

but throughout the Code, or indeed throughout Indian legislation generally. That is obviously impossible. The term "rent" is used, as for instance in section 87 of the Code, where the term "land revenue" would be inapplicable. In fact it seems to me perfectly correct to say that the term "rent" is used in the Code only with reference to those superior and inferior holders between whom the relationship of landlord and tenant subsists, and not with reference to those superior and inferior holders between whom the relationship does not exist.

Further, I do not think that the term "rent" and "land revenue" are used indiscriminately even in the one instance cited. No doubt a vast majority of alienations are alienations of land revenue, but there is nothing to prevent Government from being a landlord, or from alienating land of which it is the landlord. That appears to be sufficient reason for inserting the term "rent" as well as the term "land revenue" in the definition of "alienated."

I concur in the judgment of the late Mr. Justice Ranade.*

Decree confirmed.

* *Note.*—Ranade, J., died on the 16th January, 1901, five days before this judgment was delivered.

PRIVY COUNCIL.

KARIM NENSEY (PLAINTIFF), v. G. K. HEINRICHS AND
ANOTHER (DEFENDANTS).

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT BOMBAY.]

*Contract—Construction of contract—Contract indefinite as regards duration—
Agreement to pay a certain sum as maintenance—Effect on agreement of
defeasance being rendered impossible.*

Gifts or contracts expressed to be for maintenance, and indefinite as regards duration, may be shown by the acts of the parties or other circumstances to be intended to operate in perpetuity; but, *prima facie*, they are limited to the life either of the grantor or grantee.

* Present: Lord Hobhouse, Lord Macnaghten, Lord Robertson, Sir Richard Couch, and Sir Ford North.

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The plaintiff, one of a family of Khojas, carried on business with his grandfather Peeroo, his father Nensey, and his two uncles Kassum and Fazul, his share in the business being 2 annas. Amongst their other business the firm was employed as contractors and brokers by the defendants' firm. On 30th July, 1894, a deed of dissolution of partnership was drawn up, the basis of which was that the accounts of all the partners should be considered as settled, and that they should mutually release and be released by each other. The agreement stated the pecuniary relations of each of the partners, whether debtor or creditor to the firm, and also the terms on which each should retire and be released. The plaintiff was indebted to the firm, and by the deed it was provided that he should be released from all claims against him, and should release the other partners from all claims he might have. The deed was signed by the other partners, but the plaintiff objected to sign it, on the ground that its terms were unfavourable to him as it made no provision for him and left him dependent on his father, with whom he was then on bad terms. To induce the plaintiff to consent to the dissolution, in which they were interested, the defendants gave him the following letter, dated 4th August 1894: "In consideration of your having at our request signed the agreement of dissolution of partnership made between Peeroo, Nensey, Kassum, Fazul and yourself, and dated 30th July last, we hereby agree to pay you, on behalf of Nensey, a sum of Rs. 500 per month, payable on the first of each month, until such time as your father Nensey makes provision for your maintenance, so as to give thereby himself the above sum every month for such maintenance." The plaintiff thereupon signed the deed of dissolution. Nensey died in March, 1898, without having made any provision for the plaintiff's maintenance.

Held (affirming the decision of the High Court) that the liability of the defendants to pay the Rs. 500 a month to the plaintiff came to an end on the death of Nensey. The language of the contract pointed strongly to the life of the intended or supposed grantor as the limit of the benefit, and there was nothing in the position of the parties or the circumstances of the case to give it any other construction.

APPEAL from a decree of the High Court at Bombay (25th August, 1899) reversing a decree of that Court in its Original Civil Jurisdiction (22nd April, 1899) in favour of the plaintiff.

The appeal arose out of a suit brought by the plaintiff (the present appellant) for money which he alleged to be due on an agreement which was executed by the defendants in his favour on the 4th August, 1894.

The facts of the case were that prior and up to the 30th July, 1894, the plaintiff (whose family were Khojas) carried on business in partnership with his father Nensey Peeroo Mahomed, his grandfather Peeroo Mahomed, and his uncles Fazul Peeroo

Mahomed and Kassum Peeroo Mahomed, under the names and styles of Peeroo Mahomed and Nensey Peeroo. The deed of partnership was dated the 21st December, 1835, and under it Nensey had a 5-anna share, Karim (the plaintiff) a 2-anna share, and the remaining 9 annas was equally divided between Peeroo and his other sons Fazul and Kassum. Part of the business of the firm was acting as mukádams (contractors and brokers) for the defendants Heinrichs and Glade, who also traded under the name of Glade & Co.

In 1894 a dissolution of the partnership was proposed, and was agreed to by all the partners except the plaintiff, and an agreement to dissolve the partnership was drawn up, dated 30th July, 1894. The basis of this agreement was that the accounts should be treated as having been adjusted and settled and that all the partners should mutually release and be released by each other. It stated the pecuniary relations of each partner to the firm (whether a debtor or creditor to it) as shown by the books, and also the terms in which each partner was to retire and be released by the others. The third clause related to Nensey Peeroo, the plaintiff's father. It recited that about Rs. 3,75,000 was due by him, and agreed that in respect of this he should pay Rs. 75,000 to his father Peeroo Mahomed, and further that he and his heirs should pay certain allowances to Peeroo for his life, and after his death to his wife. It also recognized the exclusive right of Nensey Peeroo to certain specified properties. The sixth clause related to Karim Nensey, the plaintiff, and provided that he should be released from all claims against him, and should release all claims he might have. It was in evidence that his indebtedness, as shown by the books of the firm, proved by Fazul Mahomed, was about Rs. 76,000. No provision was made for the plaintiff by the agreement for dissolution. The deed was signed by the other partners, but the plaintiff objected to sign it, on the ground that its terms were unfavourable and disadvantageous to him, as no provision was made by it for him, and he was left dependent on his father, with whom he was at that time on bad terms. In consequence of the continued refusal of the plaintiff to sign, the defendant Heinrichs endeavoured to induce the plaintiff to agree to the dissolution, and ultimately offered

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on behalf of his father Nensey Peeroo to guarantee the plaintiff as maintenance the sum of Rs. 500 a month until he could make arrangements with his father to allow him that sum for his maintenance. The plaintiff declined to agree to this unless it was put into writing, and Heinrichs therefore signed and gave the plaintiff the following letter which constituted the agreement on which the suit was brought :—

MR. KARIM NENSEY,

Bombay, 4th August 1894.

In consideration of your having at our request signed the agreement of dissolution of partnership made between Mr. Peeroo Mahomed and Messrs. Nensey Peeroo, Kassum Peeroo, Fazul Peeroo and yourself, and dated the 30th July last, we hereby agree to pay you on behalf of Mr. Nensey Peeroo a sum of rupees five hundred per month, payable on the 1st of each month until such time as your father, Mr. Nensey Peeroo, makes provision for your maintenance, so as to give thereby himself the above sum every month for such maintenance.

Yours truly,

GLADE & Co.

The plaintiff thereupon executed the deed of dissolution of partnership, and the sum of Rs. 500 a month was paid him by the defendants' firm up to the death of Nensey Peeroo, the plaintiff's father, which took place on 29th March, 1898. On their refusal to continue the payment the suit out of which this appeal arose was instituted on 2nd August, 1898.

The plaintiff had taken out letters of administration of his father's estate, but he alleged that the estate was insolvent, and that he had no provision out of the estate and took nothing by his father's death. He claimed Rs. 2,023-6-0 with further interest on Rs. 2,000, part thereof, at 12 annas per cent. per month from 1st August, 1898, until payment.

The defendants contended that they were under no obligation to pay the plaintiff the Rs. 500 a month after the death of Nensey Peeroo. They stated that the defendant Heinrichs had endeavoured to get the plaintiff's father to provide for the plaintiff's maintenance, but without success. They further alleged that the plaintiff, since the death of his father, was amply provided for out of his father's property, and they claimed that the letter of the 4th August, 1894, should be delivered up to them to be cancelled.

The High Court in its Original Jurisdiction (Tyabji, J.) held that the agreement of 4th August, 1894, meant that the

maintenance of Rs. 500 a month was to be paid to the plaintiff for his life. He therefore gave a decree for the plaintiff.

The defendants appealed, and the Appellate Court on 25th August, 1899 (Jenkins, C.J., and Candy, J.) reversed the decree of the lower Court, and dismissed the suit with costs.

Jenkins, C.J., in coming to that conclusion, observed :—

The question that arises for our determination is whether this document of the 4th August, 1894, secures, as the plaintiff contends, the payment to him of a monthly sum of Rs. 500, if not in perpetuity, at any rate for his life, or whether, as the defendants urge, it was not intended to operate in any event beyond Nensey Peeroo's life. Mr. Justice Tyabji accepted the plaintiff's contention and accordingly passed a decree in his favour; it is from this decree that the present appeal has been preferred. The appellant maintains that in view of the ambiguity of this letter it is necessary for the purpose of determining its true meaning to consider the surrounding facts. Thus it is pointed out that the partnership of which the plaintiff was a member might be expected to secure so long as it lasted a certain income to the plaintiff, and it was this advantage that the plaintiff declined to resign. Further it is said that this income so far as it arose out of the business necessarily ended, or was at any rate determinable, on a dissolution of the partnership, an event which in any case must have occurred on the death of any of the partners despite any opposition on the plaintiff's part. In no case therefore could this income have lasted beyond Nensey Peeroo's lifetime except with the consent of the other partners. These circumstances, it is urged, give some clue as to what the letter was designed to secure.

Turning then to the letter itself we find it does not contain an agreement to pay 500 rupees per month *simpliciter*, but to make this payment on behalf of Mr. Nensey Peeroo as though the plaintiff were an agent for him, a relationship if it in fact existed would manifestly terminate with the principal's death. I do not suggest that such a relationship in fact existed, but the language is to some extent suggestive of a liability coterminous with such a relationship. Further it appears that this payment was to be made until Nensey Peeroo made provision for the plaintiff's maintenance 'so as to give thereby himself the above sum every month for such maintenance.' This again points to a common design that the liability was to take the place of the maintenance, which it was expected Nensey Peeroo would, as a Mahomedan father, allow his son, and also to an intention that the obligation should continue only so long as Nensey Peeroo was alive to provide this maintenance. As against this it is argued that the words of the letter do not expressly limit the liability, which would therefore continue until Nensey Peeroo created a sufficient security in the plaintiff's favour for the payment of 500 rupees, and that by reason of this liability the defendants would have remained liable though Nensey Peeroo had voluntarily allowed the plaintiff 500 rupees during his lifetime, and even though, as may prove

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to be the case, he may have left an estate from which the plaintiff as one of his heirs derived an income vastly in excess of that amount. Such a contention appears to me under the circumstances of the case to be unreasonable, and after giving to this letter the best consideration I can, I come to the conclusion that its phraseology points to an intention to secure a personal maintenance from Nensey Peeroo during his lifetime, and that it was not in the contemplation of the parties, nor is it the legal effect of the document in suit, to impose an obligation on the defendants to continue payment of Rs. 500 a month to the plaintiff after Nensey Peeroo's death. I would therefore allow the appeal, and dismiss the suit with costs.

Candy, J. (after referring to the construction put upon the letter by Tyabji, J.), said:

The sole question for our consideration is whether that is the correct construction of the letter. In my opinion it is not. If the parties had intended that such should be the agreement, nothing would have been easier than to say so. The letter was drafted by an experienced lawyer's clerk, and he could easily have written 'for life or until &c.' It is clear that Mr. Heinrichs bound himself to use his influence with Nensey to induce Nensey to make a settlement and provision for his (Nensey's) son Karim out of his estate, so that the son would get at least a monthly income of Rs. 500. There is no reason to disbelieve Mr. Heinrichs when he deposed that after the letter was written he several times tried to induce Nensey to make the required provision for his son. But he failed. So he had to go on making the monthly payment to Karim; but in March, 1898, Nensey died, and then Mr. Heinrichs considered that his firm's liability ceased. Karim admits that he took out letters of administration to his father's estate after his father's death. What will be the final result of that administration—whether it will be a profit or a loss to Karim—seems to me to be beside the question. Nensey being dead it is impossible for Mr. Heinrichs to use any influence on him to make any provision for Karim. The condition on which Mr. Heinrichs signed the letter was 'until such time as your father makes provision &c.' The father as long as he was alive was in a position to be influenced by Mr. Heinrichs, and so long accordingly the contract held good. When the father died the condition became impossible, and the contract was at an end. It is not contended that while Nensey was alive Mr. Heinrichs did not do all in his power to persuade Nensey to make an allowance to his (Nensey's) son. There is no default alleged on the part of Mr. Heinrichs. He certainly did not in terms bind himself to make the payment to Karim for Karim's life, should Karim survive his father. I feel quite unable to come to the conclusion that such was the intention of the parties and therefore the contract cannot be applied to circumstances which were not in the contemplation of the parties when the contract was made (see remarks of Brett, J., in *Jackson v. Union Marine Insurance Co.*⁽¹⁾ As was said in *Baily*

(1) (1873) L. R. 8 C. P. 572 (581).

v. De Crespigny,⁽¹⁾ where the event is of such a character that it cannot be reasonably supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens. I take it that what Mr. Heinrichs in effect said to Karim was—‘I will do my best to persuade your father Nensey to make due provision for you, and until I succeed in persuading him we will pay you the Rs. 500 a month.’ Obviously it is impossible now that Nensey is dead for Mr. Heinrichs to persuade Nensey to do anything. The impossibility of the event upon which the promise is contingent has the same effect upon the contract as the impossibility of the act which is the object of the agreement. Supposing Mr. Heinrichs had said : ‘We will pay you Rs. 500 monthly until your father attains the age of 60,’ and the father died at the age of 50, would Glade have been bound to continue the payment after the father’s death? If not, then why should they be bound to continue it under the circumstances of the present case?

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From the decision of the High Court the plaintiff appealed.

The only question in this appeal was as to the construction of the letter of 4th August, 1894, the appellant contending that the respondents continued liable under it, and the respondents contending that their liability ceased on the death of the appellant’s father Nensey Peeroo.

Lawson Walton, K.C., and *J. D. Mayne* for the appellant.

R. B. Haldane, K.C., *J. Jardine*, K.C., and *Kenyon S. Pasker* for the respondents.

[1901, April 30th]—*Lawson Walton*, K.C.:—Unless there is some express language to terminate the defendants’ obligation, it would continue. Their liability continues until the plaintiff has obtained maintenance from his father. The father’s death has of course rendered it impossible for him to make provision for his son, but it is submitted that the father’s death does not relieve the defendants from the obligation: in fact the event on which the liability was to terminate has not happened. It is submitted the intention was that the son should be supported as long as he required it, and not only until the death of his father, and if it was not intended that the allowance was to continue, it should have been expressly so stated.

(1) (1869) L. R., 4 Q. B. 180 (185).

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J. D. Mayne on the same side:—The son had an interest in the partnership independent of his father and one which would not have been terminated on his father's death; this allowance was consideration for his agreeing to the dissolution of the partnership; it ought therefore to be presumed to continue after the father's death. It must have been contemplated that it would compensate him for what he was giving up by agreeing to the dissolution of the partnership; but if it ceases at his father's death it does not so compensate him.

Counsel for the respondents were not called upon.

[1901, June 13th]—Their Lordships' judgment was delivered by

LORD HOBHOUSE:—The question raised in this appeal is whether the High Court of Bombay has placed a wrong construction on a written agreement made between the appellant who is plaintiff in the suit, and the respondents who are defendants. The agreement is in the form of a letter from the defendants to the plaintiff, dated 4th August 1894, and expressed as follows:—

MR. KARIM NENSEY,

In consideration of your having at our request signed the agreement of dissolution of partnership made between Mr. Peeroo Mahomed and Messrs. Nensey Peeroo, Kassum Peeroo, Fazul Peeroo and yourself, and dated the 30th July last, we hereby agree to pay you on behalf of Mr. Nensey Peeroo a sum of rupees five hundred per month payable on the first of each month until such time as your father, Mr. Nensey Peeroo, makes provision for your maintenance, so as to give thereby himself the above sum every month for such maintenance.

Yours truly,

(Signed) GLADE & COMPANY.

The circumstances bearing on the nature of the agreement are as follows:—The plaintiff was a partner in trade with his grandfather Peeroo Mahomed, his father Nensey Peeroo, and his uncles Kassum and Fazul. The profits were shared in various amounts, the plaintiff's share being two annas. It does not appear whether the partnership was for any definite period, or whether any notice was required to dissolve it. In the year 1894 a deed of dissolution was prepared and executed by the plaintiff's four partners on the 30th July. It contains statements of the pecuniary relations of each partner to the firm as shown by the books, whether a debtor or a creditor to it, and of the terms on which each is to retire and

release his partners. The plaintiff's father is stated to be very heavily indebted. The plaintiff is stated to be indebted, and it appears by the books proved by his uncle Fazul that his debts amounted to Rs. 76,000 or more. The deed provides that he shall transfer all his interest to his grandfather; that his debt to the firm shall be written off; and that his grandfather shall free him from responsibility for any debt of the firm.

The plaintiff hesitated to sign this document. When the four others executed it they inserted a statement to the effect that he had not executed it, but it was hoped that he would do so.

The defendants carry on business in partnership under the firm of Glade & Co. They employed the plaintiff's firm, or his father as one of the firm, to transact their mukadam business; and they were consulted about the dissolution. For some reason they were desirous that the dissolution should take place as arranged, and were willing to give the plaintiff some benefit to induce him to agree. Negotiations between them resulted in the letter of 4th August now sued on; and on the same day the plaintiff signed the dissolution deed.

The plaintiff's family are Khojas, who, though Mahomedans, have some peculiar customs. It is not shown what is the custom prevailing in their caste with reference to a son's right to maintenance from his father, nor is it shown what were the legal incidents of the property, of which the father appears to have been in possession, as between him and the family. At any rate no suggestion is made by the plaintiff that the custom of the caste gives him any stronger claim for maintenance than among Hindus a son would have against a father in possession of family property. Nensey Peeroo may have been bound to maintain the plaintiff out of family property; but there is nothing to show that he was bound to maintain an adult son, or to give him any definite sum or proportion, or to settle property on him by way of permanent provision.

As a matter of fact Nensey Peeroo was on bad terms with the plaintiff and did not provide any maintenance at all for him. Consequently the plaintiff had recourse to the defendants who paid him the stipulated sum up to the month of April, 1898. In March of that year Nensey Peeroo died. The defendants then

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declined to pay anything more, conceiving that their liability did not extend beyond Nensey Peeroo's life.

The plaintiff alleges that his father, to whom he took out administration, died not only intestate but insolvent, and that the defendants had agreed unconditionally to secure him an income of Rs. 500 per month. On that view he brought the present action, which was tried in the High Court before Mr. Justice Tyabji. That learned Judge declared that the stipulated amount was to be paid to the plaintiff for his life, and passed a decree on that footing. His reasons are not stated. On appeal by the defendants, the Court, consisting of Chief Justice Jenkins and Mr. Justice Candy, was of a different opinion, and dismissed the suit.

The learned Chief Justice held that the liability of the defendants was intended to take the place of the maintenance which it was expected that Nensey Peeroo as a father would allow to his son without any intimation that there is any joint family property or that the father is subject to legal claims for maintenance of an adult son. The learned Judge speaks of him as a Mahomedan father. Mr. Justice Candy construes the document to mean that the defendants were to do their best to persuade the father to make provision for the son, and were to pay him Rs. 500 a month until they succeeded in that work of persuasion. Then finding it proved that the defendants had done their best to persuade Nensey Peeroo while he was alive, he held that their contract had been fully performed. The grounds taken by the two learned Judges differ in expression, but in substance they amount to the same thing, *viz.*, that the obligation of the defendants to maintain did not extend beyond the life of Nensey Peeroo. If the inheritance then devolving on the plaintiff has turned out to be insufficient, that was a contingency not provided for. The defendants did not undertake that Nensey Peeroo should die rich enough to leave the plaintiff an inheritance worth Rs. 500 per month.

Their Lordships have no hesitation in concurring with the decree appealed from. It is true that the agreement provides for payment by the defendants to the plaintiff without any definite limit of time except the making of a provision by Nensey Peeroo ;

and it was argued at the Bar that the provision intended was an actual settlement of property by the father on the son in perpetuity. That puts a strain on the words which they cannot bear. Gifts or contracts expressed to be for maintenance, and indefinite as regards duration, may be shown by the acts of the parties or other circumstances to be intended to operate in perpetuity; but *prima facie* they are limited to the life either of grantor or grantee. In this case the language of the contract points strongly to the life of the intended or supposed grantor as the limit of the benefit. Whatever may be the relations between a Khoja father and son in this respect, the maintenance spoken of is one to be given by the father himself every month to the son, just as a Hindu father in possession of family property might make a definite allowance to his son. What the defendants guarantee is that the father shall be bound to allow Rs. 500, and that if he does not they will pay on his behalf. There is nothing to show that they intended to incur more liability than Nensey Peeroo would have incurred if he had executed a bond obliging himself to pay his son Rs. 500 for maintenance. Upon his death his paternal obligation to maintain his son would come to an end, and the son's share in the family property would take its place. The defendants have not guaranteed the amount of Nensey Peeroo's estate, nor have they undertaken to pay, on his behalf and by way of maintenance, money which could only be expected to come from him while living.

Such being the reasonable construction of the agreement on its face, it only remains to say that there is nothing in the position of the parties to give it any other construction. A great deal has been said at the Bar of the plaintiff's relinquishment of his interest in the partnership. For all that appears his interest was nothing more than a right to have the accounts taken and the surplus, if any, divided. No attempt is made to show that the terms on which he retired were other than favourable to him, or that by the contract as now construed the defendants did not pay an ample price for avoiding the litigation on which he might have insisted. Allowing that the expressions of the contract are not precise, and that the construction placed on them by the first Court might be shown under supposable circumstances to be the

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true one, their Lordships find nothing in the evidence to suggest that the meaning which most easily fits the words leads to any unreasonable conclusion, or that it was not the real intention of the parties.

They will humbly advise His Majesty to dismiss the appeal. The appellants must pay the costs.

Appeal dismissed.

Solicitors for the appellants:—*Messrs. Payne and Lattey.*

Solicitors for the respondents:—*Messrs. Cameron, Kemm & Co.*

APPELLATE CIVIL.

Before Sir L. Jenkins, Chief Justice, and Mr. Justice Chandavarkar.

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February 5.

SHARIFA (ORIGINAL DEFENDANT), APPELLANT, v. MUNEKHAH
(ORIGINAL PLAINTIFF), RESPONDENT.*

Minor—Suit to recover custody of—Suit by a father for the recovery of his children illegally detained—Tort—Death of defendant pending suit—Survival of cause of action against defendant's heirs—Practice—Procedure.

A Civil Court has jurisdiction to entertain a suit by a father to recover possession of his minor children illegally detained by a stranger. Such a suit is not barred by the provisions of the Guardian and Wards Act (VIII of 1890).

A Mahomedan sought to recover possession of his minor daughters, who were alleged to have been illegally detained by the defendant Mukimbhai. Pending the suit Mukimbhai died, and the suit was continued against his widow Sharifa as his heir and legal representative, on the ground that the minors were in her possession.

Held, that the cause of action did not survive as against the widow of the deceased defendant, and that therefore the suit could not proceed. The cause of action which gave rise to the suit was extinguished when the defendant Mukimbhai died.

SECOND appeal from the decision of E. H. Moscardi, District Judge of Surat, reversing the decision of Ráo Bahádur K. B. Marathe, First Class Subordinate Judge at Surat.

The plaintiff, a Mahomedan, sued to recover possession of his two minor daughters, aged 13 and 11 years, respectively, from one Mukimbhai Dhumunbhai, the defendant, alleging that he had left

* Second Appeal No. 473 of 1900.