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APPEL.

LATE

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The Subordinate Judge found that the plaintiff had not proved the house to have been the self-acquired property of Tukaram. He, therefore, rejected the plaintiff's claim.

In appeal, the Assistant Judge affirmed the decree of the Court below, on the ground that the house was ancestral property in which Tukaram and Sadu were, respectively, half-sharers, and that the plaintiff could not maintain a suit for the whole of it (19th January, 1880).

The plaintiff, Indrassa, thereupon appealed to the High Court on the 12th April, 1880.

Pandurang Balibhadra, for the appellant.—The Assistant Judge found that Tukaram, through whom the appellant derives his title, had a half-share and only a half share, in the house in dispute. Having found that, he ought to have allowed the appellant's claim to that extent, and not to [506] have dismissed it altogether. The appellant is, at least, entitled to the joint possession of the house with the respondent under the previous decisions of this High Court.

Harishankar Balkrishna, for the respondent.

The following is the judgment of the Court delivered by

MELVILL, J.—The appellant's pleader admits that he cannot say that there is no evidence to support the Assistant Judge's finding that the house in dispute is ancestral property; and we must, therefore, accept that finding as conclusive. The house must, consequently, be held to have been the joint property of Tukaram and his brother, the defendant. The plaintiff, having purchased Tukaram's share only is not entitled to the whole house, nor to the exclusive possession of half of it; but, following previous decisions of this Court (*Babaji Lakshman and another v. Vasudeo Vinayak* (1); *Kallapa bin Girmallapa v. Venkatesh Vinayak* (2); and *Dugappa Sheti v. Venkatramnaya and others* (3)), we make a decree that the plaintiff be put into possession of the house jointly with the defendant, and leave it to either of the parties to have their respective shares therein ascertained by a partition suit. The decrees of the Courts below are amended accordingly. The parties to bear their own costs in this appeal. [N.F., 5 B. 499.]

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Before Mr. Justice Bayley.

MITHIBAI AND OTHERS v. LIMJI NOWROJI BANAJI AND OTHERS.*

[28th and 29th April, 2nd and 3rd May and 4th August, 1881.]

Parsis in the Mofussil of the Bombay Presidency, law applicable to—"Justice, equity, and good conscience,"—English law, general and special—Rule in Shelley's case.

The law applicable to Parsis in the Mofussil of the Presidency of Bombay is, in the absence of evidence of any specific law or usage, applicable to the particular case, "justice, equity, and good conscience alone." (Reg. IV of 1827, s. 26.)

In applying "justice, equity, and good conscience" to the facts of any particular case the Courts will be guided by the general principles of English law applicable to a similar state of circumstances, and so as, if possible, to give effect to the intentions of the parties concerned, where such intentions are clearly expressed, and are not repugnant to any general principle of English law.

The Courts will not, in such a case, apply rules of English law which, though well established and binding on English Courts, are yet so special in their nature and origin as to be inapplicable to the different circumstances of this country.

The members of a Parsi family, the heirs of one Framji Cowasji Banaji, deceased, entered into an agreement with one another, bearing date the 24th May 1851 by which they agreed that the remaining income, after paying the deceased's debts of a certain estate which had belonged to the deceased, called the Poway Estate—an estate situated in the island of Salsette, and, [507] therefore, in the mofussil of the Presidency of Bombay—should be apportioned "to the heirs mentioned in cl. 7 (of the agreement)"—i.e., among the various heirs of Framji Cowasji Banaji, deceased, the parties to the agreement—

* Suit No. 877 of 1870.

(1) 1 B. 95.

(2) 2 B. 676.

(3) 5 B. 493.

"but, after their death, their shares are to be enjoyed and received by their heirs and children from generation to generation."

Held—that, it being the plain intention of the parties to the agreement, appearing on the face of the agreement, that they themselves should take only a life-estate to the extent of their respective shares in the remaining income of the Poway Estate, the rule in *Shelley's Case* ought not to be applied so as to defeat that plain intention.

[*Affirmed*, 6 B. 151; F., 1 Bom. L.R. 303; R., 8 B. 323 (327); 18 B. 160 (170); 30 B. 359=7 Bom. L.R. 988; 33 B. 122 (137)=10 Bom. L.R. 417=1 Ind. Cas. 834; 5 Bom. L.R. 983 (986).]

MOTION to vary the special report of the Assistant Commissioner, Mr. G. H. Farran, dated 11th April, 1881.

The facts of this case and the arguments of counsel, together with the authorities cited on either side, will appear fully from the judgment herein.

Latham (with him *Inverarity*) moved, on behalf of the defendant Hari Valabdas Kaliandas, to vary the Assistant Commissioner's report.

Lang, for plaintiffs other than Hormusji Pestonji Framji, Jerbai, and Awabai.

The Hon'ble *J. Marriott* (Advocate-General), for defendant Nanabhoy Framji.

The plaintiff Hormusji Pestonji Framji in person for himself and his wife Jerbai, and the defendant Dhunjibhoy Byramji in person for himself and his wife Navazbai.

The other parties did not appear, either in person or by counsel.

JUDGMENT.

4th August.—Judgment was this day delivered by

BAYLEY, J.—This is a motion to vary a special report of Mr. G. H. Farran, Assistant Commissioner of this Court, dated the 11th April, 1881, by which he certified and reported that he had decided that the persons who had signed a certain family agreement, dated the 24th May, 1851, had a life-interest only in the Poway Estate, in Salsette; that they had no power to dispose of any interest in that estate, save such life-interest, by deed or will; and that the interest of the defendant, Hari Valabdas Kaliandas, extended only to the life-interest of the defendant, Nanabhoy Framji, [508] in the Poway Estate. He further certified and reported that all the parties interested in this matter had not been represented before him.

A brief reference to the facts which led up to the agreement of the 24th May 1851, being made, as well as to the nature of this long-pending suit, and of the decretal order made in it by consent on the 24th February, 1872, is necessary for the proper understanding of the points argued before me on the hearing of this motion.

Framji Cowasji Banaji died on the 12th February, 1851, seized or possessed of the Poway Estate, in Salsette, which had been granted to him by the East India Company by an indenture, bearing date the 15th February, 1837, to hold unto and to the use of himself, his heirs, executors, administrators, and assigns for ever. The deed contained a covenant by Framji Cowasji, for himself, his heirs, executors and administrators, that he and they would, when and so soon as required by the said East India Company, their successors or assigns, execute such deed or other sufficient instrument for securing the due supply of water to two reservoirs erected on the Duncan Road, near Kamathipura, in the island of Bombay, for the purposes and in manner in that behalf in the said deed of the 15th February,

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1881 1837, contained, as by the said Company their successors or assigns, and
 AUG. 4. their counsel learned in the law, should be deemed reasonable and expedi-
 ORIGINAL ent in that behalf. Framji Cowasji also died possessed of much move-
 CIVIL. able and immoveable property in the island of Bombay; but he left consi-
 5 B. 506. derable debts contracted in the course of his trade as a merchant.

He left a widow, Bachubai; three sons—Jehangir (the eldest), Pestonji and Nanabhoy; three daughters—Rutanbai, Navazbai and Perozbai; and he left grandchildren by three other daughters, Goolbai, Meherbai and Maneckbai, all of whom had predeceased him. He left a Gujarathi will, dated the 5th July, 1828, and a Gujarathi codicil of the 15th December, 1831.

In cl. 2 of his will he states, in much detail, his reasons for being dissatisfied with the conduct of his eldest son, Jehangir; excludes him from any share in his inheritance, but directs that Rs. 100 a month should be paid him—to be increased, if his mother [509] Bachubai thinks fit, to Rs. 125; and that, two years after his (the testator's) death, Rs. ——— are to be paid, when the monthly sum of Rs. 125 is to be stopped—a bequest which, as no sum was named, was no bequest at all, or, if it was, is void for uncertainty; and he further directed that a small house, worth Rs. 10,000 or Rs. 12,000, was to be given that his children might remain in it.

Neither the will nor the codicil contained any general devise of his residuary estate; and there were no words, in either of those documents, sufficiently large to include the Poway Estate, which he did not obtain from Government until 1837, although he had made an application to Government so early as 1831 in regard to such estate.

By the codicil he confirms his will, and then refers to the Poway Estate. The codicil is short, and is as follows:—

CODICIL.

In the way thus particularly set forth this will or testament was made before. It is to be considered as confirmed and upheld. And besides this, as to the property (called) the Sans Souci which I having sold, laid out on Poway Rs. 1½ (one and a half) laos. I cannot at present write at great length, because my health is much impaired; but now, by the grace of God, I am better: so I will afterwards make a memorandum; but at present this is all. On the ———, 1831, I wrote a letter to Government, an answer to which arrived on the ———, in accordance with which it shall not be competent to my heirs to sell this estate, neither shall it be competent to them to partition it. As to the conveying of water from Mugbhat to Kumateepol (or Kamathipura) the outlay for that is to be made out of this Poway Estate; and, besides that, after making the outlays, whatever balance may remain my heirs are to divide and take. And as to the whole of the outlays for the water of Mugbhat, in case my heirs should neglect the same, I have made the Government joint trustees, (and) they will, disgracing you, cause the same (outlays) to be made. Therefore you should very honourably carry on that water charity perpetually. Now, if God will bestow good health on me, I will write a separate memorandum in regard to this. The English date the 15th December of the year 1831: the Kudmi 15th day *Dukhmir*, the 4th month *Teer*, *Yeederdi* 1201 (*Maha Sud* 11th of *Samvat* 1888), the day of the week Thursday.

The state of affairs soon after his death, assuming as correct the statements in the will and codicil as well as those in the family agreement dated the 24th May, 1851, and in the plaint, would appear to have been somewhat as follows:—Jehangir, the eldest son, and his family were virtually disinherited. There was no testamentary disposition in regard to the Poway Estate or in regard to some of the immoveable property in the island of Bombay, or in [510] regard to much of the testator's moveable property. There were considerable debts due by the testator to

third parties which it was, of course, desirable to pay off as soon as possible.

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Disputes had arisen regarding the will, the allegation in para 4 of the plaint being that the will was defective in parts, and that disputes and differences had arisen respecting the same and about the distribution of the said property, and that, in order to put an end to such disputes and differences (amongst other things), an agreement was on the 24th May, 1851, entered into by and between the parties interested in the property mentioned in the will and codicil.

The most material clauses of the agreement, to be noticed here, are the first, second, fourth, seventh, ninth, tenth, eleventh, twelfth, fourteenth, and fifteenth. They are as follows:—

1. The said late Framji Cowasji Seth, deceased, had for many years past carried on an extensive business, and, agreeably to the affairs of this world and by reason of his trade, he has left behind him debts due by him, and has at the same time, by the favour of God, left very extensive landed property; but it is now the desire of all of us, the undersigned, that the deceased during his lifetime having entertained a wish to settle all his affairs with his own hand; but as it has pleased the Almighty to order him at last to leave this world, and he departed this life on the 12th day of February, 1851, of the English year and the 19th day of *Furverdin* of the 6th month of *Sharavur* of the Kudmi, and carried with him the desire he had entertained of settling his affairs; but he, having been ill for a long time before his death, had, in accordance with both his wishes, commenced making out his new will, but as the same remained unexecuted and unattested, we all of us, having unanimously joined together, do entertain the same wish that the debts due by, and to, him be paid and received in a proper manner; and, with a view that no blot should in any way be attached to his name, we, the undersigned, are to aid and assist in conducting this business as far as it may lay in our power, and to carry on the whole affair with peace and unanimity, and, therefore, it became necessary to make this writing and we are to act agreeably to the conditions of this writing, which is truly to be agreed to and abided by all of us respectively and our heirs and executors.

2. On searching the presses of the late Seth Framji Cowasji, deceased, on the 17th of February, 1851, the above-mentioned will of the 5th July, 1828, with its codicil of the 15th December, 1831, was found in a tin-box, at which all of us were delighted that, after obtaining probate under the said will, the management of the affairs and dealings of our patron, the late Framji Cowasji, deceased, would be carried on with ease; but on examining it we found it had been made many years ago, whereupon we all, the undersigned, do hereby unanimously consent and agree that the said will should only be made use of, and abided by, for the purpose of obtaining probate from the [511] Supreme Court, in order that the affairs and dealings of the deceased may be managed by the hands of his executors. Therefore none of us, the undersigned heirs, or any one else to whom a legacy or inheritance or a lump sum has been given in the said will, shall now or at any time hereafter make any claim or demand after the probate has been obtained of the said will; and if any one should make any claim or demand whatsoever it shall be by this writing considered null and void, and that this writing containing this arrangement after being executed and attested by all shall be registered in the Supreme Court along with the abovesaid will of the deceased, and we are truly to abide by the same.

4. After I, the undersigned Bai Bachubai, have obtained probate of the above-mentioned will of the 5th July, 1828, with its codicil, it is resolved, with the unanimous consent of us, Bachubai and all the undersigned, to give full authority to Parsi Cursetji Nusservanji Camaji for conducting the management of my late husband Framji Cowasji Seth's affairs and dealings, for collecting and paying (his debts), selling his landed property and other goods and effects, and managing his estates in Salsette and other villages; and this party, after I, Bai Bachubai, shall have obtained probate, is to commence to exercise his authority under this writing; but to whatever the said Cursetji Nusservanji Camaji does, neither I, Bai Bachubai, nor any of the other undersigned are to raise a dispute or objection of any kind whatever, and are not to swerve herefrom; and, should we at any time raise any dispute or objection, it is truly to be all null and void.

7. As to all the debts due by the late Seth Framji Cowasji, deceased (the proceeds of) the sale of his landed estate in Bombay and the amount of insurance of the ship *Buckinghamshire*, destroyed by fire, having been collected, and furniture and other

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goods and effects having been sold, and such outstanding debts as may be due by different persons having been collected, his creditors should be paid. But on selling and collecting all the above (property), should all the creditors be not paid in full, then there are six villages, inclusive of Poway in Salsette, belonging to the deceased which have been obtained from Government rent-free for ever: out of the income of these villages in the first place water should be supplied for the use of the poor community of Kamathipura in Bombay which the late Framji Cowasji Seth, deceased, has been supplying from the year 1824 A.D. out of the well in his Girgaon cart called Mughbat; and, in order that this charity may continue for ever, a trust-deed in English, dated the 30th September, 1837, had been made for drawing Rs. 2,400—namely, twenty-four hundred—annually out of the income of the villages, inclusive of Poway; and the English Government has been appointed trustees therein with a view that, should the heirs of the deceased be unable to supply the water properly, then Government—the trustees having drawn out of the income of the village of Poway the above-mentioned sum of Rs. 2,400 every year—are to conduct and preserve that charity work for ever. Therefore, after the amount of these charges of the karkuns and sepoy and the charges of the villages, inclusive of Poway, have been deducted from the amount of the income, the surplus, whatever it may be, should be paid in the best possible way to the creditors in part payment of the interest; and, in case there be any surplus, the same should be paid to them in equal proportions, [512] in part payment of their principal, until all the debts of late Framji Cowasji, deceased, are discharged: payments are to be truly made out of this income.

9. We all, the undersigned heirs of the late Seth Framji Cowasji, deceased, have by our unanimous consent acknowledged and determined by the writing of the under-mentioned persons to be the heirs of the said Framji Cowasji deceased. The particulars of their names and the manner in which it is agreed their shares are to be paid, are as follows:—

25 (twenty-five) cents to Bai Bachubai the widow of our late patron, Framji Cowasji.

50 (fifty) cents to be divided equally among the sons who are living. The particulars whereof are as follows:—namely (1) Jehangir Framji, (2) Pestonji Framji, and (3) Nanabhoy Framji—50.

25 (twenty-five) cents to be divided in equal shares among the living daughters and the heirs of the deceased daughters:—(1) Bai Rutoibai, the widow of the late Nusservanji Rustomji Baly Hamaji, deceased.

(2) Bai Navazbai, the wife of Dhunjibhoy Byramji Rana.

(3) Bai Pirozbai, the wife of Ardasir Cursetji Seth.

(4) The late Goolbai, deceased, wife of the late Dhunjibhoy Nusservanji, deceased, is dead, and her daughter, Hirabai, is at present her heir, and she is the wife of Sorabji Pestonji.

(5) The late Meherbai, deceased, the wife of Pestonji Nowroji, is dead, and her heirs are her two sons, Ardesi Pestonji and Nowroji Pestonji, and these sons are at present young, and are living with their father, Pestonji Nowroji; and having appointed along with their father and guardian two other persons as trustees, and the amount of the share of these young heirs until such time as they come of age having been duly guaranteed,—that is to say, having been invested in Government paper,—the accumulating interest is to be added thereto, and their shares should be paid to them as they respectively come of age. The late Maneckbai, deceased, the wife of Dadabhoy Rustomji, is dead, and her heirs are her daughter, Sirinbai, and her son, Kaikhashru, but those children are at present young, and are living with their father, Dadabhoy Rustomji; and having appointed along with their father and guardian two other persons as trustees, the amount of the shares of these young heirs until such time as they come of age having been duly guaranteed,—that is to say, having been invested in Government paper,—the accumulating interest is to be added thereto, and their shares should be paid to them as they respectively come of age. According to these particulars, 100—namely, one hundred—cents are to be apportioned among Bai Bachubai, the three sons, the three living daughters and the children and heirs of the three deceased daughters, agreeably to the shares of the heirs settled above.

10. Agreeably to what is written above, the said Bai Bachubai, the widow of our patron, the late Framji Cowasji, deceased having obtained probate in her own name alone under the said will of our patron, the late Framji Cowasji, deceased, and having given a full authority to her attorney or wakil, the above-mentioned Cursetji Nusservanji Camaji is to discharge all the debts due by our patron, the late Framji Cowasji, deceased, and after paying all [513] those debts and after paying them by selling the landed property and other goods and effects, the surplus, whatever it may be, shall be divided among the said heirs, determined in the above-mentioned paragraph 9, agreeably to what is written in that very paragraph, and the same is truly to be apportioned

by the said Bai Bachubai, the widow of the late Framji Cowasji, deceased, and Cursetji Nusservanji Camaji.

11. After paying in full, agreeably to what is written above, all the creditors of the late Seth Framji Cowasji, deceased, out of the income of the Poway Estate of the late Seth Framji Cowasji, deceased, as written above; out of the remaining income, whatever it may come to, after paying for the two charitable works—namely, supplying water and the management of fire-temple, for which trust-deeds have been made agreeably to and as mentioned in paragraphs 7 and 8—and after deducting the amount of the expenses of those villages, the remainder is to be apportioned to the above-mentioned heirs agreeably to the shares mentioned above; but after their death their shares are to be enjoyed and received by their heirs and children from generation to generation for ever; no other person shall make any claim or demand whatsoever thereon; and, should any male or female heirs give away his or her or their share to a stranger or to any improper person, the same should not take effect; and we, all the heirs, do agree by this writing that, should anything of this kind be done, it is to be all null and void, and is truly to become void; and should any of the under-mentioned heirs or their heirs and children die hereafter without issue, then his or her share is truly to go to the surviving male and female heirs, and my (Bai Bachubai's) share, too, after my death, is truly to go to the male and female heirs settled above, and, in the event of their death, to their children and heirs in the manner written above. This we all, the undersigned heirs, concurring with one another, are truly to abide by. Should we, or our children and heirs, now or hereafter, make any alterations or deviations therein, or make any claim or demand thereon, it is to be truly null and void. Moreover, the authority for the management of all the remaining estate of the late Seth Framji Cowasji, deceased, whatever it may be, and the income of the villages in Salsette, inclusive of Poway, and the management and the taking care thereof, and for the management of the supply of water for charity from the Girgaon cart to the poor of Kamathipura in Bombay belongs to us, Pestonji Framji and Nanabhoj Framji, executors and heirs appointed in the said will of the late Seth Framji Cowasji, deceased; and, in the event of the death of either of them, one of his sons and heirs is to be appointed by the other, and so from generation to generation, who is to do all the business agreeably to what is written above. Should any one die without appointing any one out of his sons as his heirs, then his eldest son, whoever he may be, is truly to join in conducting all the management on behalf of his father agreeably to what is written above, and is truly to give and receive what is due to and from the other heirs appointed by this writing agreeably to what is written above; no other heirs have any authority in this matter, and should any one whatsoever raise any claim or demand whatsoever thereon at any time, it is truly to be null and void.

[B14] 12. The trust-deeds, which have been executed by our patron, the late Framji Cowasji, deceased, during his lifetime are to be kept in force in every respect, and they shall not in any way be affected, or be suffered to be affected, by anything, contained in this writing: and we are truly to agree and abide by whatever is contained therein, and conduct ourselves agreeably thereto.

14. As the late Seth Framji Cowasji, deceased, had himself no right either to sell or mortgage the villages and the estate in Salsette belonging to our patron, the late Framji Cowasji, deceased, consequently none can ever exercise such a right over the same in any respect; but we, the undersigned heirs, and our successive heirs do agree that we are in no way able either now, or at any time hereafter, to sell or mortgage the said estate in Salsette; but in addition thereto, agreeably to what is written in the above paragraph in this writing, it is agreed that the claim of inheritance of us, the undersigned heirs of our patron, the late Framji Cowasji, deceased, is to be received out of the income of this estate. As to that claim we, the undersigned, all the heirs of the late Seth Framji Cowasji, deceased and our successive heirs do agree that the claim of each of us separately over the above-mentioned income is not in any way to be sold or to be given in writing to any one now or hereafter by any of one of us or any of our successive heirs; and should any one do any such thing it shall truly be null and void by this writing. Our respective shares, after they shall have come into our hands, may be used and enjoyed by us in any way we like; but agreeably to this writing, we are not to sell or give away in writing our prospective income to anybody, which we all are truly to agree to and by agreeably to this writing.

15. We, after having read and understood the above-mentioned particulars, have at present signed this writing, and are truly to sign without any objection another writing also that may be made in English from this writing through an attorney.—Dated *Samvat* 1907, *Vaisak Vud* the 9th day of the week, being Saturday, the English date being the 24th of May A.D. 1851.

In June, 1851, probate of the will and codicil was granted by the late Supreme Court to the testator's widow and executrix, Bachubai—

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power being reserved to the two others, her sons Pestonji and Framji, to come in and prove the same.

Mr. Cursetji Nusservanji Cama managed the estate in obedience to the powers conferred on him by the family agreement of the 24th May, 1851, and by Bachubai, the executrix, and, it is alleged, paid off, as soon as he was able, all the testator's debts.

In November, 1858, Bachubai died intestate, and on the 17th December, 1858, probate of the will and codicil of Framji Cowasji was granted to the surviving executors, the testator's two sons Pestonji and Nanabhoy.

The testator's eldest son Jehangir, died on the 16th December, 1863, having by his will appointed his wife, Mithibai (the first [515] plaintiff in this suit), his executrix, and given her authority over his inheritance and share in the property of his deceased father. Mithibai obtained probate of his will on the 25th January, 1866.

Pestonji, one of the testator's three sons, died after the commencement of this suit, and one of his executors, Mr. Limji Nowroji Banaji, was made a party defendant in his stead.

Nanabhoy, the other son of the testator, is still alive; but all his right, title, and interest in his father's property having been attached in execution of one or more decrees against him, all his interest in the property and all the rights secured by such decrees became subsequently vested in Hari Valabdas Kaliandas, who, by a Judge's order dated the 18th March, 1880,—made after full argument, and which order was not appealed against—was added as a defendant.

The suit, the plaint in which was filed on the 5th December, 1870, was brought by Mithibai, the widow, and by the heirs of Jehangir Framji against the other parties to the family agreement of the 24th May, 1851—the suit being based upon that agreement—and prayed that the rights and interests of the plaintiffs and defendants, under the said agreement of the 24th May, 1851, might be ascertained and declared; that the net residue of the testator's estate might be ascertained and decided according to the shares mentioned in the said agreement; that such of the immoveable property as was unsold might be sold under the decree and directions of this Court; that the defendants, Pestonji Framji and Nanabhoy Framji, might be directed to account for all moneys received by them, or either of them, belonging to the estate of the testator, or which, but for their or either of their wilful neglect or default, might have been received by them or either of them; that a receiver might be appointed, and the said Pestonji Framji and Nanabhoy Framji restrained by injunction from receiving and collecting the rents, profits, and moneys belonging to the estate of the deceased Framji Cowasji; that the share of Bachubai in the estate of Framji Cowasji might be ascertained and set aside, or distributed among her next-of-kin, under the decree and directions of the Court; that, pending the suit, provision might be made [516] for the maintenance of the plaintiff, Mithibai, and such of the defendants, other than the defendants Pestonji Framji and Nanabhoy Framji, as might desire the same out of their shares in the estate of Framji Cowasji. There was also a prayer for further relief.

The suit came on for hearing before me, and was heard on the 20th, 22nd, 23rd, and 24th February, 1872, on which last day the Court declared, with the consent of the plaintiffs and defendants, their respective counsel and attorneys, that the plaintiffs and defendants were entitled to have the estate of the late Framji Cowasji ascertained and distributed under the

agreement of the 24th May, 1851. The Court also declared that the agreement of the 24th May, 1851, was, and then was, a binding and valid agreement between the parties thereto, and decreed the same accordingly; and ordered, by and with the like consent, that it be referred to the Commissioner of the Court to enquire and report who were then entitled to a share in the estate then remaining of Framji Cowasji, and to ascertain and report in what shares and from what dates they were so entitled on the footing of the agreement of the 24th May, 1851, after making all just allowances, and to ascertain and report the amount of the share of Bachubai, the testator's widow, in his moveable and immoveable estate, and also of her ornaments and moveable estate (if any), and to report amongst whom and in what shares the same ought to be divided. The decretal order contained directions as to taking certain accounts, and appointed the late Mr. Henry Gamble sole receiver to manage the said estate in lieu of the defendant, Pestonji Framji; and Pestonji Framji and Nanabhoy Framji were restrained from collecting or receiving the rents, profits, and moneys belonging to the estate. The receiver was, with the like consent, ordered to pay to certain of the parties to the suit certain sums monthly for their maintenance; and it was likewise ordered that such of the immoveable property of Framji Cowasji as was not sold be sold forthwith by the Commissioner, in one or more lots, by private contract or public auction as to him might seem best, with liberty to the parties to bid. Liberty was given to the Commissioner to report specially as to the best mode of releasing any portion of the estate from any charges or [517] incumbrances thereon and of providing for the same. The costs of all the parties to the suit up to and including the decretal order were to be paid out of the estate. Further directions and further costs were reserved with liberty to any of the parties to apply as there might be occasion.

The accounts directed by the above decretal order have been partly taken in the Commissioner's office by Mr. C. E. Fox and Mr. G. H. Farran, and are still being taken by the latter officer. Part of the testator's landed estate in Bombay has been sold; but, in consequence of the difficulty experienced in giving a good title to the Poway Estate, in Salsette, by reason of its liability to contribute towards the maintenance of the water-supply to the two reservoirs in the Duncan Road and the necessity of obtaining the concurrence of the Government of Bombay to any alienation of the Poway Estate, no part of that estate has as yet been sold.

From the recitals in the special report of the Assistant Commissioner of the 11th April, 1881, now objected to, it appears that a warrant was taken out by Messrs. Craigie, Lynch, and Owen, solicitors for Hari Valabdas Kaliandas, "to show cause why the Assistant Commissioner should not issue a certificate or special report defining the nature and extent of the estate and interest in the Poway Estate of the defendants, Hari Valabdas Kaliandas and Nanabhoy Framji, and of the other persons named as heirs in the ninth clause of the family agreement dated the 24th May, 1851." And the Assistant Commissioner having, upon the return of such warrant, been attended by the parties or their solicitors, made his special report, dated the 11th April, 1881, to the effect already stated at the commencement of these remarks, and thereby decided (*inter alia*) that the interest of the defendant, Hari Valabdas Kaliandas, extends only to the life-interest of the defendant, Nanabhoy Framji, in the Poway Estate.

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The parties to that agreement mostly support the contention of Hari Valabdas Kaliandas in his objection to the above finding of the Commissioner.

The objections to the Commissioner's special report were argued before me at considerable length, on the 28th and 29th [518] April and the 2nd and 3rd May last, by Mr. Latham for Hari Valabdas Kaliandas, supported by Mr. Lang, who appeared for all the plaintiffs except Hormusji Pestonji Framji, Jerbai, and Awabai; and by the Advocate-General, who appeared for Nanabhoy Framji. Such of the other parties to the suit as were not represented by counsel took no part in the argument,—the plaintiff, Hormusji Pestonji Framji, who appeared in person on behalf of himself and his wife, the plaintiff Jerbai, stating only that he relied on the decretal order, and left the rest to the Court.

The question now for determination is whether the finding of the Assistant Commissioner—that the persons who signed the family agreement dated the 24th May, 1851, have or had life-interests only in the Poway Estate—is erroneous.

The family agreement, upon the true construction of which the question turns, is written in the Gujarathi language and character, and is headed, as is usual in native documents, with "Shree 1½" (i.e., prosperity, &c.) It was evidently framed without any legal advice; but the parties intended that a more formal document should be executed, as, by the last clause of it (the fifteenth clause), they say: "We, after having read and understood the above-mentioned particulars, have at present signed this writing; are truly to sign, without any objection, another writing also that may be made in English from this writing through an attorney."

The translation, a copy of which was annexed to the plaint, was admitted to be correct and not susceptible of improvement. It was made by the late Mr. Narayan Dinanath on the 13th September, 1851, then one of the interpreters and translators of the late Supreme Court of Bombay.

It was not contended before me that the persons who signed the agreement were domiciled elsewhere than in the island of Bombay. They were all Parsis; and it was argued on either side that the law to be applied, so far as regards that portion of the agreement which concerns the Poway Estate, must be the law in force as to Paris in the island of Salsette, which is part of the Mofussil of this Presidency, forming part of the collectorate of Thana and beyond the ordinary original civil jurisdiction of the High Court of Bombay.

[519] The learned Advocate-General stated that no case has decided what is the tenure of land belonging to Parsis in the Mofussil of Bombay; and he contended that English law does not apply to Parsis outside the island of Bombay; that the leading principles as to English real property, including the law of primogeniture, are not applicable to Parsis in the Mofussil; that there is no distinction between moveable and immovable property as regards Parsis; that this agreement must, as regards the Poway Estate, be construed with reference to the *lex loci* of the Mofussil; and that Parsis as to that estate must be governed by their own usages and customs.

Mr. Latham, on the other hand, contended that the strict English law, with the distinction between realty and personalty, would not apply to the Mofussil; that Nanabhoy Framji had, and that Hari Valabdas Kaliandas now has an absolute estate of inheritance in one-third of one-half of the Poway Estate, possibly liable to be divested if Nanabhoy

dies without issue (which at present seems improbable, as Mr. Latham stated that Nanabhoy has two sons who have children); that the Court will apply the *lex loci* in Salsette in regard to property there. Mr. Latham stated that he and the Advocate-General seemed to agree that the law of descent there would more nearly resemble personal law. He contended that here the parties intended to create an estate which would remain in the family for ever, which the Court would be bound to reject. That the rule in *Shelley's Case* applied; but, even if it did not, that the estates of the persons who signed the agreement were not for life, and that the estate of inheritance in the parties to the agreement was good, but the restraint against alienation was absolutely void.

Some of the above points are not merely novel, but of much importance and difficulty.

Now, what is the law applicable to these limitations in the family agreement of the Poway Estate?

With respect to real property, the *lex loci rei sita* universally prevails: *Sill v. Worswick* (1); *Doe d. Birtwhistle v. Vardill* (2); *Brodie [520] v. Barry* (3); *Warrender v. Warrender* (4); *Story's Conflict of Laws*, ss. 365—428; *Forsyth's Cases on Constitutional Law*, 248.

The case of *Earl Nelson v. Lord Bridport* (5), cited by the Advocate-General, and decided in 1846 by Lord Langdale, Master of the Rolls—a case presenting several points analogous to those in the one now before me—may here be noticed in some little detail.

Ferdinand the IV, King of the Two Sicilies, granted in 1799, by a charter or instrument written in the Latin Language, to Horatia Viscount Nelson, for himself and the heirs of his body, the duchy and estate of Bronte, situated on the western slopes of Mount Etna, with power to appoint a successor to whom solemn investiture should be granted according to the law of Sicily. By a will, in the English Form, Lord Nelson appointed William (afterwards Earl) Nelson and W. Haslewood to succeed to the Bronte Estate, and he devised the same upon certain trusts. For the purpose of determining the rights of the parties it became necessary to ascertain, as well as might be, what, according to the laws of Sicily as effecting the estate of Bronte, was the operation and effect of the will of Viscount Nelson, and such enquiries as were thought proper were referred to the Master who reported thereon. Many exceptions were taken to his report, some of which related to his findings respecting the law of Sicily, or the effect of it, and were argued before the Master of the Rolls. It appeared that the law of Sicily did not admit of a settlement or conveyance of the estate with a rule of succession conformable in all respects to the limitations directed by the will.

At p. 570 Lord Langdale said: "The incidents to real estate, the right of alienating or limiting it, and the course of succession to it, depend entirely on the law of the country where the estate is situated. Lord Nelson, having accepted this Sicilian estate, could deal with it only as the Sicilian law allowed; he had a right to appoint a successor, but no right to modify the estate, interest or power of disposition to which the successor was entitled by the law of Sicily. The successor became the holder of the estate [521] subject to the incidents annexed to it by the grant and the law of Sicily, and no others." At p. 572 he said: "Earl Nelson, the duly nominated successor of Lord Nelson, the grantee, had obtained the

(1) 1 H. Bl. 665.

(2) 5 B. & C. 438.

(3) 2 Ves. & B. 127.

(4) 9 Bligh's H L. 89.

(5) 8 Beav. 547.

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only estate which the law of Sicily allowed him to have—an inalienable estate descendible in a particular manner. By an alteration in the general law of Sicily that estate was afterwards enlarged, and Earl Nelson became the absolute owner of it, with a free power of disposing of it as he pleased;" and he stated that he was of opinion (p. 574) "that the alteration made in the law of Sicily gave the absolute ownership of the estate to William Earl Nelson, and that the estate did not continue to be, and did not then become, subject and liable to the trusts of the will so far as they regarded the Bronte Estate."

In *Webbe v. Lester* (1), which was argued in 1865 by the late Mr. Anstey on one side and by myself on the other—a case as to whether certain land near Poona had been held by two persons as joint tenants or as tenants in common—Mr. Justice Couch in delivering the judgment of the Court said (p. 56): "The English law is confined within the limits of the charters of the Supreme Courts, and is not the law of the Mofussil, where by Reg. IV of 1827, s. 26, the law to be observed in the trial of suits is 'Acts of Parliament and Regulations of Government applicable to the case; in the absence of such Acts and Regulations the usage of the country in which the suit arose; if none such appears, the law of the defendant; and, in the absence of specific law and usage, justice, equity, and good conscience alone.'"

In the Report of the Commission appointed to enquire into the usages recognized as laws by the Parsi community of India and into the necessity of special legislation in connection with them, dated the 13th October, 1862, and of which Commission Sir Joseph Arnould and Mr. Justice Newton were the two European members, it is stated in paragraph 2 that "the Parsis of the Mofussil in this Presidency have, ever since the year 1824, when the charter constituting the late Bombay Supreme Court came into operation, been under a different system of substantive law from the Parsis within the limits of the late Supreme Court and of the present [522] High Court in its ordinary original civil jurisdiction. The Parsis of the Mofussil have throughout had law administered to them in accordance with such usages and customs as the litigants were enabled from time to time to prove to the satisfaction of the adjudicating tribunal to be binding upon the Parsi community."

In paragraph 3 it is stated that "the law applicable to Parsis in the Mofussil has throughout been and still is ascertained and administered in the mode thus indicated" (i.e., as indicated by s. 27, cl. 2 of Reg. IV of 1827): "The disadvantages of such a mode of administering law are its uncertainty, its consequent tendency to encourage litigation, the inconvenience and delay arising from having to ascertain the law in each case, as well as to apply it. On the other hand, such a mode of administering law is likely to be popular with a community whose prejudices are strong, whose dread of change is deeply rooted, and whose progress in civilization is comparatively slight."

In paragraph 4 it is stated that "in the Recorder's Court of Bombay the law appears for some time to have been administered to Parsis on the same principles as in the Mofussil. Thus, in the case of the 'Gheestas,' Sir James Mackintosh, just before leaving India (in 1811), was induced, on evidence that such was Parsi usage, to admit to the right of inheritance the illegitimate son of an intestate Parsi, because he had been invested with the sacred badge. This decision, which caused a great sensation

among the Parsi community at the time, was reversed by Sir John Newbold (Sir James Mackintosh's immediate acting successor); and it is by no means improbable that this and other instances of the difficulty and uncertainty introduced into the administration of law among Parsis, by the admission of such evidence of usage, had much to do with inducing the Judges of the late Supreme Court to exclude Parsis from the benefit of that clause in the charter of 1823 which provides "that matters of contract, inheritance, and succession should be determined, in the case of Mahomedans, by the laws and usages of the Mahomedans, and in the case of the Gentus by the laws and usages of the Gentus." The Judges of the late Supreme Court "declined to regard the Parsis as Gentus; and from thenceforth the Parsis, within the limits of the jurisdiction of the late Supreme Court, were, 'in all [523] matters of contract, inheritance, and succession,' subjected to English civil law; while in matters of marriage and divorce they have, as will presently appear, been for some years absolutely deprived of the benefit of all law."

And in paragraph 20 the Commissioners state that "before recording their conclusion on this point" (*i.e.*, what, if any, are the usages recognized as laws by the Parsis of India as to the right of females to inherit to intestate male Parsis?) "the Commission wish to observe, as a general result of an anxious and laborious enquiry on their part into the matter, that whatever usages as to property, inheritance, and succession may hitherto have been regarded as law by the Parsi community in India, are not Zoroastrian usages but Hindu usages—usages to which, in the course of some twelve centuries of sojourn in the land, the Parsis have become habituated, and which they have acquiesced in, regarding them as having the force of customary law. After all the enquiry they have been able to make, the Commission are of opinion that the language of Mr. Borradaile (a gentleman profoundly versed in the history and manners of the Parsis) is almost as true now as it was when first published in 1825. 'The Parsis,' (1) says Mr. Borradaile, 'have no laws; for such books as they had before they emigrated from Persia were at that time all lost; and the rules, which, by their engagement with the Hindu Chief of Sunjan, they bound themselves to obey, form, together with the custom of the country which they insensibly picked up in their intercourse with the people, a body of rules or common law differing in few respects from that custom of the country founded on Hindu law which regulates the whole of a Hindu's life.'"

No evidence was offered, before the Assistant Commissioner of this Court, as to any usage in regard to land in Salsette, or as to any specific law or usage by which, as the law of the persons who signed the agreement of the 24th May, 1851, he ought to have decided the points argued before him on the return of the warrant taken out by the solicitors of Hari Valabdas Kaliandas.

I have had nothing placed before me to indicate the existence of any specific law or usage applicable either to lands held by [524] Parsis in Salsette, or to the parties to the family agreement. It does not, indeed, expressly appear whether all or any of the parties to that agreement were born in Bombay or in British India:—whether, in fact, they must or must not be considered as natural-born subjects of the Queen, so as to make (as the Court said in *Webbe v. Lester* (2)) the English law their law.

(1) 1 Borr. 2, note.

(2) 2 B.H.C.R. 52.

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I think it probable, however, that the persons who signed that agreement were born in Bombay.

Framji Cowasji in his will dated the 5th July, 1828 (and which will is recited in that agreement), describes (para. 10) his deceased father Cowasji as having been "formerly ruined by trade and expenses. I received nothing belonging to him ; on the contrary, from the day I was seventeen years of age, I laboured and served Europeans, and according to my ability, I provided, as I could, for the expenses of the house. . . . According to my ability I took care of my brothers in such a way as I could. Besides this there are sundry small sums of cash against my father, Cowasji Byramji, and from a former period up to this day I have been paying his creditors relative to the same. I, having made an account book, have given it to him up to the 23rd October, 1824 ; about Rs. 35,237 are found due as a balance to me." In his will, which is of great length, Framji Cowasji describes himself (para. 13) as having carried on business with European mates and captains of vessels, and (para. 7) as then transacting the business of captains of European ships. He appears to have invested large sums in the purchase of bungalows and house property in the Fort and elsewhere in the island of Bombay ; one of such houses he describes in the paragraph 6 of his will as the bungalow in the Sans Souci Garden at the Mount, lately repaired, and then in the occupation of Sir Edward West, Chief Justice, at the monthly rent of Rs. 300. He refers to an office and warehouses which he had built in the Fort—to six shares he held in the Apollo Screws (then of very considerable value)—to his ships (one of which, the *Sulleymany*, he says he had navigated for so many years) ; and he estimated (para. 6) the net annual income from that portion of his landed estate which he was then describing and from his shares in the Apollo Screws to amount to Rs. 35,000.

[525] In the indenture dated the 15th February, 1837, already noticed, by which the East India Company granted the Poway Estate unto and to the use of Framji Cowasji, his heirs, executors, administrators, and assigns for ever, he was described as "Framji Cowasji Banaji, Esquire, of Bombay, Parsi Merchant."

If, as he says in his will, he did business with Europeans from the time he was seventeen ; and if his trade, as it would seem to have been, was carried on, and his money made in Bombay, which contains a far larger number of Parsis than are to be found in any other town in India, I think it not improbable that he married or lived in Bombay, and, if so, it is likely that most, if not all, of his numerous children were born there.

If the persons who signed the family agreement were born in Bombay, or even in British India, they would be natural-born subjects of the Queen.

By the common law of England, every person born within the dominions of the Crown, no matter whether of English or of foreign parents,—and in the latter case whether the parents were settled or merely temporarily sojourning in the country,—was an English subject, save only the children of Foreign Ambassadors (who were excepted because their fathers carried their own nationality with them), or a child born to a foreigner during the hostile occupation of any part of the territories of England (1).

(1) Nationality or the Law relating to Subjects and Aliens, by Sir Alexander Cockburn, Lord Chief Justice of England, 1869.

In the well-known judgment, as to landed tenures in Bombay, of the Court of Appeal in the case of *Nowrojee Byramjee v. Rogers* (1), delivered by the present Chief Justice in 1867 (concurrent in by Mr. Justice Couch), it is stated (pp. 11-12) that "until the recent legislation of the year 1865 (Act XV of 1865, Act XXI of 1865, and the Indian Succession Act of 1865) the law uniformly applied to Parsis and their property in the island of Bombay by the Supreme Court, and, since it was closed by the High Court at its Original Jurisdiction Side, has been, as correctly stated in the clear and able report of the Parsi Law Commission (dated 13th October, 1862) of which Sir Joseph Arnould and Mr. Justice [526] Newton were members the English law, except so far as it is varied by Act IX of 1837, and also since the decision of the Privy Council in 1856 in *Ardasir Cursetjee v. Perozbai* (2), except as to matrimonial suits at the Ecclesiastical Side of the Court, and, perhaps I should add, except as to bigamy."

In the present case the plaintiffs brought their suit, praying that the rights and interests of the plaintiffs and defendants under the agreement of the 24th May, 1851, might be ascertained and declared. Most of the immoveable property of the late Framji Cowasji, as appears by his will, was situated within the island of Bombay. A portion only of such immoveable property, *viz.*, the Poway Estate, in Salsette, lies outside such jurisdiction. And such estate and its revenues had been in due form made liable by Framji Cowasji to certain onerous charges in respect of the expense of supplying water to the two reservoirs which are situated in the Duncan Road within the island, and, therefore, within the ordinary civil jurisdiction of the High Court of Bombay. The persons who signed that agreement were, as already stated, probably born in Bombay, and were, therefore, natural-born subjects of the Queen or of Her Royal Predecessors on the British throne. The agreement was, I think, in answer to a question from the Court, stated to have been executed in Bombay. By the agreement the parties to it bound themselves (cl. 15) to sign, without any objection, another writing that should be made in English from that agreement through an attorney, and at that date in 1851 the attorneys of the Supreme Court were exclusively Europeans.

In the early case of the *Earl of Athol v. Earl of Derby* (3) a contract respecting the Isle of Man, though out of the jurisdiction, was enforced by the Court of Chancery in England. So in *Toller v. Carteret* (4), where a bill was filed by the mortgagee for foreclosure of the Island of Sark, the defendant pleaded to the jurisdiction of the Court that the Island of Sark was part of the Duchy of Normandy, and had laws of its own, and was not under the jurisdiction of the Court of Chancery; but the Lord Keeper, Sir Nathan Wright, overruled the plea, observing that the Court of Chancery [527] had jurisdiction, the defendant being served with process here, and *equitas agit in personam*, which is an answer to the objection.

In the leading case of *Penn v. Lord Baltimore* (5) Lord Hardwicke decreed the specific performance of articles executed in England concerning the boundaries of two provinces in America.

And in *Cood v. Cood* (6) Sir J. Romilly, M. R. said: "The right to land in Chili must, no doubt, be determined by their laws; but a contract entered into between three English gentlemen—two of them domiciled and

(1) 4 B.H.C.R. 1.

(3) 1 Ch. Cas. 220.

(5) 1 Ves. Sen. 444, and 2 Wh. & T. L. C. 939 (5th ed.)

(6) 33 L. J. Ch. 273.

(2) 6 M. I.A. 348.

(4) 2 Vern. 495.

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residing in England, and the third residing in Chili, but not having acquired a foreign domicile—must, I think, be governed and construed by the rules of English law.”

In *Webbe v. Lester*, already cited, Mr. Justice Couch said that there was no evidence that the defendants must be considered as natural-born subjects of the Queen so as to make the English law their law, nor any evidence of any specific law or usage by which, as the law of the defendants, the suit ought to be decided; and the rights of the parties, must, therefore, be determined according to justice, equity, and good conscience, and that in so doing the Court might be guided by the principles of English law applicable to a similar state of circumstances, and that the Court had come to the conclusion that, according to both justice, equity, and good conscience and to English law, which in Courts of Equity ought to be identical, there was in that case no right of survivorship.

In the month preceding the one in which that decision was given, a case had been argued before Justices Couch, Newton, and Warden in regard to the application of the principles of English law in a Court in the Mofussil on special appeal from the District Judge of the Konkan, of which zilla the island of Salsette, in which the Poway Estate is situated, forms part: *Dada Honajee v. Babajee Jagushet* (1).

In delivering the judgment of the Court Mr. Justice Couch said (p. 40): “The judgment of the Privy Council in *Vardin Seth Sam v. Luckputty Royjee Lallah* (2) is an authority of the highest Court of Appeal; that, although the English law is not [528] obligatory upon the Courts in the Mofussil, they ought, in proceeding according to justice, equity, and good conscience, to be governed by the principles of the English law applicable to a similar state of circumstances.

Now, a not inconsiderable portion of the jurisdiction of this Court is exercised in either compelling parties to perform their agreements, or in awarding damages against those who have refused to perform them. Where persons for a valid consideration enter into a contract to which no objection can be raised either in law or in equity, it would be contrary to justice, equity, and good conscience, as well as to English law, to allow the parties to violate such contract with impunity. Courts of Equity look, too, with much favour upon family arrangements by way of compromise. See *Stapilton v. Stapilton* (3).

The parties to this family arrangement seek by their suit to have it established, and they now come—those of them at least who are represented by counsel, and following the lead, apparently, of Hari Valabdas Kaliandas, a Hindu, and, therefore, an alien in race to this Parsi family, but who has been made a party to the suit in consequence of his having become possessed of all the right, title, and interest of Nanabhoy Framji in the estate—and, with the exception only of Nanabhoy Framji, they ask this Court to hold the legal effect of the agreement to be totally different to the intention expressed on the face of that instrument.

For I take it to be clear, beyond all doubt, that the parties to the agreement intended, and have expressed that intention with sufficient clearness in the document itself, that, in dealing with the Poway Estate they only professed to and did only intend to deal with the income of it during a succession of life-interests—limitations which would, no doubt, infringe the rule against perpetuities; or, to speak more accurately and

(1) 2 B.H.C.R. 36.

(2) 9 M.I.A. 303.

(3) 1 Atk. 2 and 2 Wh. & T.L.C., 836 (5th ed.), and the cases collected in the notes.

with special reference to the motion now before me, that they intended and by their language have said that they themselves, the persons who signed the agreement, should take no more than life-interests in the income of the Poway Estate. Indeed, the rule in *Shelley's Case*, which [529] Mr. Latham asked the Court to hold applicable, admits the existence of, and cannot have any operation unless there be a life-estate in the ancestor of first taker.

Having already read the material clauses of the agreement I will do no more than here point out that by cl. 11 the remaining income (*i.e.*, of the Poway Estate) is to be apportioned to the heirs mentioned in cl. 7 agreeably to the shares therein mentioned, but after their death their shares are to be enjoyed and received by their heirs and children from generation to generation; and, by cl. 14, they state that, as Framji Cowasji had himself no right to sell or mortgage the villages and estate in Salsette, consequently none can ever exercise such a right; and the persons who signed the agreement, and their successive heirs agree that they are in no way able now or at any time hereafter to sell or mortgage the said estate in Salsette; and it is agreed that the claim of inheritance of them, the signors of the document, is to be received out of the income of this estate, and as to that claim they and their successive heirs agree that the claim of each of them separately over the above-mentioned income is not in any way to be sold or to be given in writing to any one now or hereafter by any of them or any of their successive heirs; and, should any one do any such thing, it shall truly be null and void by that writing. And they conclude that fourteenth clause by saying that their respective shares, after they shall have come into their hands, may be used and enjoyed by them in any way they like; but, agreeably to that writing, they are not to sell or give away, in writing, their prospective income to anybody, which they all are truly to agree to and abide by agreeably to that writing.

Clearer language, though no doubt it is untechnical, could not, I think, in the evident absence of legal advice, have been used to indicate the intention of the parties to that agreement, that, so far as they themselves were concerned, they were only during their lives to enjoy the income of the Poway Estate which remained after the charges upon it were satisfied, and without any power of anticipating the same.

Such, in my opinion, being undoubtedly the intention of the [530] parties as expressed in the agreement itself, is there any law which will prevent this Court carrying out such intention? In the case of *Varden Seth Sam v. Luckputy Royjee Lallah and others* (1) there is a passage in the judgment to the Privy Council delivered by Lord Kingsdown (2) which I will here quote, and which is in these words: "In this case there is an express contract for a security on the lands to which, no law invalidating it, effect must be given between the parties themselves."

Now, is there any law which this Court is bound to administer in the present case invalidating the contract by which the parties to this agreement have declared that during their respective lives they shall only take the income—*i.e.*, the remaining income—of the Poway Estate? Mr. Latham, in arguing that this was an absolute estate of inheritance in the parties to the agreement, at first cited and relied on the rule in *Shelley's Case*, and pointed out that it applied to personalty, citing 2 Jarman, on Wills, 306, 534, 535; Fearn's Contingent Remainders, p. 466,

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(1) 9 M.I.A. 303.

(2) At p. 322.

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note (H) ; whilst in his reply he stated that he was not arguing that English law applied, or that these were estates tail, but that the Court would apply the *lex loci* in Salsette in regard to property there. Later on in his reply he contended that the rule in *Shelley's Case* applied; but, even if it did not, that the first estate were not for life.

There appears to be this difficulty in applying "justice, equity and good conscience alone" (Regulation IV of 1827, s. 26) as interpreted by Couch, J., in 2 Bom. H. C. Rep. 38 and 55, and by the Privy Council in 9 Moore's Ind. App. 303, *viz.*, "according to the principles of the English law applicable to a similar state of circumstances," *viz.*, that there are no decisions directly bearing on this novel point either in England or in India ; for it has never yet been decided,—at least the learned Advocate-General as well as myself has been unable to discover, nor was Mr. Latham able to point out any case in England or in India which has decided what is the tenure of land belonging to Parsis in the Mofussil of Bombay, or the Mofussil of any other part of British India, or anything strictly analogous to such a point.

[531] Some portions of the English law have been held to have no effect in India and other parts of the possessions of the British Crown. The Mortmain Act (9 Geo. II, c. 36), is not applicable to India (*The Mayor of Lyons v. The East India Company* (1) ; *Mitford v. Reynolds* (2), nor in general to our Colonies as to New South Wales (*Whicker v. Hume* (3)) or to the West Indies (*Attorney-General v. Steward* (4)). The English law as to *felo de se*, and the forfeiture of goods and chattels consequent, upon suicide, does not apply to a native Hindu, though a British subject, committing suicide at Calcutta: *Advocate-General of Bengal v. Ranees Surnomoye Dossee* (5).

The rule in *Shelley's Case*, which Mr. Latham argued that the Court should apply to these limitations of the Poway Estate, has never yet, that I am aware, been held applicable to the deeds or wills of Parsis in cases arising within the local limits of the Supreme or High Court of Bombay, or in regard to the property of Parsis in the Mofussil of this Presidency. Mr. Fearne in his very elaborate and exhaustive discussion² of that rule in his Essay on Contingent Remainders says (p. 83, 10th ed., 1844) that the rule has generally been considered of feudal origin, and introduced to prevent frauds upon the tenure. It has been held in England that words conferring an estate tail in real, give an absolute interest in personal estate (*Leventhorpe v. Ashbie* (6)) and in accordance with that case, which was cited by Mr. Fearne as a leading one upon the subject, it has, no doubt, been established by numerous cases that a bequest to a person of chattels, whether real or personal, in such terms as would, in the case of a devise of real estate, have conferred upon him an estate tail, will, as a general rule, but subject to certain exceptions, give him an absolute interest, which on his death will go, not to his heir in tail, but to his personal representative. See the cases collected by Mr. Tudor in the notes to *Leventhorpe v. Ashbie*, pp. 764, 765.

But the words "heirs of the body" may be so explained by the context as to have the meaning of the word "children" in [532] which case, as in the case of realty, the parent will only take for life, and the children as purchasers: *Symers v. Jobson* (8). In *Sparling v. Parker* (7) where there

(1) 1 M.I.A. 175.

(2) 1 Phillips 185.

(3) 7 H.L. Cases, 124.

(4) 2 Mer. 160.

(5) 2 Moore's P.C. Ca. (N.S.) 22=9 M.I.A. 387.

(6) Tu. R. P. C. 763 (2nd. ed. 1863).

(8) 16 Sim. 267.

(7) 29 Beav. 450.

was a bequest of personal estate to Charles Sparling "and to his first and other sons after him in the usual mode of succession," it was held by Sir John Romily, Master of the Rolls, that Charles Sparling only took an estate for life. The Master of the Rolls said: "I have no doubt, on the intention and on the true construction of this will, that no larger estate is given to Charles than for life. I cannot go beyond that; Charles may yet have children."

I may here remark that the material words in cl. 11 of the family agreement are that "the remainder" (*i.e.*, "the remaining income of the Poway Estate") "is to be apportioned to the above-mentioned heirs" (*i.e.*, those persons who signed the agreement) "agreeably to the shares mentioned above, but after their death their shares are to be enjoyed and received by their heirs and children from generation to generation for ever."

Two decisions of high authority may here be noticed.

The first was the case of *Knight v. Ellis* (1) decided by Lord Chancellor Thurlow. There the testator directed certain rents to be accumulated till his grand-nephew should attain the age of twenty-one years, and after that event he gave the interest of that accumulated fund to his grand-nephew for his life, and after his decease he gave the fund to his issue male, and in default of such issue to his (the testator's) three nieces. It was argued that as this would have been an estate tail in real estate it was an absolute interest in personalty; but Lord Thurlow held otherwise, that the grand-nephew took only a life-interest, and having died without issue who would have taken as purchasers, the limitation at once took effect.

At p. 578 he said: "Now an estate in chattels is not transmissible to the issue in the same manner as a real estate, nor capable of any kind of descent, and, therefore, an estate in chattels so given, from the necessity of the thing gives the whole interest to the first taker; but if the testator, without leaving it to the [533] necessary implication, gives the fund expressly to the issue, they are not driven to the former rule, but the issue may take as purchasers, and then there is an end of the enlargement of any kind of the estate of the tenant for life, for another estate is given after his death to other persons who are to take by purchase; it no longer rests on conjecture. The word 'issue' used in a will, certainly is considered as creating an estate tail, and that because the context puts on the word an import which it has not naturally, but in a feoffment it is not a word of inheritance, and a gift to A and the issue of his body gives only an estate for life. On the whole I think that the issue, if any, would have taken as purchasers."

The second case was *ex parte Wynch* (2) which was heard on appeal from Vice-Chancellor Stuart by Lord Chancellor Cranworth and the Lords Justices Knight Bruce and Turner. The question arose under a devise by John Wynch, late of Vellore, in India, who by his will, dated the 8th March, 1796, had bequeathed to Anna Maria Mealy, then wife of R. Mealy, Lieutenant and Fort Adjutant of Vellore, in the East India Company's service, an annuity of £600 sterling "for her life and the issue from her body lawfully begotten, on failure of which to revert to my heirs," with a request that "K and C would act as trustees for her, so that the annuity might be secured for her sole use and benefit. It was held by Lord Cranworth and by Lord Justice Turner—the Lord Justice Knight Bruce giving no opinion

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(1) 2 Bro. C. C. 570.

(2) 5 De G. M. & G. 188.

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on the point—that Anna Maria Mealy took an interest for life only, with a gift in the nature of a remainder to her issue.

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Portions of the judgments of Lord Cranworth and Lord Justice Turner appear to me to afford much assistance in the consideration of the present case, and I will, therefore, quote them.

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The Lord Chancellor said (p. 204): "The authorities, I must observe, on this subject are very far from satisfactory, and the principles on which they have gone, have not, I think, in many cases been such as were strictly applicable to questions of this sort. Rules drawn from principles of tenure have been adopted as canons of construction where tenure is out of the question [534] though in the great bulk of the cases the intention has been thereby defeated. Where, however, I find a rule established I will not question it, or inquire very narrowly as to its origin; but the point is whether the authorities which gave an absolute interest in personalty to the first taker do govern this case,—that is to say, whether this is a case in which I am bound by authority to hold that words expressing a gift to the issue are words of limitation, and not words of purchase. I think I am not so bound."

After citing some decisions in which it had been held that the first taker took an absolute interest, he said (p. 206): "In these cases the principle on which the Courts went was this, that technical words were used which indicated a clear meaning, on the part of the testator, that the property should go in a course of devolution till there was an exhaustion of the heirs of the body; and as that, of course, could not be carried into effect, they gave an absolute interest." After commenting upon some other decisions he said (p. 208): "In all these cases the rule applied to real estates derived from principles of tenure, has been made the foundation of the rule for construing bequests of personalty, but in all either the technical words 'heirs of the body' have occurred, or there has been nothing to show that the words 'issue,' 'children,' or the like have not been intended merely to define or explain the extent of the interest given to the first taker; and I see nothing in these decisions compelling me to hold that where technical words are not used, and where the interest of the first taker is expressly confined to the life-estate, I am bound to act, in the construction of the bequest of personalty on principles derived from laws of tenure and not resting on intention. It was on this distinction that Lord Thurlow acted in the case of *Knight v. Ellis* (1) I cannot consider that case as having been overruled; I believe it to have been rightly decided; and, at all events, if it was wrongly decided, I think it can only be questioned in the House of Lords."

Lord Justice Turner held that, in construing a disposition by will of personal estate, the Court is not to be absolutely governed by the rules which would be applied at law in the cases of real [535] estate and at p. 226 he said: "The great principle in all cases upon the construction of wills is that the intention of the testator is to be carried out as far as it is consistent with the rules of law, and I am satisfied that the construction put by Lord Thurlow upon the will in *Knight v. Ellis* (1) was much more conformable to the testator's intention than the construction which has been contended for in the present case." He stated that he was not inclined to dissent from *Knight v. Ellis*, that it was not a case which stood

(1) 2 Bro. C.C. 570.

by itself, there being older authorities to the same effect, among which he would mention *Clare v. Clare* (1) and *Warwan v. Seaman* (2).

The above two cases were cases of wills. The present one turns upon the construction of a family agreement; and presenting, as it does, features of much novelty and with no authority in point to assist the Court, I conceive that it is my duty to ascertain, from the agreement itself and from the terms in which the parties to it have expressed themselves, what was the intention of those who signed it, and to give effect to such intention so far as the rules of law and equity will allow; or, in other words, in the absence of any specific law or usage applicable to the parties to that agreement, or to the Poway Estate, to decide the point at issue according to justice, equity, and good conscience.

The rule in *Shelley's Case* ought not, I think, to be held applicable to these limitations, in the construction of which the above cited cases of *Sparling v. Parker*, (3) *Knight v. Ellis*, and *Ex parte Wynch* (4) appear to me to afford much assistance.

The learned Advocate-General further contended that, even if the rule in *Shelley's case* did apply to the limitations of the Poway Estate, the trust was an executory one, a further deed being by the last clause of the agreement contemplated for the purpose of carrying out the limitations, and that in that case the Court would not allow the principal intent of the parties to be frustrated, citing *Lord Glenorchy v. Bosville* (5) the cases mentioned in the notes. Mr. Latham, on the other hand, argued that it was absurd to call this an executory trust, which he said only [536] existed in two cases, viz., in marriage articles and under wills, and that the leaning of the Courts was against executory trust (6). The principle upon which Courts of Equity have proceeded in such cases may, I think, afford some light in considering the question now before the Court.

In commencing this discussion on the effect of the rule in *Shelley's case* on equitable limitations Mr. Fearn says (Essay on Contingent Remainders, p. 90) : "The Court of Chancery, indeed, has not considered itself tied up to an implicit observance of the same rule in respect to those limitations which are the immediate object of that Court's jurisdiction. I mean limitations which do not include or carry the legal estate. In the decreeing the execution of marriage articles and in the construction of trust estates, of some descriptions at least, that Court regards the end and consideration of the settlement and the intent of the trusts beyond the legal operation of the words in which the articles of the trusts are expressed. Thus in the case of articles before marriage for making a settlement, if there be a limitation to the parents for life, with a remainder to the heirs of their bodies, the latter words are generally considered as words of purchase, and not of limitation, and the future settlement or conveyance, in pursuance of such articles, will be decreed to be made agreeable to such construction.

In discussing in his next paragraph (p. 113) those cases of trust, other than marriage articles, in decreeing the execution of which the Court of Chancery has so far departed from that which would be the legal operation of the words limiting the trust, if reduced to a common law conveyance, as to construe the words heirs of the body of the *cestui que trust*, although preceded by a limitation for life to the *cestui que trust*, as

(1) Cas. temp. Talbot. 21.

(2) Finch. 279.

(3) 29 Beav. 450.

(4) De G. M. & G. 188.

(5) 1 Wh & T. L. C. 1.

(6) Citing 1 Jar. on Wills, 277 (3rd ed.).

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words of purchase and not of limitation—cases, he says, where some clause repugnant to the nature of an estate tail showed that the donor intended only an estate for life, he expresses himself in the following language. He says (p. 123): "In the meantime we are to consider that trusts were originally creatures of confidence between party and party and totally distinct in almost every quality from those legal estates which were the subjects of tenure. They were in their nature independent of [537] tenure, and therefore, not the object of those laws which were founded in tenure. They were rights arising solely out of the intent of the party who created them, and, therefore, such intent was the great guide in the execution of them. Consequently, when a Court of Equity, in certain cases of trusts estates, deviates from the rule above laid down, it does not, in so doing, depart at all from any rule of law by which it was ever bounden; it only exercises that conscience and discretion to which trust estates were in their nature originally and necessarily subject."

It was not denied that the estates intended to be or actually limited by the family agreement as regards Poway were trust estates. As to whether they were executed or only executory I abstain from giving any opinion, as it is not necessary to do so, having regard to my views upon the other points in the case.

The learned Advocate-General also contended that the Court in construing these executory trusts and limitations might apply the *cy-pres* doctrine to prevent infringing the rule against perpetuities. Mr. Latham cited authorities to show that such doctrine does not apply to personal estate (1).

A very clear statement of the nature of the *cy-pres* doctrine is to be found in Mr. Butler's note in Fearne's Contingent Remainders, p. 204, at the end of Chap. I. s.v. which was cited with approval by the Court of Exchequer in *Monypenny v. Dering*, (2) the judgment of the Court being delivered by Lord Cranworth, then Mr. Baron Rolfe. The same case was afterwards sent for the opinion of the Court of Common Pleas, and eventually came before Lord St. Leonards, Lord Chancellor: *Monypenny v. Dering* (3).

Lord St. Leonards also expounds the doctrine in his judgment in the House of Lords in the case of *East v. Twyford* (4).

Mr. Butler in the above-quoted note (p. 208 of Fearne's Contingent Remainders) says, however, that no case has been decided in which the *cy-pres* doctrine has been applied to limitations in a deed, and that this is observed by Lord Eldon in *Breedenell v. Elwes* (5).

[538] It appears to me to be premature upon the present occasion to express any opinion as to what interests or estates, whether absolute or otherwise, those members of the family might take in the Poway Estate or the income thereof, who were the children or heirs of those who signed the agreement of the 24th May, 1851, but who were not parties to it. The Assistant Commissioner in his report has certified that all the parties interested in the matter had not been represented before him.

If the Assistant Commissioner was right, as I think he was, in deciding that the individuals who signed the family agreement took under it life interest, and no more, it follows that the children or heirs who would take upon the death of such persons were not represented before that officer, and the suit would appear to be at present defective for want

(1) 1 Jar. on Wills 281.

(2) 16 M. & W. 418.

(3) 2 De G. M. & G. 145.

(4) 4 H. L. Cases 517.

(5) 7 Ves. Jun. 389.

of such parties. Nanabhoy Framji, as already mentioned, was stated by Mr. Latham to have two sons who have children, and, for aught I know, one or more of the other persons who signed the agreement may have had children whose interests are not at present represented in this suit.

For the above reasons I am of opinion that the special report of the Assistant Commissioner is correct, and that it must be confirmed, and I accordingly confirm it.

By consent of the parties it was arranged that the cost of all the parties appearing on this motion of and incidental thereto should be taxed as between attorney and client, and be paid out of the funds to the credit of the suit. I, therefore, make an order as to costs to that effect.

Solicitors for plaintiffs.—Messrs. *Crawford and Boevey*.

Solicitors for defendant, Nanabhoy Framji.—Messrs. *Tobin and Roughton*.

Solicitors for defendant, Hari Valabdas Kaliandas—Messrs. *Craigie, Lynch, and Owen*.

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Before Mr. Justice Bayley.

W. & A. GRAHAM & CO. v. MERVANJI NUSSERVANJI AND ANOTHER.* [5th and 6th August, 1881.]

Charter-party—“*Safe port or as near thereunto as she may safely get always afloat*”—*Ship unable to enter port or lie there without previous lightening—Rights of parties.*

Where a vessel is chartered to load a full and complete cargo and being so loaded to proceed therewith to a “safe port or so near thereunto as she may safely get, and deliver the same always afloat,” the master is not bound to sign bills of lading for, or to sail to, a port where the vessel cannot, by reason of her draught of water, lie and discharge “always afloat” without being previously lightened, even if the cost of the requisite lightening would, by the charter-party, fall on the charterers.

By the terms of a charter-party a vessel was to take in a full cargo at Bombay, and therewith proceed to a “safe port in the Mediterranean (Spanish ports excluded), as ordered on signing bills of lading, or so near thereunto as she may safely get, and deliver the same to the said charterers or their assignees always afloat.” Marseilles was at first named as the port of discharge, but subsequently the vessel was ordered to Cette, a French port, a little to the west of Marseilles; and bills of lading, made out for Cette, were tendered to the master for signature. The master refused to sign the bills of lading, or sail, for Cette. The vessel's draught of water when loaded was such that she could not have entered or lain afloat in Cette harbour without discharging a portion of her cargo. The cost of lightening the vessel by lighters outside the harbour would, under the charter-party fall on the charterers, and they were willing to incur the expenses necessary for that purpose.

Held—that it was no breach of the charter-party by the master to refuse to sail to Cette, or to sign bills of lading for that port.

THIS was a suit brought by the charterers of the steam-ship *Ossian* against the agent in Bombay of her owners, and the master of the said vessel.

The plaint set out that on the 22nd of June, 1881, a charter-party was entered into between the plaintiffs and the first defendant, Mervanji Nusservanji, signing as agent on behalf of the owners of the steam-ship *Ossian*, by which it was agreed, *inter alia* that the said steamer

* Suit No. 320 of 1881.