

1881 the rules applicable to brothers, or to *gotraja sapindas*, according as the
 MARCH 1. Mitakshara or the Mayukha is taken to be the principal authority govern-
 ——— the case. We reverse the decree of the Acting Assistant Judge, and
 APPEL- decree that Bhagirthi and Baya do recover the property in dispute, and
 LATE hold the same as coparceners, until partition be effected between them.
 CIVIL. The original defendants to pay the costs of Bhagirthi and Baya in the
 Court of first instance and in appeal No. 74 of 1879. Bhagirthi and Baya
 5 B. 264= to bear their own costs in cross appeal No. 81 of 1879 and in this second
 5 Ind. Jur. appeal.
 599.

Decree reversed.

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Before Mr. Justice West.

MERBAI, WIFE OF RATANJI JIVANJI, AND THE SAID RATANJI
 JIVANJI (*Plaintiffs*) v. PEROZBAI, WIDOW OF BURJORJI
 MERWANJI (*Defendant*). * [21st, 25th, 29th and
 31st January, and 8th February, 1881.]

*Gift—Necessity of endorsement of Government notes in order to complete gift—Donor
 constituting himself trustee for donee—Enforcement of trust by representative of
 donee—Trust—Trustee, liability of—Gift to sole and separate use among Parsis.*

The plaintiffs Merbai and Ratanji were Parsis, and were married in the year 1851. The defendant was the widow of Burjorji Merwanji, who was the father of the plaintiff Ratanji. The plaintiffs sued to recover from the defendant [269] certain Government promissory notes which they alleged had been presented by Burjorji to Merbai at her marriage for her sole and separate use. They alleged that the said notes, then of the nominal value of Rs. 1,500 were endorsed in the name of the said Burjorji, and had been deposited by him for safe custody with Merbai's grandfather Jehangir; that the said Burjorji during his life used from time to time to receive the said notes from Jehangir, and draw the interest thereon for Merbai; that Burjorji died in 1864, and that after his death the defendant, who was his widow and executrix, used to draw interest for Merbai; that in 1869 she obtained possession of the said notes, and had ever since continued in possession thereof, informing the plaintiffs that she was duly keeping them and collecting the interest for Merbai; that the plaintiffs had been living with the defendant until shortly before the present suit, and having then separated from her, had called upon her to hand over the notes and the accumulated interest, which she refused to do. The defendant denied that her husband Burjorji had ever presented Merbai with Government notes for her separate use. She alleged that the notes, which had been deposited by Burjorji with Jehangir, were her own separate property, and not Merbai's; that she and her husband had dealt from time to time with them, and that no interest was ever paid to the plaintiffs, or either of them, or for their benefit. She further stated that some of the notes which had been deposited with Jehangir had been disposed of by Burjorji in his lifetime with her consent; that in 1869 she obtained the remaining notes from Jehangir, and sold them, and applied the proceeds to her own benefit. At the hearing it was proved that, on the occasion of the plaintiffs' marriage, presents were made to Merbai both by her own family and by that of the bridegroom, Ratanji. Two accounts were then opened in the books of the firm of J. N. & Co., of which Merbai's grandfather Jehangir was a partner, one of which showed her acquisitions from her own family and the other her acquisitions from the family of her husband. The latter account contained an entry (under date August, 1854), to the effect that Burjorji, the father-in-law of Merbai, had bought two Government notes for Rs. 1,500 in Merbai's name, and had obtained the interest on them, which was duly credited to her. Other documents were produced, proved to be in the handwriting of Burjorji and Jehangir, in which the said Government notes were alluded to as the property of Merbai, and as having been purchased with her moneys. In 1864 Burjorji died without

* Suit No. 267 of 1880.

having endorsed the notes over to Merbai, or to any one in her behalf, and they remained in his name in the hands of Jehangir until 1869, when the defendant got possession of them.

Held that the notes not having been endorsed to Merbai, there was no valid gift of them to her by Burjorji. If Burjorji intended to bestow the notes as a gift only, without any intention that his purpose should be effected otherwise than by a substitution of ownership, his purpose remained unfulfilled, and the Court could not fulfil it for him.

Without endorsement, or something equivalent, a gift of Government stock cannot be completed. Where a particular form of transfer is prescribed by law, a transfer in another form is as inefficacious *inter vivos* as in a will.

Held, also, that Burjorji was liable to answer for the notes as a trustee, and after Burjorji the defendant as his executrix and representative. In the [270] documents put in evidence Burjorji alluded to the notes as Merbai's property. His placing them, as he did, with Merbai's grandfather, was itself an acknowledgment, according to the practice of the class to which he belonged, that the benefit was to be hers and her children's. He thus sufficiently admitted an obligation as trustee. The legal ownership was his, but he had acknowledged with sufficient clearness an obligation to hold and use the ownership for the benefit of another. Such a purpose clearly manifested constitutes a trust, and burdened with a trust the property passed from Burjorji to the defendant as his representative, and could be enforced against her.

Held, further, that having regard to the general practice among Parsis, the conduct of Burjorji in relation to the notes showed that it was his intention that the property should be enjoyed in sole and separate use by Merbai and her children.

Among Parsis a gift may be made to the separate use of a married woman, or of a woman about to be married.

[R., 10 Bom. L.R. 1209.]

THE plaintiffs in this suit prayed that the defendant should be ordered to endorse and deliver to the plaintiff Merbai certain Government promissory notes of the nominal value of Rs. 2,200 belonging to the plaintiff Merbai, and that, in default thereof, the defendant should be ordered to pay to the said Merbai the sum of Rs. 2,200 and interest thereon, and that the defendant should be ordered to pay to the said Merbai the sum of Rs. 300, the proceeds of the sale of a pearl nose-ring of the said Merbai, being part of a trust fund belonging to the plaintiff Merbai, and held by the defendant, and all interest thereon.

The plaintiff stated that the first and second plaintiffs intermarried in or about the year 1851, the plaintiff Merbai being then a child, and that on the occasion of the marriage the plaintiff Merbai was presented for her separate use by Burjorji Merwanji Mowji, the husband of the defendant Perozbai, with Government promissory notes of the nominal value of Rs. 1,500; and that the said notes, which were endorsed in the name of the said Burjorji Merwanji Mowji, were deposited for safe custody with the plaintiff Merbai's grandfather Jehangir Framji Jussawalla until the year 1869. The said Burjorji Merwanji during his life used from time to time to receive the said notes from Jehangir Framji Jussawalla, and draw the interest thereon for the plaintiff Merbai. With the interest of the said notes, other notes had been purchased, and at the time of Burjorji's death, which took place in 1864, the plaintiff Merbai's promissory notes were of the nominal value of Rs. 2,200.

[271] After Burjorji's death the defendant, his widow and executrix, used to receive the notes from Jehangir Framji Jussawalla, and draw interest for the plaintiff.

In December, 1869, the defendant Perozbai obtained possession of the said notes, and ever since had continued in possession thereof, informing

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the plaintiffs that she was duly keeping the same and collecting the interest for the plaintiff Merbai.

Both the plaintiffs had been living with the defendant until shortly before the present suit. They then separated from the defendant, and called upon her to hand over the notes and accumulated interest. The defendant refused to do so, and denied that she ever held the said notes as trustee for the plaintiff Merbai.

The plaint also stated that in the year 1872 the plaintiff Merbai delivered to defendant a pearl nose-ring; that the same might be sold and the proceeds held by the defendant in trust for the plaintiff Merbai; that the said nose-ring realized Rs. 300; of which the defendant was in possession as trustee for the plaintiff Merbai.

In her written statement the defendant denied that her husband Burjorji had ever presented the plaintiff Merbai with Government promissory notes for her separate use. She alleged that, on various occasions subsequent to the marriage of the plaintiffs, Burjorji Merwanji Mowji, with the defendant's consent, deposited Government promissory notes, amounting altogether to the nominal value of Rs. 3,500, with Jehangir Framji Jussawalla for safe custody; that the said notes were endorsed in Burjorji's name, but were the separate property of the defendant; that the said notes were not deposited for the benefit of the plaintiff Merbai; and that the defendant and her husband dealt from time to time with them, and the interest thereon was never paid to the plaintiffs, or either of them, or for their benefit.

The defendant further stated that some of the notes deposited as aforesaid had been disposed of by Burjorji in his lifetime with her consent; that in December, 1869, she applied for and obtained the remainder of the notes which remained with Jehangir Framji Jussawalla, and sold the same and applied the proceeds for her own benefit. She denied that the plaintiff Merbai had ever delivered a pearl nose-ring to her, or that she had ever sold the same [272] as alleged; she further denied that the plaintiff had ever lived with her, and she alleged that the present suit was the result of a family quarrel.

The Hon. J. Marriott (Advocate-General) and Farran, for the plaintiffs,

Latham and Inverarity, for the defendant.

The following cases were cited:—*James v. Bydder* (1); *Thorpe v. Owen* (2); *Arthur v. Clarkson* (3); *Gee v. Liddell* (4); *Richardson v. Richardson* (5); *Dunkley v. Dunkley* (6); *Scott v. Spashett* (7); *Francis v. Brooking* (8); *In re Cordwell* (9).

JUDGMENT.

February 8. WEST, J.—The present case is one which has arisen out of a bitter family quarrel, and it has been frankly and properly admitted on both sides that but a qualified reliance can be placed on the oral testimony. Under such circumstances the recognized criterion by which to try conflicting statements is to compare them with those facts which are established beyond reasonable question. Of such facts there are several in the present case, by the aid of which the relations of the parties to each other with respect to the property in dispute are so strongly indicated that a forcible presumption arises in favour of the story that agrees

(1) 4 Bea. 600.

(2) 5 Bea. 224.

(3) 35 Bea. 458.

(4) 35 Bea. 621.

(5) L.R. 3 Eq. 686.

(6) 2 DeG. M. & G. 390.

(7) 3 Mac. & G. 599.

(8) 19 Bea. 347.

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

with them, and against that with which they can be reconciled only by supposing matters to have proceeded in a manner very different from the ordinary course of human affairs.

When the plaintiff Merbai was married to Ratanji about the 5th December, 1851, a number of presents were made to her of jewels and apparel, both by her own family and by that of the bridegroom. Ratanji's father, Burjorji, was married to the daughter of a wealthy contractor Jivanji, and Ratanji himself seems to have been adopted by Jivanji and his wife Herabai. They were his grandparents through their daughter, Perozbai, the present defendant. It is not proved by disinterested evidence that money was presented exactly at the time of the marriage to [273] anything like the amount of the Government loan notes now in question: the two accounts opened in Merbai's name at that time contain no entry of any such sum placed to her credit. These accounts were opened in the books of Jehangir Nusserwanji and Co., of which firm the grandfather of Merbai, Jehangir, was then a partner. One of them, called the "Maira" account, was intended to represent her acquisitions from her own family of birth; the other, called the "Sasra" account, her acquisitions from the family of her husband. The latter, as the clerk Cursetji deposes, is opened by a transfer from the Maira account. The other entries in it are few and of no great amount, but on the 19th of August, 1854, Merbai is credited with Rs. 181 $\frac{9}{4}$ ·54 (Ex. R), and the entry says: "Your father-in-law bought two Government notes for Rs. 1,500 in your name. He sent the interest on them by Bhai Cavasji Jehangir." The interest corresponding to this sum had, in fact, been drawn by Burjorji on two notes of Rs. 1,000 and 500, appears from the Government books. The account in which it is credited to Merbai has for fifteen years been under the control of a firm of which Jehangir was no longer a member, and is not in any way influenced. The details of the Rs. 181 $\frac{9}{4}$ ·54, as given in it, do not quite tally with those of the interest actually drawn by Burjorji as shown by the Government books; but Burjorji in sending the money, would probably not be careful in his description of the manner in which the total had been arrived at. There had been a conversion of the loan from 5% to 4% and a payment in advance of part of the interest. It seems likely that the mehta's calculation was in a great part conjectural, but there is not any ground for supposing, as to the main facts, as that a scheme of fraud was initiated in 1854 to support a claim never pressed until 1880.

It is clear, then, that in 1854 Burjorji was, in fact, appropriating the interest on two notes for Rs. 1,000 and 500 to Merbai's benefit. In what capacity was he doing this? As a donor, a trustee, or a merely benevolent connection assigning a fixed measure to a bounty which still remained entirely under his own control?

The document marked Ex. A is an old envelope addressed originally, as it would appear, to Jivanji, the maternal grandfather [274] of Ratanji and by adoption the father-in-law of Merbai. On this there are several endorsements in the writing of Merbai's grandfather Jehangir. The first of these is undated. It says:—

"Government Loan Notes for Rs. for the ornaments of Bai Merbai, the daughter of Bai Kavasji, are given by her father-in-law Burjorji and his mother-in-law Bai Herabai."

Then comes—

"Notes, two in number, for Rs. 1,500."

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The next endorsement, dated 13th October, 1857, says that Burjorji sent for the two notes for Rs. 1,500 in order to draw the interest, and this is followed by one of the 22nd October, 1857, which says that Burjorji, having received Rs. 150, for interest, has credited that sum at his place, and sent back the notes by Dadabhai. Dadabhai Cursetji proves, was a clerk of Jehangir.

On the 22nd January, 1863, there is an endorsement saying: "You sent for three notes for Rs. 1,000, 500, and 700,—in all Rs. 2,200—this day to draw the interest." Lastly, the return of the notes by the hand of Cursetji is noted. Cursetji is the witness of that name who recollects taking and bringing back the notes for his master Jehangir.

Jehangir having died in 1875 it is hard to suppose he made false endorsements resulting in an obligation on himself which were to be made no use of for several years afterwards. There is no doubt as to the genuineness of the writing. It plainly points to some deposit in which Jehangir was interested on account of his granddaughter. It is probably authentic, for the entries correspond in date to those in the Government books as to interest drawn by Burjorji. But, still, it is conceivable that Jehangir may have put on Burjorji's expression of a benevolent intention a construction which converted it into a declaration of an immediate gift of his interest in the notes to Merbai. He was her grandfather, and would have a natural tendency to understand what was said and done in a way favourable to her. The document Ex. E is open to a similar remark. That says: "These are Merbai's notes for Rs. 1,500. Her father-in-law, Burjorji, after drawing the interest sent them on the 7th July, [275] 1860, by the hands of Ratanji." It is clear that Jehangir regarded the notes as the property of Merbai, but his supposing they were hers would not make them so. Burjorji might intend to benefit Merbai, and yet reserve entire control and ownership to himself.

The documents K and L thus come to be of great importance. There was a contest over the genuineness of these documents, purporting to be written by Burjorji, in which the members of the family deposed strictly according to the sides they had taken. Mr. Bapooji Dinanath pronounced the document K a fabrication, on the grounds of the signs presented by it of the letters having been copied and retouched and of its disagreement with admitted and proved writings of Burjorji. The document L he thought genuine. Mr. Flynn could not see the marks of retouching in K which Mr. Bapooji discerned there, nor can I. The writing looks as little like a forgery as any that I have ever examined;—certainly in no way more suspicious than the letters in the group W or in No. 10. Mr. Nusserwanji Cowasji Jussawalla swears the disputed documents are in Burjorji's writing, and I believe he tells the truth.

The document Ex. K is as follows. In this exhibit and also in Ex. L the plaintiff Merbai is called Gulbai, which was her name in Burjorji's household:—

"The interest from the 1st January, 1855, to the 31st December, 1857, being 30 months, on a four per cent. note (or notes) for Rs. 1,500 (purchased) with Gulbai's moneys, has been brought, being Rs. 150. This sum is credited at my place on this day (*i.e.*, on the 22nd day of October, 1857, written by Merwanji Patel."

In L also Burjorji sends for the notes in the following terms:—

"To Setji Saheb Jehangir Framji Jussawalla, written by Burjorji Merwanji Mavji, whose salutations do you be pleased to read. To wit: the cause of this being written is as follows:—There are Behan Gulbai's

(loan) notes. Do you be pleased to send them for drawing the interest. After drawing the interest I will return them.

"Dated 15th January, 1863."

An endorsement on this, not itself to be regarded as evidence, says that these notes for Rs. 1,000, 500 and 700 are accordingly [276] sent to Burjorji. The witness Nusserwanji Jussawalla accounts for this increase in the amount of the deposit by saying that on the occasion of Merbai's first pregnancy, Burjorji adding something to the interest then standing to her credit with him, bought a loan note for Rs. 700, which he placed with the other two in Jehangir's custody. Jehangir's memorandum of the 22nd January, 1863, (A) agrees with this, and Cursetji took the notes and brought them back again.

Burjorji died in 1864, and Nusserwanji and Cursetji depose to a visit which they paid to him in his last illness on the subject of the notes deposited with Jehangir. According to their account he expressed his willingness to endorse them over; but Perozbai having remonstrated against her husband, who was dangerously ill, being disturbed by what might alarm him, the notes were not sent to him by Jehangir, and they remained in his name at the time of his death. His acknowledgment of Merbai's right was complete if the recollection of these two witnesses is to be trusted; but the memory is treacherous in such matters. Cursetji and Nusserwanji, too, thought the notes were Merbai's—there seems no doubt of that,—and people are apt to allow their own impressions to colour what was really said to them when this has long been stored in the memory without close and frequent analysis. Perozbai entirely contradicts these witnesses. I fear she has allowed herself to be swayed in her testimony very much by feelings of a not altogether creditable kind. This is apparent in several places, as it is apparent, too, in the evidence of her sons and other witnesses. What Nusserwanji and Cursetji say, however, is not at all improbable in itself. They might have been expected to take the notes with them in case Burjorji should be willing to endorse them at once; but their not doing so, though it has deprived the plaintiffs of a positive addition to their evidence, cannot be regarded as a weight in the opposite scale.

Burjorji's position in 1864 has, in the main, to be gathered from his own writings. In Ex. L he sends for "Gulbai's notes." In Ex. K he calls them "(the produce) of Gulbai's money." The expressions used by Burjorji seem inconsistent with his having thought that he still remained, except formally, master of the notes. They had been deposited for twelve years probably with [277] Jehangir, or, at least, two of them had; and a third note had, according to the evidence, been added to the deposit as a simple increment taking the character of the original benefit. From the testimony of Mr. Nusserwanji Petit, it appears that gifts are commonly made to Parsi ladies in much the same fashion as was adopted in this case. Every time Burjorji sent for the notes and returned them, he confirmed the impression that he did not regard them as his own. The proper construction of a man's acts and language is that which he may most reasonably suppose they will receive in the circumstances from those with whom he has to deal, and, thus interpreted, I think Burjorji's words and conduct conveyed and were intended to convey that he did not regard himself as master of the loan notes on his own account.

Still, however, the notes were not endorsed over to Merbai, or to any one on her behalf. This is by no means inconsistent with Burjorji's

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regarding her as owner, for he may well have thought that they were safer in his own name than in that of any one else; but he had not done all that he could have done to transfer the notes. Merbai was of full age long before Burjorji died. He might have endorsed the notes to her, or to her and himself jointly. He omitted this, and, without it, or something equivalent, I do not think a gift of Government stock could be completed. Where a particular form of transfer is prescribed by law, a transfer in another form is as inefficacious *inter vivos* as in a will. And to such a unilateral transaction in a case where it is gratuitous, completion cannot be given by the Courts, as where a consideration has been paid and the contract must be enforced in order to prevent fraud. The learned Advocate-General contended that, the notes having been given at the marriage, the marriage was a consideration to support a transfer of the interest, and that thus, as on contract, Burjorji was to be regarded as forthwith made a trustee for his daughter-in-law; but, so far as appears, the notes were not given exactly at the time of the marriage, or stipulated for in the contract, or regarded on either side as part of the consideration. No writing to that effect has been produced. They were meant to be bestowed as a bounty; but, if as a gift only, without any intention on Burjorji's part that his purpose should be effected otherwise than by a substitution of ownership, his [278] purpose, though entertained for so many years, remained unfulfilled, and the Court cannot fulfil it for him.

It is as a trustee, if at all, that Burjorji was liable to answer for the notes, and, after Burjorji, his executrix Perozbai as his representative. The word 'trust' does not occur in the writings, which are material; but it is of no consequence that the word is not used if the sense is clearly there. Now, in the document K, Burjorji speaks of the notes as the produce of, or purchased with, Gulbai's money. In L he calls them Gulbai's loan notes. His placing them, as he did, with Gulbai's grandfather was itself an acknowledgment, according to the practice of the class to which he belonged, that the benefit was to be hers and her children's. It seems very likely, as Hirabai was a lady of considerable wealth, that the money for the purchase of the notes came from her; but, however that may be, I think that when Burjorji, parting with the custody of the notes to Merbai's grandfather, calls them her notes, and says they were purchased out of her money, he sufficiently admits an obligation as trustee.

The legal ownership was his, but he had acknowledged with sufficient clearness an obligation to hold and use the ownership for the benefit of another. Such a purpose, clearly manifested, constitutes a trust; and burdened with a trust the property passed from Burjorji to his representative. The trust subsists still, and can in some form be enforced against the defendant Perozbai.

The English cases on voluntary trusts from *Ex parte Pye* down to *Fox v. Hawkes* have been sufficiently discussed at the hearing. As the Judges in England have not been able to satisfy one another, I need not scruple to say that I find it impossible altogether to reconcile judgments, one group of which tends to obliterate a distinction which the other rigidly guards. In principle they all cling to the rule that a gratuitous transfer, intended to operate only as a transfer, but defective, will not be treated as complete; while he who, retaining the ownership of property, makes it understood that he holds it wholly or in part for the benefit of another, is forthwith bound to this. A beneficial ownership or interest of the proposed beneficiary has instantly arisen, and the formal proprietor has come under the obligations of a trustee. The variances of decision have

[279] arisen rather from differences of logical method, or of susceptibility to the force of particular kinds of proof than from any differences in legal principle. The present case, tested by those adjudged on in England, falls within the border line of trust rather than of ineffectual assignment.

What I have said, relates to the loan notes : as to the nose-ring or the price of the nose-ring said to have been deposited with Perozbai on the same trust as the loan notes, there is nothing to go upon, or almost nothing, but oral evidence. The claim as to this money was an after-thought. The account first given of it differs from that which has been deposed to in Court. The amount has been variously fixed at Rs. 350 and Rs. 300. The defendant and her daughter, Avabai, seem almost as worthy of credit on the one side, as Merbai and Dhunjibai on the other. The testimony of Dosibai and the receipt given to her by Merbai's brother, Nusserwanji, would be by no means conclusive against a transaction otherwise well established, such as Merbai describes. The pearls said in the list to have been sold, might belong to some other piece of jewellery. Still the receipt does suggest very strongly that there had been a sale by Merbai inconsistent with the story she now tells, and not leaving her a similar jewel to sell in order to fund the proceeds with Perozbai. A real sale has, I believe, in this instance, suggested a groundless claim. As a suit was to be instituted, Merbai and her party thought they might as well seek as much as there was any chance of getting.

In determining what was the matter of the trust as secured by Burjorji, it is necessary to bear in mind the common practice of the Parsi community to which he belonged. The customs of his people are amongst the most important circumstances by which a man's expression of his will is to be construed and supplemented. They form a part of his consciousness, and are accepted as operating, and likely to operate, apart from their legally coercive force. That presents of large value are given at Parsi marriages, is a matter of common knowledge. The social opinion which prescribes them, is a frequent source of embarrassment to those who feel its pressure. In the case referred to in argument, Bayley, J., decided that custom amongst [280] the Parsis assigned the control of property thus given to the married pair jointly during their lives, and after the death of one of them to the survivor. This custom, however, if to be deemed a law as having a coercive force, does not exclude the possibility of a gift for the separate use of a married woman or of a woman about to be married. Such an arrangement is no longer regarded as opposed to the policy of the law, and the donor can impress on his bounty the character in this respect which he desires. There is in the present case no evidence, of an impartial kind, as to any precise declaration made by Burjorji with regard to the use and benefit of the bounty of which he was the source or the channel, such as to exclude the interest of the husband ; but the evidence of Mr. Nusserwanji Petit as to the general practice of the Parsis in similar cases shows what would be understood, and what Burjorji would know to be understood, by his conduct in relation to the loan notes in question. He called them Gulbai's ; he deposited them with her grandfather ; he, as usual, retained a control over them to be exercised for her advantage and for hers only ; a transfer to her name might have given a direct ownership to her husband which could be used to her prejudice, and this was avoided by Burjorji's retaining the notes in his own name. There is no

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indication that Ratanji was intended to appropriate or even share this benefit. He never has shared it. I cannot doubt that the intention was that it should be enjoyed in sole and separate use by Merbai and her children, and to this intention of a trust, when it is ascertained, I must give effect. That it is not explicitly set forth, so as to exclude all argument against it, makes it more difficult to reach the conclusion, but does not affect the consequences of the conclusion when once arrived at.

Another question has been started and another issue raised in the case on the point of whether, supposing Ratanji to have a marital right over the loan notes, that right could be given effect to without a provision being made out of the property for his wife and daughter. It is from his side that the property came, but it was not meant for him, and he seems for many years not to have been in circumstances to support his family as his wife might reasonably expect. She has lived mostly with her brother. Her [281] pocket-money was supplied by her grandfather. She has had to sell her jewels to raise funds. Ratanji himself became insolvent eight years ago. He is still without a certificate; and gaining a scanty and precarious livelihood, he cannot be trusted to provide a decent maintenance for those dependent on him. The property, if adjudged to be his, would pass forthwith to the Official Assignee for his creditors, and thus there can be no doubt the purpose of Burjerji would be defeated. Ratanji himself disclaims all but a purely formal interest as plaintiff; he did not, he says, include this property in his assets, because he did not regard it as his. Neither, it may be presumed, did his creditors; they respected the intended disposition; and there is no reason why at this day the Court should let "right too rigid harden into wrong" by giving Ratanji an unqualified common law property which no one desires. The Official Assignee himself is passive: he seeks nothing and renounces nothing. Under such circumstances, supposing the trust had not originally been created for the sole benefit of Merbai and her children, I should think myself justified in directing the whole amount, which is but small, to be secured for their advantage.

Perozbai has sold the notes. She must pay an equal sum in money. Down to the rupture, last May, it is evident that she held the capital, and used the interest for domestic purposes in which all parties were interested. No demand was made on her for an account in such imperative terms that she must have felt she would be held legally responsible for every item of receipt and expenditure. It is said that, when pressed to return Merbai's notes to the former custody, she promised to make them and the interest a trust. They were a trust already; and there is nothing to indicate that Merbai ever gave up her right, as beneficial owner, to the capital and the accumulations as they had come to the hands of Perozbai. On the other hand, Perozbai was not bound gratuitously to maintain, or partly maintain, Merbai and her husband. It is very probable that, if she had been called on for a strict account, or to render up the securities, she would have declined to receive her son and his wife as members of her house-hold. They contributed some trifle, it seems, to the house-keeping in the last four years, but it cannot have been much; and accepting a house and sustenance from Perozbai, which considerably exceeded [282] in cost the accruing interest of the notes, probably allowed her to use that produce for the common purposes. I am induced to say "probably," because it is most unlikely that any distinct agreement was ever come to. The oriental mind is averse to

close definitions, and the relations of a family transcend the sphere of law. The parties here, as in most such cases, allowed strict right, it may be assumed, to be absorbed in mutual benevolence so long as amity prevailed amongst them; and it was not necessary that Merbai should execute any formal instrument to warrant the expenditure which she tacitly sanctioned. Her husband, Ratanji, I cannot doubt, knew, as well as his brothers, that the notes had been sold. With the hopeful temperament of a spendthrift he reckoned on their being replaced when wanted.

While, therefore, Perozbai is not to charge the plaintiffs for their board and lodging during the years of her widowhood, neither is she to account for the interest she has drawn and expended in that time. She has not, it is true, set up the defence of a set off on this account. It never occurred to her, we may suppose, until lately, that her sons and their wives were not, of course, to sit at her table and share the shelter of her roof; but, if legal right is to take the place of kind impulses and religious duty, whose part it can but imperfectly fulfil, then it must, in justice, be applied all round. Perozbai had rights which she voluntarily sacrificed on the altar of the family. Merbai's non-assertion of her rights was a reciprocal sacrifice no less voluntary. What was distinctly her property she did not give up; the accruing proceeds she allowed to be employed for the domestic needs. At Burjorji's death a definite sum was due by him as trustee for the interest he had received in excess of what he had paid to Merbai. An account must be taken of it, interest being reckoned at 9 per cent. on each item, from its reaching his hands, and the total thus constituted, added to Rs. 2,200, must be paid by Perozbai and secured for the benefit of Merbai and her daughter according to a scheme on which I will hear counsel again when the account has been ascertained and the arrangement framed.

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FEB. 8.

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3 B. 268.

*Decree for the plaintiffs.*Attorneys for the plaintiffs.—Messrs. *Ardesir and Hormusji.*Attorneys for the defendant.—Messrs. *Chalk and Walker.*

5 B. 283 (F.B.).

[283] APPELLATE CIVIL.—FULL BENCH.

*Before Sir Michael Roberts Westropp, Kt., Chief Justice, Mr. Justice M. Melvill, Mr. Justice Kembal and Mr. Justice F. D. Melvill.*RACHAPA (*Original Defendant*), *Appellant v.* AMINGOVDA
(*Original Plaintiff*), *Respondent.**

[30th and 31st August and 6th September, 1880.]

Regulation XVI of 1827, s. 20—Vatan, alienation of—Bombay Act III of 1874, ss. 5, 8, 9, 10—Construction Certificate of Collector under s. 10.

Previously to the year A. D. 1818, R, the great-grandfather of the plaintiff settled accounts with Rudrapa, the father of the defendant, in respect of debts due by himself (R) and his ancestors. The amount found due to Rudrapa was Rs. 20,000, and as security for this sum, R, by deed, dated A.D. 1818, mortgaged to Rudrapa certain vatan lands, and also an annual allowance of Rs. 200 received by him (R) on account of a *rusum*. Under this deed these properties were to be held by Rudrapa, in lieu of interest until repayment of the principal of Rs. 20,000.

* Miscellaneous Special Appeal No. 2 of 1877.