain doth or lawfully may under our great seal of our United Kingdom or as near the same as the circumstances and conditions of the places and persons under their jurisdiction and the laws, manners, customs and usages of the native inhabitants will admit."

This is a rule like that in s. 29 conferring jurisdiction, not in any way constituting or declaring the substantive law. The same safeguard is provided as in the earlier section against dangerous aberrations, but the original legal relations of all persons are left to be governed by their pre-existing substantive law. The safeguard might indeed have been omitted had it been certain that particular doctrines of jurisprudence would be applied to the interpretation of the charter; but this, it may perhaps be said, was not quite certain. A temptation which constantly arises, in its most conspicuous forms expressly counteracted and in a charter equally as in a contract *quæ dubitationis tollendæ causa inseruntur jus commune non lædunt*.

(1) Section 33,

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As to what the law of the Hindu and Mahomedan inhabitants of Bombay was in 1823, there is room for much argument. In the [169] case of *Naoroji Beramji* v. *Rogers*, Westropp, J., points out (1) that the charter to the London East India Company provides "that the laws to be administered in these Courts, as well to the persons belonging to Company as to persons who live under them, should be the laws of this kingdom, *i.e.*, England." His Lordship thought that the language of the treaty ceding Bombay to the British Crown was framed with reference to this charter (2)—The charter relating in terms only to "factories or places of trade," a question might be raised of whether it was not meant to be conferred on those living within places assigned to the Company in foreign territory. By the charter of 1668 the Company were empowered to establish laws "like into those established and used in England," and the Governor being granted jurisdiction was to administer such laws, but still "so always as the said laws, ordinances and proceedings be reasonable and not repugnant or contrary, but as near as may be agreeable to the laws, statutes, Government and policy of this our kingdom of England, and subject to the provisos and savings herein" (3), and then the jurisdiction given by the earlier charter is expressly extended to Bombay. There are thus strong reasons for holding that the English law applied to all inhabitants of Bombay down to the establishment of the Recorder's Court under the Statute 37, G. III, c. 142, and that this being so, the exceptions made in favour of the Hindu and Mahomedan laws and usages should be strictly construed. If, however, those laws and usages had been legally extinguished in Bombay more than a century before, it is not easy to suppose that it was intended to revive them. The provision seems rather to recognize that these laws and usages had always subsisted of right, though in fact infringed upon. The customary law of the classes of Gentus or Mussalmans might admit of recognition and enforcement equally with that of the class of merchants, and could not in practice be recognized in the cases already provided for without the recognition extending still further, except at the cost of endless complications and inconsistencies. An indulgence of the kind in question, as it affects the native communities themselves, should [170] receive, as in fact it has received (4), a benignant construction (5), and in order to give full effect to it, the general laws of property must for natives be native laws, so far at least as is consistent with rules immediately perceived to be just and necessary, and so far as is not repugnant to the public law of the dominant country. On the principle of the English private law being operative amongst Englishmen settled abroad only so far as it is suited to their situation, the same private law could hardly be introduced amongst natives at all; and the two communities have remained as separate in their primary legal ideas as if they had been under different Governments.

Amongst Hindus, then, within the Island of Bombay I think, though not without some hesitation, that private legal relations must in their whole range be taken to rest still on the basis of the Hindu law, except where the public law or the direct commands of the Legislature have abolished or modified it; and starting from this principle Mr. Farran has contended that the Court can exercise no jurisdiction over the present case

(1) 4 B.H. C. R. O. C. J. 28 (29). (2) 4 B.H. C. R. O. C. J. 31.
(3) See 4 B. H. C. R. 37.
(4) *The Advocate-General* v. *Vishvanath Atmaram*, 1 B. H. C. R. IX, App.
(5) See *Voet ad Pand*, Lib. I, Tit. 3, Sec. 44; Tit. 44, Sec. 19; Poth. Pand. Lib. I, Tit. 3, Sec. 1, 24; Secs. 8, 16.

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under the provisions of Act XXVII of 1866. "The power and authority given by this Act to the High Court shall and may be exercised only in cases to which English law is applicable." To a Hindu's gift for religious and charitable purposes the English law is not applicable. The appointment of a new trustee may then be sought, as it has on previous occasions been successfully sought, by a bill or a suit of the nature of a bill in equity, but cannot be made on an application under the Act.

In weighing this argument the first consideration is, what is the meaning of the phrase "cases to which English law is applicable." It does not, I apprehend, mean cases to which, in their whole extent,—the original constitution of the right, as to the persons and the legal acts or events, the infringement of the right alleged as a ground of complaint, the suit and the procedure, and the legal consequences of the judgment,—the law prevailing in England applies without qualification or reserve. This would virtually exclude the act in any case on which an Act of the [171] Indian Legislature had any bearing. It must mean cases to which English law is in some measure applicable,—in what measure, is not indicated. Mr. Farran argues that the proper measure is to be found in the English substantive law. Where the legal relations brought before the Court rest on that, there only, the Act, he contends, may be made use of. This, however, raises the question of whether any modification, even the slightest, of the English by the local law makes the Act inoperative, and, if not, at what point are we to say that the substantive law applicable ceases to be English law? No criterion is laid down, nor, so far as I see, can any, except a purely arbitrary one, be devised, whereby to distinguish cases in this country in which the English substantive law is from those in which it is not that which is to be regarded as constituting the legal relations which are made a matter of forensic dispute. If, however, we have to say that "English law is applicable" wherever the English law of actions, or the English substantive law in any material degree governs the Court in dealing with a case, and that this was the view of the Legislature in 1866, then, I think, that the authority given by Act XXVII of that year does enable me to deal with the present application. "English law is applicable," I think, in the sense intended, if the principles recognized as by the English Equity Courts are applicable. Now under s. 41 of the charter of 1823 this Court has authority "to administer justice in a summary manner according or as near as may be to the rules and proceedings of our High Court of Chancery in Great Britain." The distinctive equitable jurisdiction of the Court of Chancery has been the theme of many learned disquisitions, of which no two perhaps lead to exactly the same conclusions. The reason for this may be that the problem proposed for solution is in its nature indeterminate. Equity follows the law, but it is when it approves the law, and then, as Lord Hardwicke said (1), it goes sometimes beyond it. The doctrine of "no wrong without a remedy" became under the English common law, as under the strict civil law of Rome, a mere lawyer's version of the rule that when the approved formula failed to meet the wrong, the Courts would not take notice of it. The Chancellors learned in the *jus gentium* and the Canon law found duties [172] recognized there as obligations, which the common law Courts could not or would not enforce. They found in those sources suggestions, too, of a freer method of pleading, a more searching procedure, a more pliant and complete adjudication, and enforcement of the Courts' decrees. This

(1) *Paget* v. *Gee*, Amb. App. X 810 : Spence's Eq. Jur. II, 149.

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assumed jurisdiction, in part supplementary and corrective, was, in the main, an extension of principles recognized by the common law Courts to consequences and details in which those Courts would not give them effect. There is no more striking instance of the way in which the law of actions and the machinery at the disposal of the Courts re-act upon the substance of the law then in the growth of the large body of specially equitable doctrines in England. These are now developed by a purely logical process without the conscious addition of new principles; but as equity is an intellectual energy, it is influenced by the gradual changes in the mental standpoint taken by successive generations. It thus moulds its deductions from one set of *data* as the common law from another into continued adaptation to the growing needs of society. Under the new constitution of the High Court of Justice in England it may be expected that the requisite adaptations will be made by a resort to either set of principles, as either may be best fitted to further what at any particular time is conceived by society as material and moral progress.

In India and in the Island of Bombay the introduction, at all, of a system of equity in the English sense bearing on the native community, implied on the part of the Parliament and the Crown an intention that equity should perform its characteristic functions. It was not intended that the substantive native laws should in their essence be changed, but it was, I think, intended that unprincipled men should be prevented from taking an unconscientious advantage of those laws for purposes of fraud or oppression. When I say unconscientious, I mean offensive to a conscience admitting the influence of Indian notions in framing its scheme of morality. It must have been intended that a remedy should be found by equity for a wrong recognized as such by the native law, or a feeling, in the main, consonant to that underlying the native law in cases wherein that law failed to provide a remedy which the Court could apply. It must have been intended [173] that the native laws should receive a consistent logical development which, without involving any grating discordances, should allow of a freely growing complexity of affairs as the consequence and the sign of advancing liberty and civilization. The machinery and method of procedure were to follow the English pattern as far as practicable, and it must have been foreseen that this would gradually educe from the materials of the native law a system collateral to it in its earlier and ruder form, and, attaining by degrees a growth and character of its own in obedience to the impulses of the societies amongst whom it prevailed. We may see now that this would eventually modify the usages and the ideas which had formed its original platform, but I am not sure that this inference from modern investigation was present to the mind of His Majesty George IV, or of the draftsman of the charter.

It is certain, however, that, by the year 1823, English equity had become a system which would deal with a body of *quasi* common law in a scientific manner and in obedience to known and uniform rules. In checking abuses, expanding formulas, embracing all rational considerations, devising varied remedies, it would follow the course prescribed by its own principles and precedents. Its method was in all or most respects peculiarly its own. When it applied that method to the determination or the constitution of a right, even based on the Hindu or Mahomedan law, it administered English law. That the lower root of the obligation it dealt with, was in another law, did not prevent this: the plastic force, determining the special growth and form was no part of that law, but was brought to bear upon it from without.

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In this sense I think that "the English law was applicable" in 1866 to all cases in which peculiarly equitable doctrines had obtained recognition in the relations between the native inhabitants of Bombay. Those doctrines could not, consistently with the statutes and the charter, be employed to subvert the native substantive laws, but they afforded a means of continually ameliorating them, and so preventing their desuetude by a system of rules borrowed from the English Courts of Equity.

Trusts, as is said in the *Tagore Case* (1) are no more strange to the Hindu than to the English system." The anomalous law, which [174] has grown up in England, of a legal estate which is paramount in one set of Courts and an equitable ownership which is paramount in Courts of Equity, does not exist in and ought not to be introduced into Hindu law. But it is obvious that property, whether moveable or immoveable, must for many purposes be vested, more or less absolutely, in some person or persons for the benefit of other persons, and trusts of various kinds have been recognized and acted on in India in many cases. Implied trusts were recognized and established here in the case of a *benami* purchase in *Gopeekrist Gosain* v. *Gungapersaud Gosain* (2); and in cases of a provision for charity or for other beneficent objects, such as the professorship provided for by the will under consideration where no estate is conferred upon the beneficiaries and their interest is in the proceeds of the property (to which no objection has been raised), the creation of a trust is practically necessary (3)." But while the substantive Hindu law insists as strongly as any on the suppression of fraud and the fulfilment of promises, it fails to furnish the detailed rules by which effect is to be given to its principles in cases of trust. It contemplates no such power and flexibility in the legal machinery as are an integral element of the English equity system. If the Court is called on to give effect to a trust in any given case, it looks, indeed, to the Hindu law of property to determine the estate of the trustee; but in many of the duties it annexes to that estate, the rights it recognizes as arising from the position of beneficiaries, the means by which those rights are made effectual, it is governed by the rules of English equity. There are no others that it can apply. It has to take care, in applying them, not to violate the "laws, manners, customs and usages" of the native community as these may subsist. It must not allow a trust to be made a means of conferring a gift either *inter vivos* or by testamentary disposition upon a person not in existence at the moment when the donation is declared. It must not allow it to effect a course of devolution opposed to the Hindu law of property and succession. Thus the operation of the native laws is preserved as to the estates that may be taken in property and the purposes to which they may be applied, while it gains a flexible adaptation, to new circumstances from the English system. In meeting an [175] exigency, or taking cognizance of a form of right not provided for in the Shastras, the Court, in exercising its jurisdiction under s. 41 of the charter, may certainly apply the Hindu law. It must be careful not to overlook it, but taking the Hindu law as one of its *data* it applies "English law" also in the form of equity to all or nearly all the questions that arise.

It is conceded that on a proceeding by a bill in equity the late Supreme Court could and would appoint a trustee in such a case as the present.

(1) *Ganendra* v *Jatindra*, 9 B.L.R. 377. (2) 6 M.I.A. 53.
(3) 9 B.L.R. 401-2.

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By what law could it do so, and by what law would it be guided in dealing with the case? Not by the Hindu law, but by the law of the Court of Chancery. It would recognize and give effect to the Hindu law as the Chancellor would give effect to an English custom, or the law imposed by its founder on a charitable trust, but having thus got its materials it would deal with them according to equitable principles. In other words, English law, in the sense intended by the Act, would be applied to the case. This was the law, as I understand it, immediately before Act XXVII of 1866 was passed, and this being so, the "powers and authorities" given by the Act may, I think, be exercised in the case of a Hindu trust as well as of any trust whatever.

The applicant Kahandas Narrandas, even without resort to the doctrine of a resulting trust, has an immediate interest in the due execution of the trust in this case. One of its purposes is the maintenance of a reader of the Puranas to Kahandas's household. He may on a proper occasion claim to have this spiritual nurture of himself and his family duly protected.

There can be no reasonable doubt, on an unprejudiced reading of the instrument of trust, that it intends and requires two trustees. On the death of his co-trustee it requires Premchand to appoint another, and, Kahandas being alive, with his assent. This being so, Premchand ought not to have allowed a year to pass, after the death of Tulsidas, without a proposal to replace him. It is said that he thought that the matter rested entirely in his discretion, and that this, if not a correct construction of the deed, is, at least, a reasonable one, such as an unprofessional person might honestly adopt. How that may be, it is hardly possible to say; but [176] Premchand could have obtained professional advice if he had sought it, and a trustee who acts without advice is not on that ground to be excused for any failure or omission in the discharge of his duty.

Kahandas, on the other hand, by proposing to name a trustee himself and endeavouring to make the acceptance of this proposal a condition of his handing over the Government papers in his possession and forming part of the trust property, took up an indefensible position. He was aware, as his solicitor's letter of the 25th November 1880 shows, of what the trust-deed really prescribed. To this he ought to have cut down his demand before coming to this Court to supersede Premchand in the performance of a duty which he has not simply called on him to discharge. Premchand Raichand is now willing to appoint a trustee. His prior disinclination does not deprive him of that power, and I cannot say, that it is "inexpedient, difficult or impracticable" to make an appointment without the assistance of the High Court. A proper occasion for the Court to supersede the trustee has not yet arisen. See *In re Hadley* (1); *In re Hodson* (2). The latter was a stronger case than the present, but the Court refused to take the appointment out of the hands to which it was committed by the trust-deed. The nomination and its approval or disapproval by Kahandas Narrandas are to be governed by considerations of what will be beneficial to the trust, not of what will be distasteful to the other party.

I dismiss the petition.

Counsel for the several parties assenting to the nomination of a co-trustee with Premchand Raichand by the Advocate-General, and the Advocate-General undertaking to appoint, the Court directed that the

(1) 5 De G. & Sm. 67. (2) 9 Hare, 118.

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nomination be embodied in the order. And the Advocate-General assenting the Court directed that the costs of the several parties be paid out of the trust-fund, and those of the Advocate-General as between attorney and client.

Attorneys for the petitioner.—Messrs. *Hearn, Cleveland and Little.*

Attorneys for surviving trustee.—Messrs. *Smith and Frere.*

Attorneys for Narotamdas Kahandas.—Messrs. *Ardesir and Hormusji.*

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[177] ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Justice.

LUCKUMSEY OOKERDA (*Plaintiff*) *v.* FAZULLA CASSUMBHOY AND OTHERS (*Defendants*).* [20th December, 1880.]

Specific performance—Misjoinder—Civil Procedure Code (Act X of 1877), ss. 28 and 45—Specific Relief Act I of 1877, s. 42, Illustration (a).

A stranger to a contract, of which specific performance is sought, cannot be a party to the suit.

Where, therefore the plaintiff sued as against one defendant for specific performance of a contract to sell land and as against another for a declaration that he was not entitled to any charge upon the said lands, *held*, that the latter defendant was improperly made a party to the suit.

[R., 19 M. 211 (216) = 4 M.L.J. 288; 11 Bom. L.R. 545 (563) and 366 = 6 M.L.T. 200 = 3 Ind. Cas. 124; **Expl. & D.**, 10 C. 1061 (1068); **D.**, 18 M. 415 = 5 M.L.J. 164.]

SUIT for specific performance.

The plaint stated that on 12th February 1876 the plaintiff contracted to purchase certain lands from the first defendant, Fazulla Cassumbhoy; that at the date of the contract he had paid Rs. 2,000 earnest-money, and that the remainder of the purchase-money, *viz*, Rs. 10,500, were to be paid when the said defendant should execute the conveyance and effect the registration thereof; that the said defendant was willing to carry out the contract and to execute the conveyance, but that he was unable to do so, inasmuch as the second and third defendants, *viz*, the New Dhurumsey Spinning and Weaving Company and Cassumbhoy Dhurumsey, held possession of the title-deeds and refused to deliver them up, alleging that they had an equitable lien upon the said lands.

The plaintiff prayed for a declaration that neither the second nor the third defendant was entitled to any charge upon the premises, and that they might be ordered to deliver up the title deeds, and that the first defendant should be ordered to specifically perform the contract of the 12th February 1876, and to convey the premises to the plaintiff.

The second defendant put in a disclaimer.

Inverarity (with *Lang*), for the third defendant, objected that the plaintiff could not obtain the relief he sought against the [178] third defendant in a suit for specific performance against the first defendant. He relied on *Tasker* v. *Small* (1) and *De Hoghton* v. *Money* (2) and ss. 44 and 45 of the Civil Procedure Code, Act X of 1877.

Farran (*Jardine* with him), for the plaintiff.—I admit that, unless this case can be distinguished from the cases of *Tasker* v. *Small* (1) and *De Hoghton* v. *Money* (2), the suit as against the third defendant cannot proceed. The objection now taken is, that the plaintiff cannot sue the

* Suit No. 208 of 1879.

(1) 3 My. & Cr. 63. (2) L. R. 2 Ch. Ap. 164.