

that he has paid too much, he seeks to recover a part of that sum. He must, therefore, prove that he has paid too much, and to do so must, if he disputes the accuracy of the statement in the bill of lading, show what the intake measurement really was upon which he is liable for freight. At the hearing, however, no evidence upon this point was given by the plaintiff, and he was, therefore, properly non-suited.

Of the questions referred to us, we answer the first in the affirmative. The second we answer also in the affirmative, as, looking to the sixth and eighth paragraphs of the case, we think there was evidence that the statement of quantity in the bill of lading was the intake measurement, and this evidence was not rebutted by the plaintiff. To the third question we do not think it necessary to give any answer; and the fourth we answer in the negative.

WEST, J.—I am of the same opinion. Apart from the decided cases, I should feel disposed to give to the disputed clause the effect which has been proposed by the plaintiff, and to hold that where the captain added such words as "weight, measurement, &c., unknown" to a bill of lading, there is no agreement as to the quantity shipped on board. But the authorities which bind us have laid down that these words do not cancel the statement of quantity contained in the bill of lading, but that under [322] their protection, if the captain deliver what was given to him, he is not bound by any clause in the bill of lading which purports to state the quantity of goods shipped. That being so, there is in this case some evidence that upwards of 115 tons of timber were shipped at Moulmein. The measurement appears to have been taken by some person acting as the agent of shipper, and the taking the bill of lading in this form argued that the same terms which were to govern the payment of freight as between the owners of the ship and the charterers upon the whole cargo should apply also as between the charterer and the shipper in respect of the payment of freight upon a particular portion of the cargo. The shipper ran the risk of the measurement being incorrect. That, however, was his own doing, and cannot now affect the captain's clause. I think the bill of lading is *prima facie* evidence of the intake measurement upon which freight was to be paid, and I agree in the answers made to the question referred to us.

Attorneys for the plaintiff: Messrs. Nanu and Hormusji,
 Attorney for the defendant: Mr. H. W. Payne.

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APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Justice, and Mr. Justice
 M. Melvill.

THE COLLECTOR OF THANA (*Original Defendant*), Appellant v.
 KRISHNANATH GOVIND AND ANOTHER (*Original Plaintiffs*),
 Respondents.* [6th December, 1881.]

Limitation—Act XIV of 1859, s. 1, cls. 12 and 16—Grant by a Hindu sovereign to a Hindu temple—Applicability of Hindu law to determine questions of limitation—Antastha saditwar—Kherij jamabandi parbhare paiki—Nibandh—What is immovable property.

The Peishwa, by a *sanad* dated 1790, granted to the temple of Shri Vyankatesh, at Mahim, an annual sum of Rs. 350 in cash out of the "antastha"

* Second Appeal No. 12 of 1879.

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sadilwar",* and three khandis of rice out of the "kherij jamabandi parbhare"† derivable from the [323] several mahals and forts therein particularly mentioned. The Collector of Thana stopped these allowances in 1859, when the plaintiffs' father died, and the plaintiffs in 1871 claimed to have their right established to the benefit of the above grant.

The right of the plaintiffs admittedly depended on whether the grant was immoveable property or an interest in immoveable property, and, as such, subject to the twelve-years' period of limitation provided by cl. 12 of s. 1 of the Limitation Act XIV of 1859.

Held (per SARGENT, J.)—

1. That the grant in question was of the nature of immoveable property, and that the suit, therefore, fell within the provisions of cl. 12 of s. 1 of the Limitation Act XIV of 1859.

2. In using the expression "subject of the suit" in the rule laid down by the Privy Council in the Toda Giras case (*Maharana Fatesangji v. Desai Kallianrayaji*) (1) their Lordships intended to include in it all the facts which determine the nature of the plaintiff's claim, and not merely of the allowance itself, and to confine the application of Hindu law to those cases in which the "subject of the suit" has such a distinctive Hindu character as that only Hindu law and usage can be legitimately invoked to determine its quality and nature.

3. It is the fixed and permanent character of an allowance, from whatever source derived, which by Hindu law entitles it to rank with immoveables. Here the grant, from the object which it had in view, was to be deemed to be one in perpetuity, and the fund out of which this perpetual allowance was to be paid was derived from a permanent source. It had, therefore, all the characteristics of permanency and durability which were essential to bring it, according to Hindu law, within the term "immoveable property."

Held (per MELVILL, J.)—

1. That the allowance in question was not immoveable property, and that the suit, therefore, did not come within the provisions of cl. 12 of s. 1 of the Limitation Act XIV of 1859.

2. From a consideration of the judgment of the Privy Council in *Maharana Fatesangji v. Desai Kallianrayaji*, it would appear that the rule which their Lordships intended to lay down is this, viz., that, whenever it is possible to do so, the term "immoveable property" and, "interest in immoveable property" in Act XIV of 1859 must be interpreted, on general principles of construction, with reference to the nature of the thing sued for and not to the status, race, character, or religion of the parties to the suit; but that in exceptional cases, in which the thing sued for is of such a special and exceptional character that its nature cannot be determined without reference to the special and peculiar law of a particular sect or class, in such cases, and in such cases only, the law of such sect or class may properly be referred to as furnishing a guide to the determination of the question.

3. The Privy Council has thus laid down a rule and an exception, and the question in every case must be whether the rule or the exception applies.

[324] The rule is that the terms "immoveable property" and "interest in immoveable property" are to be held to include not only land and houses, and such other things as are physically incapable of being moved, but also such incorporeal hereditaments as issue out of, or are connected with, immoveable property properly so called, and which, therefore, "savour of the realty" e.g., rights of common, rights of way, and other profits *in alieno solo*, rents, pensions and annuities secured upon land,—all these clearly constitute an interest in immoveable property. Pensions and annuities not secured upon land, houses, or the like as clearly do not constitute such an interest. When a classification can thus be made, it ought to be so made without reference to the character of the party claiming the right.

* "Antastha sadilwar" means extra assessment levied to meet local charges analogous to the present local cess fund.

† "Kherij jamabandi parbhare" means extra assessment in kind upon land over the regular land assessment collected by local officers, and paid by them direct.

4. But there may be cases in which the test prescribed by the rule fails, or is very difficult of application, and then will come in the operation of the exception to the rule, and it may become the duty of the Court to seek for guidance in some arbitrary definition contained in the religious law of the claimant, e.g., in the instance of an hereditary office in a Hindu community incapable of being held by any person not a Hindu. The claim now in question is a claim to an annuity granted by a Hindu sovereign to a Hindu temple. The annuity is not made a charge upon land, and it is not, therefore, according to general principle of construction, immoveable property. That being so, it is not necessary to go further.

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[R., 10 B. 149 (151); 19 C. 544 (F.B.); 3 Bom. L.R. 94 (97); D., 23 B. 22 (30).]

THIS was a second appeal from the decision of W. M. P. Coghlan, Judge of Thana, reversing the decree of H. Batty, Assistant Judge.

The plaintiffs in 1871 sued to establish their right to an annual allowance of Rs. 350 payable in cash out of a fund called "antastha sadilwar," and a similar allowance of three khandis of rice out of "the kherij jamabandi parbhare" in virtue of a *sanad*, dated 1790, granted by the Peishwa to the ancestors of the plaintiffs as a contribution to the expenses of the temple of Vyankatesh at Mahim, in the district of Thana. The suit was first brought in the Court of the Assistant Judge of Thana, who rejected it on a preliminary point of limitation, and his decision was upheld, in appeal, by the Judge. The High Court, however, reversed both these decrees, and directed the suit to proceed, leaving it open to decide any question of limitation that might properly arise upon a further examination of the pleadings. Upon the retrial before the Assistant Judge, the defendant (*inter alia*) contended that the allowances having been stopped in 1859, when the plaintiffs' father died, the suit, brought in 1871, was time-barred. This contention was based on the ground that the allowances were not a charge upon land, and, consequently, not immoveable property, or any interest in such property within the meaning of s. 1, [325] cl. 12 of Act XIV of 1859. Mr. Batty, the Assistant Judge, came to the conclusion that the defendant's contention was right, and rejected the plaintiff's claim. The Judge, Mr. Coghlan, arrived at a different conclusion, and, reversing Mr. Batty's decree, remanded the suit for a trial on the merits.

The defendant appealed to the High Court.

Jardine and *Nanabhai Haridas*, Government Pleader, for the appellant.

The Hon. Rao Sahib *Vishvanath Narayan Mandlik*, for the respondents.

JUDGMENT.

SARGENT, J.—The question which the Court has to determine in this case arises upon a grant by *sanad* made in 1790 by the Government of the Peishwa to the temple of Sri Vyankatesh at Mahim of the annual sum of Rs. 350 in cash out of the antastha sadilwar and three khandis of rice out of the kherij jamabandi parbhare derivable from the several mahals and forts therein particularly mentioned. The plaintiffs seek by their plaints to have their right established to the benefit of the above grant and to be paid six years' arrears of the same. The only issue raised in the Court below was whether the plaintiffs' claim was barred by the statute of limitations, and that question having been determined and a decree passed by the lower Court in favour of the plaintiffs, this case now comes before us on appeal.—It was admitted by both sides that the only question was whether that issue was rightly determined by the lower

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Court, and that the answer to it must depend upon whether the grant was of the nature of immoveable property, and, as such, subject to the twelve years' period of limitation as provided by cl. 12, s. 1 of the Limitation Act XIV of 1859. The sadilwar or sadilwar patti, which by the terms of the *sanad* was to provide the cash payment of Rs. 350 *per annum*, is stated in Wilson's Glossary to be the extra assessment above the public revenue levied formerly by the revenue officers for the purpose of defraying local district charges, and would appear, so far as the objects for which it was levied, to have been analogous to the local fund cess of the present day. "Antastha," according to Wilson, means secret expenditure; also items in the darbar kharch or Court charges of [326] the Peishwa. The antastha sadilwar would thus be the extra assessment levied to meet local charges imposed by the Peishwa on the fund. It further appears from the *sanad* that the sadilwar, out of which the Rs. 350 were to be paid, was itself a cash payment levied upon certain mahals and forts therein particularly mentioned, and derived in part from customs levied at various ferries in the several mahals. The evidence of witness No. 86 (and it is not disputed) shows that the tax upon the mahals, or mahalanihai, was a $\frac{1}{2}$ anna cess paid in cash on each rupee of land revenue, and the various entries in the revenue books which are in evidence in this case show that the sources from which the sadilwar was actually derived were, both in the time of the Peishwa and also after the assumption of the Government by the East India Company, of the most miscellaneous nature—such as a marriage tax, house tax and tobacco tax. Again, the tax on the forts, or killenihai, would appear, from the same evidence, to have been a tax, levied on officers and soldiers, of $\frac{1}{2}$ anna on each rupee of their pay. Such, then, being the nature of the varied sources from which the sadilwar was derived, it would be impossible, I think, to regard the allowance of Rs. 350 as being derived from or charged upon land. With respect, however, to the allowance of the three khandis of grain, the case is somewhat different. It is described in the *sanad* as kherij jamabandi parbhare paiki, and it would appear, from Wilson's explanation of the term kherij jama and the evidence of witness No. 86, that these three khandis were an extra assessment in kind upon the land in the several mahals over and above the regular land assessment. The sense in which the expression "parbhare" is here used, is not so plain; but it was, I think, understood by both sides as meaning "payable at once by the officers of the local revenue,"—i.e., direct from the officers collecting the land revenue in the several districts. Such being the nature of this allowance, it would appear to have been an extra charge imposed upon the land to meet a special purpose, and not a mere payment out of the local treasury, as contended for the appellant on the strength of the remarks of the Judicial Committee in *The Government of Bombay v. Desai Kallianrai* (1).

[327] It is to be remarked, however, that in the Toda Giras case, *Maharana Ratasangji Javatsangji v. Desai Kallianrajaji Hukamatraji* (2) where their Lordships were pressed to act upon the last-mentioned case, they observed that the opinion there expressed as to the particular *hak*, that it was not in the nature of immoveable property, was "the expression of a doubt rather than a positive decision." Further, it is to be remarked that the Privy Council were dealing in that case exclusively with evidence, the effect of which, at the most, was to establish the simple fact that the

(1) 14 M.I.A. 551 (563, 564).

(2) 10 B.H.C.R. 281.

respondent had been paid for a number of years a certain allowance out of the revenue of certain parganas. In the present case, however, the respondents rely on a grant which imposes an extra assessment on the land in certain mahals; and the mere fact that it is to be collected by the local officers ought not, in my opinion, to deprive it of the character of an interest in land and, as such, constituting immoveable property. It was, however, contended for the respondents that, whether or no the grant be deemed to be an interest in land by general law, the question whether it is to be regarded as immoveable property for the purposes of the Statute of Limitations must be determined by Hindu law, and that by Hindu law it was *nibandha*, and, as such, ranked with immoveable property. This contention doubtless raises a question of considerable nicety. In *Krishnabhat Hiragange v. Kapabhat bin Mahalbat* (1), where the question was as to the right of the plaintiff to officiate as a priest of a temple and to receive the offerings, Couch, C.J., said that "in the absence of any interpretation clause, such as there was in the Indian Succession Act, 1865, he thought the Court ought, in applying the law of limitation between Hindus, to include in the term immoveable property whatever is in the Hindu law understood to be such." In *Balwantrav v. Purshottam Siddheshwar* (2) the plaintiffs claiming as mortgagees of an eight-anna share in the hereditary office of village joshi sued his mortgagor co-sharers in the office to establish their right as such mortgagees to a moiety of the joshi *haks*, which they alleged the defendants had received for some years past. Mr. Justice West disapproved of the above ruling of the [328] late Chief Justice, and expressed an opinion that the sense to be given to the expressions "immoveable" and "moveable" property in the Limitation Act should be gathered from the Acts of the Indian Legislature, and should not be subject to fluctuations depending on the race, caste or religion of those who have to do with the property. Gibbs, J., adhered to the decision arrived at by the Court of which he was a member in *Krishnabhat v. Kapabhat*. The question was, therefore, referred to a Full Court, the judgment of which was delivered by Westropp, C. J. After an elaborate discussion of the descriptions of property which were included in the term immoveable at the time of the passing of the Act of 1859, the learned Chief Justice arrives at the conclusion that there is "nothing in the Act XIV of 1859 to cut down what was the received meaning of 'immoveable property' before the Act was passed," and, further, that there is nothing "in subsequent Acts calculated to give the impression that the received doctrine as to immoveable property amongst Hindus was wrong, or that Act XIV of 1859 was intended to narrow the scope of that phrase, or to show that it is not a term elastic enough to suit itself to the law of any community to whose property it may be necessary to apply it," and the Court, accordingly, held that cl. 12, and not cl. 16, of s. 1 of Act XIV of 1859 was applicable to a suit to recover fees of an hereditary office. In *Maharana Fatesangji Desai v. Kalianrayaji* (3), better known as the Toda Giras case, the Privy Council were asked, upon the authority of the above cases of *Krishnabhat v. Kapabhat* and *Balwantrav v. Purshottam Siddheshwar*, to construe the Statute of Limitation by the light of Hindu law. Referring to the judgment of the Full Bench in the latter case, their Lordships say: "It fully upheld the decision in *Krishnabhat v. Kapabhat*, and affirmed the correctness of the rule there laid down for the interpretation of Act XIV of 1859,

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(1) 6 B.H.C.R. A. C. J. 137. (2) 9 B.H.C.R. 99. (3) 10 B.H.C.R. 281.

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s. 1, cl. 12. The rule is, shortly, this, *viz.*, that inasmuch as the term 'immoveable property' is not defined by the Act, it must, when the question concerns the rights of Hindus, be taken to include whatever the Hindu law classes as immoveable, although not such in the [329] ordinary acceptation of the word. To the application of this rule within proper limits their Lordships see no objection. The question must in every case be whether the subject of the suit is in the nature of immoveable property or of an interest in immoveable property, and if its nature and quality can be only determined by Hindu law and usage, the Hindu law may be properly invoked for that purpose. Thus, in the two cases on which the appellant relies, Hindu texts were legitimately used to show that, in the contemplation of Hindu law, hereditary offices in a Hindu community incapable of being held by any person not a Hindu were in the nature of immoveables." Proceeding to consider whether the Hindu law should be applied in the actual case before it, their Lordships say; "it appears from the authorities that the Girasias were sometimes Mahomedans, and, therefore, that the *hak* may in its inception have been held by a Mahomedan. It is certain that as these *haks* now exist they may pass to, and be held and enjoyed by, Mahomedans, Parsis, or Christians, and their Lordships think that the applicability of particular sections of this general Statute of Limitation must be determined by the nature of the thing sued for, and not by the *status*, race, character or religion of the parties to the suit. The period of limitation within which the claim is barred, must be fixed and uniform, by whomsoever that claim is preferred or resisted."

In the present case the claim is by a Hindu temple based upon a formal grant or *sanad* from a Hindu sovereign whose obligations the East India Company assumed, and to which the English Crown subsequently succeeded. The claim is, therefore, by its very nature one which can only be preferred by Hindus, and does not fall within the reasoning of their Lordships in the Toda Giras case. But it was contended for the appellant that the allowance itself was of such a nature as to render it unnecessary to resort to Hindu law, and that the case, therefore, falls outside the limits which the Privy Council have placed on the rule laid down by the Full Bench decision of this Court. This reasoning, however, appears to me to proceed on too narrow a view of the intention of the Privy Council in confining the application of the Hindu law to those cases in which "the quality and nature of the subject [330] of the suit can only be determined by Hindu law." In using the expression "subject of the suit" the Privy Council intended, I apprehend, to include in it all the facts which determine the nature of the plaintiff's claim, and not merely of the allowance itself, and to confine the application of Hindu law to those cases in which the "subject of the suit" has such a distinctive Hindu character as that only Hindu law and usage can be legitimately invoked to determine its quality and nature. The case of an hereditary office is itself an illustration of this view of their Lordships' meaning. The nature of an hereditary office is capable of being determined by English law, see [Coke on Litt., 20 (a)], but that of an hereditary office of a distinctly Hindu character can only be properly determined by Hindu law. In the present case it is legitimate to show that a grant in perpetuity (for such must be deemed to be the duration of this grant, if not upon the express language of the grant itself, at any rate by the custom and usage of the country as uniformly stated by Mountstuart Elphinstone in his report on States conquered from the Peshwa, and by Steele in his preface to Castes and Customs, as well

as by other writers) by a Hindu government to a Hindu temple of an allowance to be levied on certain districts, is, in the contemplation of Hindu law, in the nature of immoveable property, because that law alone can be legitimately applied to the determination of its nature and quality.

I proceed, therefore, to consider the conclusions to be drawn from the Hindu law. It was contended for the respondents that the grant was by that law in the nature of *nibandha*, and, as such, ranked with immoveable property. I may remark that this question was raised in *The Government of Bombay v. Goswami Shri Girdharlalji* (1), the judgment in which case was delivered by my colleague, Mr. Justice Melvill. It was there held that, even assuming that certain allowances not secured on land might be included in *nibandha* and rank with immoveable property, it was, at any rate, essential that such allowances should be derived from some express and solemn agreement or promise made by the king or other person in authority. It became unnecessary to decide the question, there being no promise or agreement proved in the case before the Court. Now *nibandha* is the Sanskrit [331] word which in the English translations of Hindu texts and commentaries has been interpreted by the obsolete English law expression "corrody." Its literal meaning, as appears from Sanskrit dictionaries, is "fixed," "made fast," and the illustrations of its use as a Hindu term of law enumerated in the judgment of the Full Bench Court in *Balwantrav v. Purshottam Siddheshwar* (2) would seem to show that it is applied in its largest sense to any fixed and permanent allowance; or payment; or as it is explained in the note to the Digest, Vol. II, p. 162, plac. xxxiv, "to a gift of a thing assigned upon a fund." An examination of the authorities referred to in the Full Bench judgment can leave no doubt, I think, that *nibandha* (of some descriptions at least) was considered as ranking with immoveables in all questions of ownership, inheritance and partition. I may also refer, in further support of that view, to Dayabhaga, ch. 2, pla. 22, 25. The former *placitum* concludes with the saying of Yajnyavalkya, "that the father is master of the gems, pearls, and corals and of all other moveable property, but neither the father nor the grandfather is so of the whole immoveable estate," and in the latter it is said, "from the express mention of immoveables, a prohibition is inferred by the analogy exemplified in the loaf and staff against the gift or other transfer of a corrody or of slaves." In other words, as explained in the note, the term, "immoveables" carries with it corrodies and slaves as well as land, in the same way as the staff being thrust through the loaves, those are necessarily brought by bringing the staff. Nor does it appear that the corrodies so included in the term "immoveables" are necessarily confined to grants by the king and rajahs and people in authority, as would appear to have been inferred from *placitum* xcii of the Digest, for it is to be remarked that the words "out of mines or the like, settled on him and his heirs by the king" are not found in the original, but have been apparently introduced into the translation from the commentary on the text, omitting however the words "or other benefactor." Ratnacara also expounding the word *nibandha* in the text says: "That which is fixed or made fast is *nibandha* or fixed pension receivable out of mines or the like." And if we look to the reason of the rule as explained in ch. ix, ss. 22 and 23 of the Dayabhaga, *viz.*, that the immoveable [332] property is a permanent means of maintaining the family which the Hindu

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(1) 9 B.H.C.R. 222.

(2) 9 B.H.C.R. 99.

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law-givers regard as an indispensable obligation, we must, I think, come to the conclusion that it is the fixed and permanent character of the allowance, from whatever source derived, which entitles it to rank with immoveables, and that the case of a grant by the king out of mines or the like is merely an illustration of a corrody in its truest sense. However that may be, in the present case the grant was by the king or his authorized representatives. It is a grant which from the object it had in view must be deemed to be one in perpetuity; and, lastly, the fund out of which this perpetual allowance was to be paid, was derived from a permanent source. It has, therefore, all the characteristics of permanency and durability which are essential to bring it, according to Hindu law, within the term "immoveable property."

I would, therefore, dismiss the appeal with costs.

MELVILL, J.—The only question which we have to determine in this appeal is whether the subject-matter of the claim is immoveable property, or an interest in immoveable property, within the meaning of cl. 12, s. 1 of Act XIV of 1859.

In *The Government of Bombay v. Gosvami Shri Girdharlalji* (1) I stated, and I think that I was right in stating, that, in considering, with reference to limitation, the question whether any particular allowance (other than an allowance incidental to an hereditary office), is or is not immoveable property, this Court has generally, if not invariably, applied the following test, *viz.*, is or is not the allowance in question a charge upon land or other immoveable property?

If this test be applied in the present instance, the plaintiffs must fail. The allowance, in respect of which they sue, is not charged upon land. In the plaint it is treated merely as an annual allowance payable out of the Government treasury. Since British rule was introduced, it has never borne any other character. If we go back to the *sanad* from the Peishwa's government by which the grant is bestowed, we find that the allowance consists partly of a money payment, out of certain extra cesses and transit [333] duties (the nature of which will be found described in Grant Duff's *History of the Mahrattas*, Vol. I, p. 26, Indian Reprint, and note, and in Mounstuart Elphinstone's *Report on the Territories conquered from the Peishwa*, p. 26), and partly of a small quantity of grain, described as "kherij jamabandi purbhare paiki," which term may either mean that the grain was to be taken out of the extra collections made for incidental expenses (see Wilson's *Glossary* under *kharij-juma* and *purbhara hak*), or else that the grain was to be received by the grantee, not from the head-quarters treasury, from which the money allowance was payable, but direct (parbhare) from the collecting officers in the revenue divisions (*sujā*) named in the *sanad*, and to be debited under the head of extra collections. The Assistant Judge has rightly described the meaning of other terms used in the *sanad*, and I agree with him in holding that none of them afford any foundation for the contention that the grant was in any way a charge upon land or other immoveable property.

But then arises the consideration whether the determination of the question before us is to depend upon the general construction to be given to the terms "immoveable property" and "interest in immoveable property" as used by the Legislature, or whether it is proper that we should proceed

further, and ascertain whether the subject-matter of this suit would, according to Hindu law, be "*nibandha*."

In the case to which I have referred, I considered myself justified in having recourse to Hindu law as supplemental to the other grounds of my decision. I was, indeed, bound by authority to do so; for in *Krishnabhat v. Kapabhat* (1) it had been broadly laid down by Couch, C. J., that we ought, in applying the law of limitation between Hindus, to include in the term "immoveable property" whatever is in the Hindu law understood to be such. This principle of construction was subsequently upheld in the case of *Balvantrav v. Purshottam* (2) by Westropp, C.J., and four other Judges, of whom I was myself one.

The two last-mentioned cases have, however, subsequently come under the consideration of the Judicial Committee, and it [334] is important to ascertain to what extent they are affected by the judgment of that tribunal.

The head-note to that judgment, *Maharana Fatesangji v. Desai Kallianrayaji* (3), which states broadly that the principle which prevailed in *Krishnabhat v. Kapabhat* and in *Balvantrav v. Purshottam* was approved by the Judicial Committee, appears to me to be inaccurate and misleading. What their Lordships really said upon this point will be found at p. 288 of the report. They refer to the rule as laid down in the Bombay cases, and then make the following remarks:—"The rule is, shortly, this, *viz.*, that, inasmuch as the term 'immoveable property' is not defined by the Act, it must, when the question concerns the rights of Hindus, be taken to include whatever the Hindu law classes as immoveable, although not such in the ordinary acceptation of the word. To the application of this rule, *within proper limits*, their Lordships see no objection. The question must, in every case, be whether the subject of the suit is in the nature of immoveable property; and, if its nature and quality can be only determined by Hindu law and usage, the Hindu law may properly be invoked for that purpose. Thus, in the two cases on which the appellants relies, Hindu texts were legitimately used to show that, in the contemplation of Hindu law, hereditary offices in a Hindu community, incapable of being held by any person not a Hindu, were in the nature of immoveables. And those decisions receive additional support from the first section of the Bombay Regulation V of 1827, which expressly declares hereditary offices to be immoveables." Their Lordships then go on to say that, in the particular case before them, it was unnecessary to consider the Hindu law, because they were of opinion that the question whether a *toda giras hak* was an interest in immoveable property within the meaning of Act XIV of 1859 was one which ought not to be determined by Hindu law. And they then lay down this general proposition: "Their Lordships think that the applicability of particular sections of this general statute of limitations must be determined by the nature of the thing sued for, and not by the *status*, race, character, or religion of the parties to the suit. The period of limitation, within which the claim is barred, [335] must be fixed and uniform, by whomsoever that claim is preferred or resisted."

The conclusion at which the Judicial Committee finally arrived was that as the *hak* in that case was payable by the inamdar *virtute tenuræ*, the interest of the *hakdars* possessed the qualities both of immobility and of indefinite duration in a degree which, if the question depended on English law, would entitle it to the character of a freehold interest in, or

(1) 6 B.H.C.R. 127.

(2) 9 B.H.C.R. 99.

(3) 10 B.H.C.R. 281.

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issuing out of, real property, and that, upon the general principles of construction applicable to an Indian Statute, it must be held to be an "interest in immoveable property" within the meaning of Act XIV of 1859.

From the passages which I have quoted I conclude that the rule laid down by the Judicial Committee, and the rule by which, we must, therefore, be guided, is this, *viz.*, that, whenever it is possible to do so, the terms "immoveable property" and "interest in immoveable property" in Act XIV of 1859 must be interpreted on general principles of construction, with reference to the nature of the thing sued for, and not to the *status*, race, character or religion, of the parties to the suit; but that, in exceptional cases, in which the thing sued for is of such a special and peculiar character that its nature cannot be determined without reference to the special and peculiar law of a particular sect or class, in such cases, and in such cases only, the law of such sect or class may properly be referred to, as furnishing a guide to the determination of the question.

We have thus laid down for our guidance a rule and an exception; and the question in every case must be whether the case is governed by the rule or the exception. The application of the rule I take to be this: that the terms "immoveable property" and "interest in immoveable property" are to be held to include not only land and houses, and such other things as are physically incapable of being moved, but also such incorporeal hereditaments as issue out of, or are connected with, immoveable property, properly so called, and, therefore, to use the language of the old English lawyers, "savour of the realty." Incorporeal hereditaments, which are of a purely personal nature, and do not savour of the realty, are moveable property. If regard be had [336] only to ordinary principles of construction, it will not generally be difficult to say within which of these two classes the subject matter of a suit should be placed. Rights of common, rights of way, and other profits *in alieno solo*, rents, pensions and annuities secured upon land,—all these clearly constitute an interest in immoveable property. Pensions and annuities not secured upon land, houses, or the like, as clearly do not constitute such an interest. When a classification can thus be made, it ought to be so made, without reference to the character of the party claiming the right. But there may be cases in which the test prescribed by the rule fails, or is very difficult of application; and then will come in the operation of the exception to the rule, and it may become the duty of a Court to seek for guidance in some arbitrary definition contained in the religious law of the claimant. Conspicuous among such cases (and, indeed, it is the only case in which the Judicial Committee has expressly approved of the application of the exception), is the instance of an hereditary office in a Hindu community incapable of being held by any person not a Hindu. It is clear that this is a kind of incorporeal hereditament which it would be very difficult to classify with reference merely to the connection of a particular hereditary office with land. Such a classification may be possible in the rare instances in which questions regarding hereditary offices or dignities may arise in England [Co. Litt., 20*a*]; but the multiplication of hereditary offices of every description is a peculiarity of Hindu communities, and most of them are of such a character that it would be scarcely possible to say whether they savour of the realty or not. In every considerable Deccan village there are, at least, twelve such offices; and a Court might well find it impossible to determine, upon general principles, and without reference to Hindu law, whether the office of an hereditary blacksmith, potter, or astrologer, is or is not immoveable property. It was doubtless

from a sense of this difficulty that the framers of Bombay Reg. V of 1827 specified hereditary offices as immoveable property, while, in regard to all other such property, they thought that the term "immoveable" would sufficiently explain itself.

What we have to deal with in the present case is an annuity granted by a Hindu sovereign to a Hindu temple. The annuity [337] is not made a charge upon land; and it is not, therefore, according to general principles of construction, immoveable property. That being so, I do not think that we need go further. If the grant had been to a Mahomedan mosque, we should have been forced to decide the question upon the general construction of the term "immoveable;" for there would be no other ground on which we could proceed. And I do not see why we should adopt any other principle, because the grant is to a Hindu temple. That circumstance may render it more probable that the grant was intended to be in perpetuity; but, except to the extent of influencing us in coming to a conclusion as to the intended duration of the grant, I do not think that the circumstance ought to affect our judgment. Indeed, if we are to hold, by reference to Hindu law, that a grant by Hindu Government to a Hindu temple is immoveable property, while a precisely similar grant by a Mahomedan Government to a Mahomedan mosque is moveable property, we must go a step further and hold that every perpetual grant by a sovereign to an individual Hindu is of a different nature and quality from a similar grant to an individual of any other race; for no texts of Hindu law have been shown to us which put grants to temples on any different footing from that of grants to Brahmins, or any other persons. It appears to me that, were we to proceed upon a principle which would conduct us to such a result, we should be acting in direct opposition to the view expressed by the Judicial Committee in *Maharana Fatesangji v. Desai Kalianrai*.

For these reasons I am of opinion that the decree of the District Judge should be reversed, and that of the Assistant Judge restored.

5 B. 338 (F.B.).

[338] ORIGINAL CRIMINAL—FULL BENCH.

Before Sir Charles Sargent, Kt., Justice, Mr. Justice Melvill and Mr. Justice West.

EMPRESS v. S. MOORGA CHETTY. [28th April and 3rd May, 1881.]

Jurisdiction—Receiving and retaining stolen goods within jurisdiction where the theft was committed out of jurisdiction—Indian Penal Code, ss. 410 and 411—Commission to take evidence, power of High Court to grant, on application of prisoner.

The prisoner was tried at Bombay, under s. 411 of the Indian Penal Code, on a charge of having dishonestly received and retained stolen property, knowing or having reason to believe the same to be stolen property. He was also charged under ss. 108 (expl. 3) and 109 with having abetted that offence. It appeared at the trial that the prisoner was a clerk in the employment of a mercantile firm at Port Louis, in the Island of Mauritius. On the 29th October and the 1st November, 1879, certain letters addressed by the firm to their commission-agent at Bombay were abstracted from the post office at Port Louis. The letters contained six bills of exchange belonging to the firm for an aggregate amount of Rs. 26,550. On the 1st November, 1879, the prisoner sent all six bills of exchange in a letter to the manager of a bank at Bombay, requesting that the several amounts might be collected on the prisoner's own account, and remitted to him by bills on Mauritius. The sums were accordingly realised by the bank, and duly remitted to the prisoner. It was not denied that the prisoner obtained possession of the money and used it as his own. His defence was that the

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