ORIGINAL CIVIL.

Before Mr. Justice Beaman.

1911. *March* 10.

CASSAMALLY JAIRAJBHAI PEERBHAI, PLAINTIFF, *v.* SIR CURRIMBHOY EBRAHIM AND OTHERS, DEFENDANTS.*

Khoja Mahomedan—Settlement—Settlor himself trustee—No delivery of possession—Son born after Settlement—Power of Settlor to revoke settlement—Settlor's intention not carried out owing to settlor's death—Power of Court to aid defective execution—Suit by after born son to set aside settlement—Limitation Act (IX of 1908), section 10—Resulting trust back to settlor—Adverse possession—Difference between estoppel and res judicata*—Validity of Wakf contained in deed containing other gifts—Local usage cannot override Mahomedan Law—Registration—*Vis Major.

By an Indenture of settlement dated 7th January 1886, J. P., a Khoja Mahomedan, purported to convey certain immoveable properties to trustees for the benefit of his family. The trusts were in effect for J. P. for life and after his death, subject to certain rights of residence and maintenance to pay the net income of the trust properties to N. M. for his life and in the event (which subsequently occurred) of the death of N. M., without leaving male issue, to divide the trust funds into ten equal parts to be held in favour of certain donees, four-tenths being given to charity. The Indenture also reserved to the settlor power to revoke or vary any of the trusts contained therein. There was no surrender of the property in fact to anyone except J. P. himself in his character as trustee for himself. The donor, however, opened an account in his books of this property as trust property. On the 26th October 1886 a second son, the plaintiff, was born to J. P. whereupon J. P. being desirous of providing for this second son, desired to vary the terms of the deed of the 7th of January 1886 and to resettle the same so that his two sons should share equally. A draft deed of declaration of new trusts was accordingly prepared by J. P.'s attorneys and on the 24th of July 1887 was finally settled and approved by J. P. An engrossment was thereupon made and duly stamped but on taking the engrossment to J. P. for his execution on July 29th it was found that owing to an error of the engrossing clerk several pages of it were missing. Another engrossment was prepared forthwith but on the same day before the new engrossment was ready J. P. died. The plaintiff thereupon brought a suit to have it declared whether or not the deed of 1886 was a valid deed and prayed that the defective execution of the second deed might be aided by the Court and the provisions of the said second deed declared to be valid.

Held, (1) That the plaintiff was not time-barred as against the trustees from bringing the action.

(2) That however restricted the gift was in form to J. P. it was in effect a gift absolute to him for life, and that entirely irrespective of the power of revocation.

* Suit No. 659 of 1909.

(3) That all the gifts in the trust settlement made contingent upon N. M. dying without issue were bad.

(4) That that portion of the instrument which purported to create a *wakf* in respect of four-tenths of the settled property was bad and void.

(5) That the gift was bad for want of contemporaneous delivery of possession.

(6) That this was a case, if ever there was a case, in which the Courts might act upon those principles which have always guided the Courts of Equity in England and aid defective execution of a power, defective not through any fault on the part of the person intending to execute it but by reason of an act of God, and that the unsigned deed ought to be effectuated by the Court to the extent of making it binding on the conscience of the trustees.

PER CURIAM.—It is only in the event of the trusts or some of them being bad that the question of limitation can arise. For if a trust-deed in its entirety is good, then of course effect must be given to it irrespective of any question of lapse of time.

Where what purports to be a trust-deed turns out to have been entirely void and therefore not to have passed the legal estate, the position of those who took possession believing themselves to be trustees but not in law real trustees, necessarily assumes the character of possession by tresspass and is therefore from its inception in law adverse against all the world. Where, however, the trust-deed in itself is good and valid to the extent of passing the legal estate but the trusts declared are in themselves wholly or partially bad, then there is a resultant trust to the author of the trust and the possession of the trustees, whatever they might think of it and however they might intend to use it for the purpose of carrying out the bad trusts, could not in law be adverse to the *cestui-que-trust*, that is to say, the grantor. Widely different is the case of trustees who obtain the legal estate from the author of the trusts to apply the beneficial uses to specified objects which may or may not be good. For then from the beginning there is always a relation between the author of the trusts and the trustees in whom his confidence has been reposed and there is always the legal possibility at least of another relation coming into existence between them where owing to the failure of the declared trusts, there is a resultant trust back to the grantor who from that moment becomes in law the *cestui-que-trust* of the trustees.

Where it was the intention that there should be an ultimate trust in favour of the grantor it is usual to express that on the face of the deed. A deed so framed as upon its very face to provide for the springing back of the trust fund or a part of it in certain events to the author of the trust, does create what is at once an express and resultant trust.

The current of authority seems to have set steadily against the extension of section 10 of the Limitation Act to all cases of resultant implied or constructive trusts.

Where the ultimate resultant trust which is to spring back to the settlor is consistent with the discharge of the declared trust, then it may by loose use of language be said to be express on the face of the deed, but when the extinction

1911.

CASSAMALLY JAIRAJBHAI v. SIR CURRIMBHOY EBRAHIM.

or failure of all the intended trusts is a condition precedent to the resultant trusts coming into being, then the latter is clearly a true resultant trust and is not express and never can be express on the face of the deed.

The answer to the question: What is the true position when declared trusts failed and there is a resultant trust over to the settlor or his heirs? is to be found in the very elementary proposition that the possession of the trustee is always that of *cestui-que-trust*, and, therefore, however, he may think or wish to be holding as trustee for trusts which have failed in the eye of the law, he is really holding, when those trusts failed, as trustee for the settlor. Then the position is simply this: so long as he retains and professes to retain the character of a good and legal trustee, he is holding the legal estate as stake-holder for two claimants, the intended beneficiaries of the declared trusts which have failed, and the resultant trustee, that is, the settlor. And no length of possession by a trustee can be adverse to his *cestui-que-trust* as soon as that legal person is discovered and ascertained.

So long as a trustee occupies the position of a trustee as soon as declared trusts failed and there is a resultant trust in favour of the settlor, the trustee's possession is essentially that of his *cestui-que-trust* and can only be changed into adverse possession by a conscious and deliberate act; that is to say, that he must repudiate all intention of holding for the resultant *cestui-que-trust* and he must assert his intention of continuing to apply the trust fund to uses which the Court has declared or which are known to him to have failed. Then his possession might become adverse to his legal *cestui-que-trust* and if that person did not take steps within twelve years he might not be able to avail himself, under the Indian authorities, of the provisions of section 10 of the Limitation Act.

Estoppel and *res judicata* are entirely distinct. *Res judicata* precludes a man averring the same thing twice over in successive litigations, while estoppel prevents him saying one thing at one time and the opposite at another.

It is consistent with the Mahomedan Law that a Mahomedan may devote his property in *wakf* and yet reserve to himself and his descendants in a very indefinite manner the usufruct of property: *Jainabai* v. *R. D. Sethna*(1) considered.

The power of revocation is inherent in the donor of every gift, so that expressing it, as is usually done by English draftsmen in these voluntary settlements, is merely surplusage and so far from invalidating the gift as a whole would necessarily be implied in it were it not expressed.

Under the Mahomedan Law where a gift is conditioned by a power restricting alienation, the gift is absolute and the condition is void.

A gift to the donor himself for his life and then over to others could not be reconciled with any recognised principle of the Mahomedan Law of gift and must necessarily therefore, so far as the remoter donees are concerned, be bad *ab initio*.

Jainabai v. *R. D. Sethna*(1) followed.

(1) (1910) 34 Bom. 604.

A vested remainder in the strictest sense of the English words and *a fortiori* a contingent remainder could not possibly by any stretch of ingenuity be made the subject of a valid Mahomedan gift *inter vivos* consistently with the requirements of the Mahomedan Law on that head and for this very simple reason that no man can give possession *in præsenti* of that which may never come into possession at all. It is of the essence of a Mahomedan gift *inter vivos* that the donor should divest himself of the actual possession of the thing given and transfer it to the donee and if the donee does not take physical possession of it at the time of making the gift, then till he does, the gift is revocable.

There is no authority to be found anywhere in the Mahomedan Law books themselves for the proposition that a man giving *inter vivos* may give an estate first to himself and then to A for life and then to B absolutely.

It is undoubtedly a rule of the Mahomedan Law that where a donor makes a gift and accepts in exchange something, whether that something be independent of or part of the original gift then the rest of the gift is irrevocable. No gift *in futuro* can be made by a Mahomedan *inter vivos*, in order to validate such a gift there must be an actual delivery of seisin to the donee, there ust be a transfer of possession and that transfer of possession must be from the donor to the donee.

While the Mahomedan Law insists that a gift to private person should be free of all pious and religious purposes, this does not necessarily prohibit the making of the gift to *wakf* which may be contained in a deed which makes other gifts at the same time to private persons.

It appears to be the Mahomedan Law that a donor may give his property in *wakf*, that is to say, appropriate and dedicate the corpus to the service of God, while reserving for himself a life-interest in the usufruct. But as in the case of gifts to private individuals the Mahomedan Law never contemplated and will not allow a merely contingent gift in *wakf*. This necessarily flows from the jural conception of a *wakf* which is the immediate appropriation and consecration of specified property to the service of God and the reservation of the donor's life interest in that property does not in any way clash with that conception for the corpus is there and then definitely and finally appropriated to its intended purpose. But it is plainly otherwise, while the gift is conditioned upon the happening of some future uncertain events. There can, in such circumstances, be no appropriation synchronizing with the declaration because should the future events happen it is neither the donor's intention then nor after the happening of that event that the property ever should be appropriated to the service of God.

It would be passing the limits of the application of the maxim "*Usus et conventio vincunt legem*" if it were sought to be shown that the Khojas are allowed by local usage to override the Mahomedan Law which prohibits any Moslem from disposing of more than one-third of his property by will.

By an Indenture of settlement, dated the 7th of January 1886, one Jairajbhai Peerbhai, a Khoja Mahomedan of Bombay, purported to convey divers immoveable properties of great

1911.

CASSAMALLY JAIRAJBHAI v. SIR CURRIMBHOY EBRAHIM.

value to trustees for the benefit of the various members of his family which then consisted of his wife Rehmatbai (the 6th defendant), his son Noor Mahomed (since deceased), his daughter-in-law Khanoobai, wife of Noor Mahomed (the 7th defendant) and his two daughters Sakinabai (the 8th defendant) and Jenabai (since deceased). The first defendant was the only surviving original trustee of the aforesaid Indenture and the defendants 2, 3, 4, 5, were subsequently appointed additional trustees.

The trusts of the said settlement were in effect for the said Jairajbhai Peerbhai (the settlor) for life and after his death (subject to certain rights of residence and a monthly payment of Rs. 300 to the 6th defendant and of Rs. 250 to the 8th defendant and the said Jenabai) to pay the net income of the trust estate to Noor Mahomed for his life and in the event (which subsequently occurred) of the death of Noor Mahomed without leaving male issue (subject to the above rights and payments and to an additional monthly payment of Rs. 300 to the 7th defendant as the widow of Noor Mahomed) to pay the net income of the said estate to the 8th defendant and the said Jenabai and the survivor of them for their or her lives and after the death of such survivor (subject to the trusts in favour of the 6th and 7th defendants) to divide the trust funds into 10 equal parts and to hold the same :—

As to $\frac{1}{10}$th for Rahimtoola Peerbhai and his heirs.

As to $\frac{1}{10}$th for Ismail Nensi and his heirs.

As to $\frac{2}{10}$ths for the right heirs of the 8th defendant.

As to $\frac{2}{10}$ths for the right heirs of the said Jenabai.

As to $\frac{4}{10}$ths for the trustees of the Jairajbhai Peerbhai Khoja Benevolent Trust Fund.

The said Indenture also reserved to the settlor power to vary or revoke all or any of the aforesaid trusts such reservation being expressed in the following terms :—

"Provided always and it is hereby agreed and declared that it shall be lawful for the said Jairajbhai Peerbhai at any time during his life-time by any deed or deeds, writing or writings executed and signed to vary or revoke all or any of the uses, estates and trusts hereinbefore limited and declared of and concerning the

said trust premises or any of them or any part or parts thereof and by the same or any other deed or deeds writing or writings to declare any new or other uses estates or trusts of and concerning the premises the uses or trusts whereof respectively shall be so varied or revoked as aforesaid."

After the date of the said settlement, that is to say, on or about the 26th of October 1886 a second son the plaintiff was born to the settlor.

The said Jenabai died on the 17th of November 1903 leaving her surviving as her heirs the defendants 11, 12.

The said Ismail Nensi died intestate on or about the 8th September 1908, leaving him surviving as his heirs the defendants 14, 15, 16.

The 17th and 18th defendants were the present trustees of the Jairajbhai Peerbhai Khoja Beneyolent Trust Fund.

The 9th and 10th defendants were the minor sons of the 8th defendant.

The plaintiff filed this suit praying *inter alia* for the following reliefs :—

(*a*) that it might be declared whether or not the Indenture of the 7th January 1886 hereinbefore referred to and the trusts therein contained constituted a valid disposition of the said properties of Jairajbhai Peerbhai ;

(*b*) that if the said Indenture and trusts should be held to be valid, the defective execution of a deed of revocation might be aided by the Court and the provisions of the said deed declared to be valid and binding as a variation of the aforesaid Indenture or otherwise as the Court should deem right ;

(*c*) that it might further be declared that the plaintiff was absolutely entitled to all the properties comprised in the said Indenture subject only (if the Court should so hold) to the right of the 6th and 7th defendants to reside in certain of the properties and to the payment to the 6th, 7th snd 8th defendants during their several lives of the monthly sums of Rs. 300, 300 and 250, respectively.

1911.

CASSAMALLY JAIRAJBHAI v. SIR CURRIMBHOY EBRAHIM.

The plaintiff based his case on the ground that neither at the date of the said Indenture of the 7th January 1886 or at any time afterwards was possession of the properties or any of them given or transferred by the settlor to the trustees, nor was the settlement acted upon in any way but all the properties continued as before in the possession and under the immediate control of the settlor, and under the circumstances the said settlement was invalid according to Mahomedan law.

The plaintiff further alleged that after his birth the settlor became desirous of varying the terms of the disposition of the properties which he had made by the settlement of the 7th January 1886 and of resettling the said properties in such a way that his two sons should be equally benefitted thereby.

A draft deed of declaration of new trusts was accordingly prepared by the settlor's attorneys under his instructions and after being submitted to him and certain alterations made therein the same was on the 21st July 1887 laid before counsel with the settlor's instructions. On the 24th of the same month the draft was finally settled by counsel and was thereafter explained to and approved by the settlor and an engrossment thereof was made and duly stamped by the said attorneys for execution by the settlor. On the morning of the 29th of the same month the engrossment so made was taken to the residence of the settlor for execution and signature by him but upon arrival there it was found that by a blunder of the engrossing clerk several pages of the approved draft had been accidently omitted and the settlor was in consequence prevented from formally executing the declaration of trusts which he intended to execute.

Another engrossment was prepared forthwith, but at 7-30 p.m. of the same day before the new engrossment was ready the settlor died, his death being the result of an accident to his hand which had occurred about a fortnight previously but which until very shortly before his death was not regarded as of a serious nature.

By the deed, which the settlor so intended to execute, it was provided in effect that the said trust premises should be held

by the trustees of the Indenture of the 7th of January 1886 after the death of the settlor, subject to the rights of residence and the monthly payments to the 6th and 8th defendants and the said Jenabai upon trust for the said Noor Mahomed and the plaintiff as members of a joint and undivided Hindu family.

After the death of the settlor the whole of the trust properties passed into the management and enjoyment of the said Noor Mahomed who, although he was himself one of the trustees under the original Indenture of Settlement, treated the said properties as his own and all the papers relating to the variation of the said trusts subsequently came into his possession and were kept by him until his death.

Noor Mahomed died intestate on the 20th August 1897, leaving him surviving his widow, the 7th defendant, but no issue. And since that date the trust premises were in the management of the first five defendants who claimed to deal with them according to the provisions of the said Indenture of the 7th of January 1886 and the plaintiff had received no benefit therefrom.

The plaintiff further relied on an oral will and also on a written but unsigned will, both made by Jairajbhai. By the said oral will the said Jairajbhai bequeathed one-half of his property to Noor Mahomed and the other half to the plaintiff.

By the said unsigned will the said Jairajbhai *inter alia* directed that upon the death of either Noor Mahomed or the plaintiff without leaving a son the survivor of them should be the owner of all his property.

The defendants 1, 2, 3 and 4 supported the settlement and alleged that after the death of the settlor Noor Mahomed was in possession and management of the trust premises only as managing trustee and for and on behalf of himself and his co-trustees.

The 5th defendant submitted to the Court whether he was a necessary party to the suit.

1911.

CASSAMALLY JAIRAJBHAI v. SIR CURRIMBHOY EBRAHIM

The 7th defendant also supported the settlement and further contended that Jairajbhai never intended to execute the second deed, and that having regard to the arbitration and award and the decree in Suit No. 282 of 1893 and the receipt of Rs. seven lákhs by the plaintiff in pursuance of the said decree the plaintiff was debarred from impeaching the validity of the deed of 7th January 1886.

Defendants 8—18 made similar defences.

Inverarity, Raikes and *Lowndes* for the plaintiff.

Bahadurji and *Vakil* for defendants 1—4.

Baptista and *Kajiji* for defendant 5.

Strangman, Advocate-General and *Wadia* for defendant 6.

Setalvad and *Desai* for defendant 7.

Jinnah and *Jayakar* for defendant 8.

Bahadurji and *Coyaji* for defendants 9—10.

Davar and *Mulla* for defendants 11—12.

Sayani and *Tyabji* for defendants 13, 17, 18.

Sayani and *Jaffer* for defendants 14, 15, 16.

Inverarity.—The first question is whether the deed of 1886 has not been varied or revoked by intention sufficiently declared by Jairajbhai Peerbhai in 1887, and if it has whether the draft deed or engrossment proposed to be executed by Jairajbhai should not be given effect to by the Court.

The second question is whether the second deed is not the real trust deed of Jairajbhai Peerbhai. If it is a further question arises whether its provisions will be given effect to by Mahomedan law. If the second deed stands good in all respects the plaintiff would take the whole of the property, if it stands good partially then the plaintiff takes half and the 7th defendant the other half. Under Mahomedan law the first deed is invalid, at any rate to a large extent.

If both the deeds are invalid the question arises whether Jairajbhai died intestate or left a will and if he left a will whether it was an oral one or written, signed or unsigned.

Five documents will be relied on:—(1) Will of 1881; (2) Deed of 1886; (3) Oral will alleged to have been made a few days before his death; (4) An unsigned will; (5) The second deed. Which of the five was the last will of Jairajbhai? We contend that the will of 1881 had been revoked *in toto* both by Mahomedan law and by the law of Equity, at all events as far as the properties in the deed of 1886 are concerned. The will of 1881 was revoked by the deed of 1886 as far as the trust properties were concerned and the second deed revoked the deed of 1886. The oral will comes in where the settlement does not affect the properties. The unsigned will revokes the deed of 1886. So does the oral will. We submit that the unsigned will does not require execution.

The first point is whether Jairajbhai left a trust deed. The laws of equity and good conscience apply: *Dada Honaji* v. *Babaji Jagushet*[1], *In re Kahandas Narrandas*[2], *Mussamat F. Barlow* v. *Sophia Eveline Orde*[3], *Ramcoomar* v. *John and Maria*[4].

The Courts will not aid the non-execution of a power where the owner of the power does nothing towards using the power. *Shannon* v. *Bradstreet*[5]. This is not a case of non-execution but of a defective execution. The settlor showed an intention to execute the power and his intention was to execute it in favour of his own son. Farwell on Powers, 2nd Edition, page 329. When the will of 1881 was executed Jairajbhai had a wife Rehmatbai, a son Noor Mahomed and two daughters Sakinabai and Jainabai, and at that time he did not expect another child. On 28th October 1886 the plaintiff was born and Jairajbhai became desirous of altering the deed. If the will and deed hold good the new-born son would be absolutely cut out. We say Jairajbhai's intention was to revoke the deed of trust and to make a new deed by which this son should take equally with the elder one. He also wished to make a new will for the same reasons. The draft of the

(1) (1865) 2 Bom. H. C. R. 36.
(2) (1880) 5 Bom. 154.
(3) (1870) 5 Ben. L. R. 1 at p. 8.
(4) (1872) 11 Ben. L. R. 46 at p. 52.
(5) (1803) 1 Sch. & Lef. 52.

1911.

CASSAMALLY JAIRAJBHAI v. SIR CURRIMBHOY EBRAHIM.

new deed reproduced the old deed except that he left the residue to both the sons as tenants-in-common. As to the suit which is said to be a bar to this one, it was a suit filed by the plaintiff claiming half the property for the plaintiff but the trust property was purposely excluded. The arbitrators gave the go-bye to the will of 1881 and they seem to have acted on the unsigned will as they gave half the property to the plaintiff.

As to the law on the points referred to:—*Chapman* v. *Gibson*(1), *Smith* v. *Ashton*(2), *Coventry* v. *Coventry*(3), *Wilson* v. *Piggott*(4), *Hawke* v. *Hawke*(5), *Kennard* v. *Kennard*(6), *Carver* v. *Richards*(7). We say that here the intention was very clearly manifested, otherwise the son would be left unprovided for altogether. It does not matter in what form the intention is expressed. As to the will, where the Indian Succession Act applies certain formalities are required, but a Mahomedan can make an oral will, and can also revoke a will without any formality.

The Transfer of Property Act was not in force at the time of the deed. The authorities support the contention that the intention of the testator, if proved, must be accepted as his will. *Mancharji Pestanji* v. *Narayan Lakshumanji*(8), *Maharajah Pertab Narain Singh* v. *Maharanee Subhao Kooer*(9), *Sri Raja Chelikani* v. *Appa Rau*(10), *Waghela Rajsanji* v. *Shekh Masludin*(11).

As to revocation of a will, marriage revokes a will, very slight circumstances added to the birth of a child would be an implied revocation. See Baillie's Digest of Mahomedan Law, pp. 231 and 628. *Emerson* v. *Boville*(12), *Johnston* v. *Johnston*(13), Williams on Executors, 5th Edn., *Castle* v. *Torre*(14), *Marston* v.

(1) (1791) 3 Bro. Ch. Cas. 229.
(2) (1839) 1 Ch. Cas. 268.
(3) (1724) 2 P. Wms. 221.
(4) (1794) 2 Ves. Jun. 351.
(5) (1877) 26 W. R. 93.
(6) (1872) 8 Ch. App. 227.
(7) (1859) 27 Beav. 488.
(8) (1863) 1 Bom. H. C. R. 77.
(9) (1877) L. R. 4 I. A. 228.
(10) (1897) 20 Mad. 207 at p. 209 and (1902) 25 Mad. 678.
(11) (1887) 11 Bom. 551 at p. 561.
(12) (1802) 1 Phillim. 342.
(13) (1817) 1 Phillim. 447.
(14) (1837) 2 Moo. P. C. 133.

Roe dem Fox[1], *Doe dem Reed* v. *Harris*[2]. Conduct can revoke a will as well as actual words, strong anxiety to provide for a child and conduct evidencing such anxiety is sufficient. We argue this part of the case on the assumption that we do not satisfy the Court that there is any other will of Jairajbhai and we submit that these deeds and new unsigned will are evidence of revocation of the will of 1881. If so, it is not necessary for us to set up a substantive will. But we submit we can establish a subsequent will. The oral will depends on the evidence of Rehmatbai. She gave the same evidence before the arbitrators as she has given here. The only requisite for a will of personality in England prior to 1838 was an intention to dispose of property in a particular manner if that intention is sufficiently declared. It is not necessary for the testator to be aware that he was performing a testamentary act. *Milnes* v. *Foden*[3], *Doe dem. Cross* v. *Cross*[4], *In the goods of Morgan*[5], where a document was admitted to probate which on the face of it did not look a testamentary document. *Montefiore* v. *Montefiore*[6], *Allen* v. *Manning*[7], *Carey* v. *Askew*[8], *Goodman* v. *Goodman*[9], *Robinson* v. *Chamberlayne*[10], *Green* v. *Skipworth*[11], showing that instructions will operate as fully as the will itself. *Sikes* v. *Snaith*[12], *Musto* v. *Sutcliffe*[13], *Lewis* v. *Lewis*[14], *Nathan* v. *Morse*[15], *Evans* v. *Knight and Moore*[16], showing that only slight evidence is necessary when the provision made by the testator is what you would naturally expect him to make. *Burrows* v. *Burrows*[17], *Masterman* v. *Maberly*[18], *Castle* v. *Torre*[19], *Whyte* v. *Pollok*[20]. Lastly we have the definition of a will in the Probate and Administration Act which is:—"will means a legal declaration..."

(1) (1838) 8 Ad. & El. 14.
(2) (1837) 6 Ad. & El. 209.
(3) (1890) 15 P. & D. 823.
(4) (1846) 8 Q. B. 714.
(5) (1866) 1 P. D. 214.
(6) (1824) 2 Add. 354.
(7) (1825) 2 Add. 490.
(8) (1786) 2 Bro. Ch. Cas. 58.
(9) (1847) 1 DeG. & S. 695.
(10) (1755) 2 Lee. 129.
(11) (1809) 1 Phillim. 53.
(12) (1816) 2 Phillim. 351.
(13) (1818) 3 Phillim. 104.
(14) (1818) 3 Phillim. 109 at p. 112.
(15) (1821) 3 Phillim. 529.
(16) (1822) 1 Add. 229.
(17) (1827) 1 Hag. Ecc. 109.
(18) (1829) 2 Hag. Ecc. 235.
(19) (1837) 2 Moo. P. C. 133.
(20) (1882) 7 App. Cas. 400.

1911.

CASSAMALLY JAIRAJBHAI v. SIR CURRIMBHOY EBRAHIM.

There are cases which go to show that Mahomedan and Hindu law are the same as the old English law. *Nagalutchmee Ummal* v. *Gopoo*[1], *Vinayak* v. *Govindrav*[2], *Mahomed Altaf Ali* v. *Ahmed Buksh*[3], *Mazhar Husen* v. *Bodha Bibi*[4], where a letter written by a person before committing suicide was treated as a will. *Aulià Bibi* v. *Ala-ùd-din*[5]. Both by Mahomedan and Hindu law any document which sufficiently shows the intention of a testator is sufficient to both constitute a will and revoke it.

Now as to the effect of the deed of 1886 according to Mahomedan law:—We are not concerned with contesting whether the life estate to Jairajbhai was the next life estate to Noor Mahomed, the plaintiff wishes to take the property as it stood at the time he filed his suit. It appears however extremely doubtful whether a Mahomedan can give to himself any interest in property belonging to himself. To all appearances the properties remained unchanged. Book entries do not count. All these points arose in *Jainabai* v. *R. D. Sethna*[6]. That a man cannot bargain with himself even if there are other people associated with him as trustees. See *Ellis* v. *Kerr*[7]. Jairajbhai remained in possession of the property and enjoyed the rents and profits thereof without impeachment of waste. No meeting of trustees was held in his life-time, and there was no change of names in the Collector's books. According to Mahomedan law a gift must be *in præsenti* and unqualified. After Noor Mahomed's death the limitations are void. As far as the gift to charity is concerned it is void because the settlor reserved a life interest to himself. Everything after the life estate to Noor Mahomed is bad according to Mahomedan law and the property reverts to Jairajbhai. The only effect of the deed is to revoke the will of 1881 as far as the trust properties are concerned. We say that no Khoja can create an estate unknown to Mahomedan law. He may will away ⅓rd of his property but he cannot create an unknown estate. How far

(1) (1856) 6 Moo. I. A. 309 at p. 320.
(2) (1869) 6 Bom. H. C. R. (A. C. J.) 224.
(3) (1876) 25 W. R. 121.
(4) (1898) 21 All. 91.
(5) (1906) 28 All. 715.
(6) (1910) 34 Bom. 604.
(7) [1910] 1 Ch. 529.

Mahomedan law is applicable to Khojas and Cutchi Memons see *Bai Baiji* v. *Bai Santok*[1]. A Khoja has got to establish any custom he relies on apart from that he is governed by Mahomedan law.

The next question is whether the law of wills has ever been held part of the law of inheritance and succession. There is a case to that effect in Bom. H. C. (referred to above) but there "succession" was "succession" as understood by the Charter. The Hindu Wills Act does not apply to Cutchi Memons. See *In re Haji Ismail Haji Abdula*[2]. There is no authority which allows them to create estates unknown to Mahomedan Law *e.g.*, conditional gifts. As far as revocation is concerned the law is the same to both Hindus and Mahomedans.

As regards the second deed :—It gives a life estate to Jairajbhai which we are not concerned in disputing. After certain legacies he gives the whole residue to his two sons as undivided members of a Khoja family. We say that that simply means that they are to take as if he died intestate. Curiously enough Noor Mahomed transferred all the properties in his own name as if they were ancestral properties. This is important on the question of limitation. *Bai Diwali* v. *Patel Bechardas*[3], is not, we submit, good law. *Radhabai* v. *Nanarav*[4]; *Venkayyamma Garu* v. *Venkataramanayyamma Bahadur Garu*[5], *Yethirajulu Naidu* v. *Mukunthu Naidu*[6]. Jairajbhai opened separate books of account in respect of these properties and later on signed rent bills as managing trustee. Noor Mahomed did the same, he had fifteen of the properties transferred to his own name, three properties could not be transferred as they were Fazendari.

The will of 1881 was never acted upon as regards the various legacies. Noor Mahomed joined one of the trust properties with his own and built a bungalow on the two treating the lands as if they were his own. *Jainabai* v. *R. D. Sethna*[7] is good law and as pointed out therein if such gifts *in futuro* with a

(1) (1894) 20 Bom. 53.
(2) (1880) 6 Bom. 452.
(3) (1902) 26 Bom. 445.
(4) (1879) 3 Bom. 151.
(5) (1902) 25 Mad. 678.
(6) (1905) 28 Mad. 363.
(7) (1910) 34 Bom. 604.

1911.

CASSAMALLY JAIRAJBHAI v. SIR CURRIMBHOY EBRAHIM.

life interest to the settlor are allowed you do away with the limitation of willing away only ⅓rd of the property.

The only point left is Limitation. The onus is on the defendants but first how can there be any adverse possession when the real owner is in possession of the property. No man can be said to hold property adverse to himself. At least that was the case in Jairajbhai's time and also in Noor Mahomed's. The plaintiff was a minor and brought a suit within a year or two of attaining majority. Then again we rely on section 10 of the Trusts Act. A Khoja has testamentary capacity to will away the whole of his property. *Advocate-General* v. *Karmali*[1].

Bahadurji, for the Trustees defendants 1—4 :—

We submit that the trust deed is valid and that everything which the law requires was done to transfer possession. Possession must be given as the subject of the gift admits of: *Khajooroonissa* v. *Rowshan Jehan*[2]. In this case on the day of execution Jairajbhai opened separate books of account. Did he retain possession as owner of the property or as trustee? From the books it is proved that he managed the properties under the trust deed which provided that he should be the managing trustee. *Mullick Abdool Guffoor* v. *Muleka*[3], *Shaik Ibhram* v. *Shaik Suleman*[4], *Bibi Khaver Sultan* v. *Bibi Rukhia Sultan*[5]. Jairajbhai acted as banker to the Trust Estate. After Jairajbhai's death Noor Mahomed was appointed managing trustee by a Trustees' Resolution of 1st August 1887 and after his death Sir Currimbhoy was appointed managing trustee. Amir Ali's Mahomedan Law, 3rd Ed., Vol. 1, p. 64 and p. 49. *Sheikh Muhammad* v. *Zubaida Jan*[6]. The fact that the properties were not transferred in the Collector's books makes no difference and does not affect the validity of the trust-deed: *Muhammad Mumtaz Ahmad* v. *Zubaida Jan* [6]; Bombay Act II

(1) (1903) 29 Bom. 133 at p. 148.
(2) (1876) 2 Cal. 184.
(3) (1884) 10 Cal. 1112 at p. 1123.
(4) (1884) 9 Bom. 146.
(5) (1905) 29 Bom. 468.
(6) (1889) L. R. 16 I. A. 205.

of 1876, section 30. We submit the whole trust deed is valid; Amir Ali, Vol. 1, p. 27. Wilson's Mahomedan Law, p. 353.

[*PER CURIAM* :—There are really two points for you to argue. First :—Is the gift *in futuro* valid? And second :—Is the deed revocable?]

Nawab Umjad Ally Khan v. *Mussumat Mohumdee Begum*(1), *Umes Chunder Sircar* v. *Mussummat Zahoor Fatima*(2) followed in *Banoo Begum* v. *Mir Abed Ali*(3), Amir Ali 3rd Ed., pp. 26, 79, 111, 126, Baillie's Digest of Mahomedan Law, Chapter III of Book IX, Wilson's Anglo-Mahomedan Law, 2nd Ed., p. 491.

Whether the annuities to the ladies in the trust deed are valid. See Amir Ali p. 80; Wilson's Mahomedan Law, p. 475, section 484 (*b*). As to whether the powers to revoke is valid, a settlor has the power to revoke under certain conditions. See Wilson, p. 366, section 316. Here the donor had no power to revoke the gift therefore the plaintiff cannot ask the Court to revoke it on the point of Limitation. See *Churcher* v. *Martin*(4), *Cowasji* v. *R. D. Setna*(5), Limitation Act, section 9, *Sreemutty* v. *Hurrykristo*(6), *Vira Pillay* v. *Muruga Muttayan*(7).

Tyabji for defendants 13, 17, 18 :—

All gifts in Mahomedan Law are revocable: Morley's Digest, p. 277. He also referred to *Nawab Umjad Ally Khan* v. *Mussumat Mohumdee Begum*(1), *Muhammad Mumtaz Ahmad* v. *Zubaida Jan*(8), *Muhammad Faiz Ahmad* v. *Ghulam Ahmad Khan*(9), *Anwari Begam* v. *Nizam-ud-din Shah*(10).

Inverarity in reply.

BEAMAN, J.—I will take the questions material to be answered in this suit separately and in order of their difficulty and importance.

(1) (1867) 11 Moo. I. A. 517.
(2) (1890) L. R. 17 I. A. 201.
(3) (1907) 32 Bom. 172.
(4) (1889) 42 Ch. D. 312 at p. 319.
(5) (1895) 20 Bom. 511.
(6) (1868) 10 W. R. 285.
(7) (1865) 2 Mad. H. C. R. 340.
(8) (1889) 11 All. 460.
(9) (1881) 3 All. 490.
(10) (1898) 21 All. 165.

1911.

CASSAMALLY JAIRAJBHAI v. SIR CURRIMBHOY EBRAHIM.

First of Limitation. The trustees contend that the plaintiff is now barred by the lapse of time from bringing this suit to have the trust-deed of the 7th of January 1886 set aside. Involved in this question is the application or otherwise of section 10 of the Limitation Act. Further, whether in the event of their being adverse possession, time commenced to run in the life-time of the settlor Jairajbhoy Peerbhoy.

It appears clear that it is only in the event of the trusts or some of them being bad, that the question of limitation can arise. For, if the trust-deed in its entirety is good, then of course effect must be given to it irrespective of any question of the lapse of time.

Next, is to be considered the somewhat more complicated question of how limitation arises when the trust-deed itself is bad and void *ab initio* or when the deed itself is good, but all or any of the trusts declared in it are bad. It is upon this point that a certain amount of difficulty appears to have been occasioned by Courts in this country. Applying the decisions in *Churcher* v. *Martin* (1) and *In re Lacy* (2), to sets of facts to which, with great respect to the learned Judges responsible for some of those decisions, I may doubt whether the principle of *Churcher* v. *Martin* really applies. All the English case-law on this subject appears to me, and has appeared to me, from the moment I commenced to study and analyse it, perfectly consistent and intelligible. Stating the effect of that law in the most general terms, it amounts to this, that where what purports to be a trust-deed turns out to have been entirely void and therefore not to have passed the legal estate, the position of those who took possession, believing themselves to be trustees but not in law real trustees, necessarily assumes the character of possession by trespass and is therefore from its inception in law adverse against all the world. Where, however, the trust-deed in itself is good and valid to the extent of passing the legal estate but the trust declared are in themselves wholly or partially bad, then there is a resultant trust over to the author of the trust and the

(1) (1889) 42 Ch. D 312 at p. 319. (2) [1899] 2 Ch. 149.

possession of the trustees, whatever they may think of it and however they might intend to use it for the purposes of carrying out the bad trusts, could not in law be adverse to the *cestui que trust*, that is to say, the grantor. In all cases like *Churcher* v. *Martin* [1] and *Lacy's Trusts* [2], the possession is referable in law to trespass. The so-called trustees never were trustees except in name and were in without any authority from the author of the trusts and without any legal relation having been established between them and him. Widely different is the case of trustees who obtain the legal estate from the author of the trusts to apply the beneficial uses to specified objects which may or may not be good. For then from the beginning there is always a relation between the author of the trusts and the trustees in whom his confidence has been reposed and there is always the legal possibility at least of another relation coming into existence between them where owing to the failure of the declared trusts, there is a resultant trust back to the grantor who from that moment becomes in law the *cestui que trust* of the trustees. When the principle is thus stated, it appears so clear and so intelligible that it is not very easy to understand how it has been extended, or appears at any rate to have been extended, in the Indian Courts so as to cover cases where the trustees were not in as trespassers but in all strictness as trustees and afterwards in the events which had happened not as trustees for the intended *cestui que trust* but for the grantor. It is true that there are passages in the judgment of Kekewich J. in *Churcher* v. *Martin*[1], which have contributed to what, if I may say so with respect, seems to have been some confusion of thought in the Courts of this country. Particularly that passage which is quoted in more than one judgment to which I have been referred, where that learned Judge asks how the possession of the trustees can enure to the benefit of the grantor whose title it was the intention of the trust settlement to defeat. Some words in that passage might be thought not to have been quite happily chosen, for it is of the essence of the decision that there were no trustees but that in fact

(1) (1889) 42 Ch. D. 312. (2) [1899] 2 Ch. 149.

1911.

CASSAMALLY JAIRAJBHAI v. SIR CURRIMBHOY EBRAHIM.

those who were at first so-called, turned out to be trespassers. Nor does it appear to me that when the analysis is carried further, it is really a question of the possession of the trustees enuring for the benefit of the grantor. It is, however, no answer to this difficulty to say that in the present case the grantor could have had no intention of defeating the interest or title of the present plaintiff because at the time of the trust settlement the plaintiff was not born. That is a pure irrelevancy in the abstract argument. But were it necessary to do so, a critical examination of all the contents of the judgment in *Churcher* v. *Martin*[1], might lead to some doubt whether were all that is implied in Kekewich J.'s reasoning, pushed to its logical conclusion, even that decision could be in all respects reconciled with established principles of other branches of the law. It is a peculiarly difficult case, used merely to elucidate the principle on which it purports to be founded for the same reason that this is a difficult case, namely, that there the residuary legatee, as here the original grantor, was one of the trustees and with reference to that Kekewich J. does say that the case might have been very different if Emanuel Churcher, who, for the purposes of that case, stood in the position of the original grantor, had been the sole trustee. And that, I think, for a very obvious reason, which on account of the difficulties it might have created, the learned Judge did not care to exhaust. For it surely must always be a matter of extreme doubt whether, carrying the fictions of law to their utmost legitimate length, a man can be said to be a trespasser upon himself. Remembering the basis of that judgment, the learned Judge had to surmount this difficulty by taking it for granted that its form was changed in some way by the fact of there being three trespassers and not one. But since it appears that it was Emanuel Churcher himself who retained the physical possession and took a chief part, if not the chief part, in dealing with the property, it certainly does seem a hard saying that in the character of a trespasser he could have obtained possession adverse to himself. In *Lacy's Trusts*[2], the principle of

(1) (1889) 42 Ch. D. 312. (2) [1899] 2 Ch. 149.

Churcher v. *Martin*[1], is brought out in the clearest light and freed from this particular complication. When these cases are compared with such cases as *Lister* v. *Pickford*[2]; *Salter* v. *Cavanagh*[3] and *Patrick* v. *Simpson*[4], the distinction in principle between these groups becomes perfectly clear. In such a case as *Salter* v. *Cavanagh*[3], which is a very favourite authority in the Courts of India, there was a trust of the whole property for uses which did not exhaust the revenues and it was held that in respect of the unapplied surplus there was an express trust inferable from the instrument itself in favour of the settlor. Kekewich J. in *Churcher* v. *Martin*[1], comments upon that, that it is sufficient to say that the trust, whatever else it may have been, was not express in the technical sense of that term.

The point becomes of importance when we have to consider the case law upon s. 10 of the Limitation Act and the applicability or otherwise of that section to the trustees' contention here. Nevertheless, it may be doubted whether in the broader etymological sense, it is not quite correct to say, as Lord Halsbury very emphatically said without any qualification in *Smith* v. *Cooke*[5], that where it was the intention that there should be an ultimate resultant trust in favour of the grantor, it was usual to express that on the face of the deed, which means much the same, as was held in *Salter* v. *Cavanagh*[3]. That dictum of Lord Halsbury excited a considerable amount of criticism in technical circles where all equity lawyers maintained that it was a contradiction in terms to say that a resultant trust could or ought to be expressed in the deed. As I have said, in the less technical and more general sense, it is probably correct to say that a deed so framed as upon its very face to provide for the springing back of the trust fund or a part of it in certain events to the author of the trust, does create what is at once an express and a resultant trust. But if I had been confined to the English authorities, I should certainly have not felt it necessary to do more than state in the plainest

(1) (1889) 42 Ch. D. 312.
(2) (1865) 34 Beav. 576.
(3) (1838) 1 D. & W. 668.
(4) (1889) 24 Q. B. D. 128.
(5) [1891] A. C. 297.

1911.

CASSAMALLY JAIRAJBHAI v. SIR CURRIMBHOY EBRAHIM.

language what I conceive to be the true meaning and applicability of such cases as *Churcher* v. *Martin*[1] and *Lacy's Trusts*[2].

It cannot, I am afraid, be denied that in considering pleas of limitation in cases analogous to this, the Courts in India have given decisions upon section 10 of the Limitation Act, some of which profess to be founded on *Churcher* v. *Martin*[1], which do occasion very great difficulty and are extremely hard to reduce to simple and consistent principles.

The form in which the question has usually presented itself to the many learned and eminent Judges who have dealt with it in this country, is whether a resultant, implied or constructive *cestui que trust* is entitled to the benefit of section 10 and with perhaps a single exception of the case in *Maulvi Saiyid Muhammad* v. *Razia Bibi*[3], upon which I will say a few words in a moment, the current of authority seems to have set steadily against the extension of that section to all cases of resultant implied or constructive trusts. It is no use shirking the difficulty which this body of case law gives rise to. For involved in all those decisions, even where they do not go the length of expressly affirming it or giving effect to it as the result of that proposition, is the assertion that the possession of a trustee in all such cases of resultant, implied and constructive trusts may be and sometimes is adverse to the *cestui que trust*. The strongest case perhaps is that of *Kherodemoney Dossee* v. *Doorgamoney*[4], where it is perfectly clear that there was, in the events found to have happened, a resultant trust in favour of the plaintiff. But the learned Judges held that the trustee, notwithstanding the failure of the declared trusts, was in possession for and on behalf of the intended beneficiaries and against the resultant *cestui que trust*. That case is, as far as I can see, exactly upon all fours with the present case.

In the case of *Vundravandas* v. *Cursondas*[5] a Division Bench of this Court, consisting of Sir Charles Farran, Chief

(1) (1889) 42 Ch. D. 312.
(2) [1899] 2 Ch. 149.
(3) (1905) L. R. 32 I. A. 86.
(4) (1878) 4 Cal. 455.
(5) (1897) 21 Bom. 646 at p. 663.

Justice, and Tyabji, J., would apparently have come to the same conclusion. That decision would undoubtedly have been binding upon me, whatever my own views as to the law involved in it might be. Fortunately, however, the passage in point is clearly in the nature of an *obiter dictum* and when the case went up on appeal to the Privy Council, it might, I think, be fairly inferred from the line of argument there adopted and the reiterated reference made by Lord Macnaghten to *Lyell* v. *Kennedy*[1] that their Lordships were not disposed to adopt that part of the lower Court's judgment. However that may be, they certainly do not adopt it and part of the judgment appears to have been reversed. So that beyond the very high respect each and every other Judge must always feel for any opinion expressed by the late eminent Chief Justice Sir Charles Farran, that part of the judgment is not binding upon me.

In a case decided by my brother Batchelor in 1906 *Mathuradas* v. *Vandrawandas*[2], that learned Judge, who is habitually averse from indulging in *obiter dicta*, allowed himself under the influence of what must have been very able and impressive argument to express his opinion upon this point, the whole of that part of his judgment is entirely *obiter*. It is not in any sense binding upon me but it contains an elaborately reasoned examination of the authorities upon this point and indicates that that learned Judge's opinion coincided with and would, if necessary, have been given in support of the judgment of the Calcatta Court to which I have referred.

Those cases will suffice to explain the difficulty I have felt throughout this part of the argument in arriving at some clear and settled principles upon which to ground my own decision upon this issue. Not that I myself, had I not been oppressed by so much authority emanating from Judges much more eminent than I can ever hope to be, should have felt at any time any real difficulty as to the proper *ratio decidendi*.

And first of the argument which is constantly repeated in all these judgments as distinguishing what is called an express trust inferable on the face of the deed from a true resultant

(1) (1889) 14 App. Cas. 437. (2) (1906) 31 Bom. 222.

1911.

CASSAMALLY JAIRAJBHAI v. SIR CURRIMBHOY EBRAHIM.

trust only coming into being because of the failure of the trust declared in the deed. Here, I think a very little examination will bring to light a perfectly clear and consistent principle, and that principle has already been announced and adhered to in more than one judgment of this Court. The two hypothetical cases which Mr. Inverarity offered me in the course of his concluding argument appear to me to entirely overlook it. Those two cases were of a trust, let me say, for a thousand pounds to the uses of so much blank for A, so much blank for B, so much blank for C. Here, said Mr. Inverarity, there is an express trust of the kind intended in *Salter* v. *Cavanagh*[1], and though that case was not referred to in *Smith* v. *Cooke*[2], clear upon the face of the deed. Then, let us take a trust of one thousand pounds, one pound to the use of my daughter and 999 pounds undisposed of. Upon what conceivable principle, Mr. Inverarity asked, can you distinguish between these two cases and say that in one there is an express trust over to the settlor and in the other there is not. It appears to me that there is no difficulty whatever in answering that question. In the first of the cases there is a true resultant trust not express upon the face of the deed but merely implied by law as Kekewich, J., put it, not because the deed is void certainly but because of the failure of the intended trusts. If those trusts had not failed and had exhausted the property, there would have been no resultant trust over to the settlor and therefore there is nothing express on the face of the deed which would bring it within the same category as the second case. In the second case the intended trust can be carried out consistently with what is then said by Lord Halsbury to be an express trust on the face of the deed over for the benefit of the settlor and the criterion is equally plain and infallible. Where the ultimate resultant trust which is to spring back to the settlor is consistent with the discharge of the declared trust, then it may by loose use of language be said to be express on the face of the deed but where the extinction or failure of all the intended trusts is a

(1) (1838) 1 D. & W. 668. (2) [1891] A. C. 297.

condition precedent to the resultant trusts coming into being, then the latter is clearly a true resultant trust and is not express and never can be express on the face of the deed.

In a recent decision of this Court *Mojilal* v. *Gavrishankar*[1], Sir Basil Scott, Chief Justice, and Mr. Justice Batchelor, following a part of the decision of Sir Charles Farran in *Vundravandas's case*[2], have re-affirmed the principle I have just stated. There, there was a small trust not exhausting the residue and the trustees were held to hold the residue on express trust for the heirs of the settlor. That of course is merely a re-statement of the rule in *Salter* v. *Cavanagh*[3].

Having so far cleared the way from all possible mis-conceptions upon this head, let me now come to the heart of this particular difficulty and deal with a case like that of *Kherodemoney Dossee* v. *Doorgamoney*[4]. If that decision is really good law, then it would appear to exactly fit the facts of the present case with this difference only that the author of the trust was not, if I remember rightly, trustee in that case. The Court there held, founding itself upon the principle of *Churcher* v. *Martin*, that on the failure of the declared trusts, which were in favour of children then unborn, the trustee, having gone into possession under the trust-deed, held adversely to the author of the trusts and his heirs; more than twelve years having elapsed before the heir sued to have the trust declared void and recover the fund. Notwithstanding that the Court did hold those trusts void, it refused to grant the plaintiff relief on the ground of limitation. The resultant trust, when the declared trusts failed, was held not to be a trust vested in the trustees for a specific purpose within the meaning of section 10 of the Limitation Act, and from that time forward our Courts have interpreted that section as though the words were an express trust as in the English Statute.

Now it appears to me that the true law underlying all sets of facts of that kind was never presented to the minds of the learned Judges who decided that case, or, as far as I can see,

(1) (1910) 12 Bom. L. R. 947.
(2) (1897) 21 Bom. 646.
(3) (1838) 1 D. & W. 668.
(4) (1878) 4 Cal. 455.

1911.

CASSAMALLY JAIRAJBHAI v. SIR CURRIMBHOY EBRAHIM.

has been considered in any of the numerous judgments which have been delivered in Indian Courts professing to follow it. What is the true position when declared trusts failed and there is a resultant trust over to the settlor or his heirs? The answer to this is to be found in the very elementary proposition that the possession of the trustee is always that of the *cestui que trust*, and, therefore, however, he may think or wish to be holding as trustee for trusts which have failed in the eye of the law, he is really holding, when those trusts failed, as trustee for the settlor. Then the position is simply this: so long as he retains and professes to retain the character of a good and legal trustee, he is holding the legal estate as stake-holder, for two claimants, the intended beneficiaries of the declared trusts which have failed and the resultant trustee, that is, the settlor. And I entirely fail to understand how any length of possession by a trustee so situated can be adverse to his true *cestui que trust* as soon as that legal person is discovered and ascertained. It is quite easy, I admit, to conceive of cases in which a trustee so situated might deny the right of the *cestui que trust* resultant on demand made. It is quite conceivable that in his partiality for the intended objects of the author of the trust's bounty, he should make over the legal estate to them. And there are many ways in which he might, divesting himself of the purely legal character of a trustee, thus put himself in direct opposition and hostility to the resultant *cestui que trust*. And I can also understand that if there were facts showing that this had been done the character of the trustees' possession might be affected by such facts and time might be deemed to run as from the first of them against the *cestui que trust*. Then indeed it would be a very serious question how far these decisions governing the application of section 10 of the Limitation Act might not preclude the resultant *cestui que trust* from obtaining relief when twelve years had elapsed from the time that he knew his trustee had been holding adversely to him.

This leads me to what is the fundamental distinction to be borne in mind when the argument turns, as it has turned here, upon section 10 of the Limitation Act. That section provides that in the case of an express trust no length of time shall bar

a suit by any person following a trust property in the hands of a trustee. I have used the word "express" following the decisions of the Indian Courts, and so adopting with the utmost reluctance the narrow view to be placed upon that section I still say that it really does not touch the point I have to consider in this case. From the very nature of the section it implies that in some way or other the possession of the trustee has become adverse to his *cestui que trust*. Else there would be no need for it in the statute of limitation. And there are many cases in which that section might have its practical use, for instance, a dishonest trustee might make off with the whole of the trust fund or deal with the trust property in a manner incompatible with its application to those uses for which alone he was entrusted with it and from that moment no doubt his possession would cease to be really that of a trustee and would become adverse to his *cestui que trust*.

Now, where a trust is express, section 10 says that even though the *cestui que trust* chooses to put up with the acts of a trustee and to take no steps to recover the trust property for more than twelve years, yet he shall never be barred when he does so choose to pursue and endeavour to recover it. But apparently where the relations between the trustee and the *cestui que trust* are not express but have arisen by implication of law only, then if the trustee assumes an adverse attitude towards his *cestui que trust*, the *cestui que trust* must seek his remedy within the period of twelve years. That I take to be the utmost length to which the Indian cases upon this head can fairly be carried and even then, speaking with the utmost deference, I think, they have been carried much too far. But that begs the whole question whether or not in the absence of any dishonesty on the part of a trustee, his possession can really be adverse to that of his true *cestui que trust*, as soon as any conflict between persons so claiming has been decided. And that is very like one of the early English cases where one of the *cestui que trust* appears to have been put into possession of a property and to have had the use of it but it was afterwards found that the real *cestui que trust* was another and limitation was not allowed.

1911.

CASSAMALLY JAIRAJBHAI v. SIR CURRIMBHOY EBRAHIM.

Now I say that in all cases like that of *Kherodemoney Dossee* v. *Doorgamoney*[1], it will not do for the trustee to say that he would prefer to hold the property to the uses intended by the trust-deed when it is found that those declared trusts are invalid. What has in law happened is that throughout he has been holding as a resultant trustee for the *cestui que trust* and until there has been some material change in the character of the trustee referable to his knowledge of his changed relations and unmistakably adverse to his true *cestui que trust*, I really do not see how any question of adverse possession can possibly arise. So that we may give the go-by in a case of this kind, if my view is correct, to section 10 entirely and treating the case as falling under Articles 141-142 of the Second Schedule, merely put the question whether the possession had been adverse and if so from when.

In the present case the trust was executed in 1886. For the purposes of my present argument it is immaterial whether it was a good trust or a bad trust, provided only that the deed itself was good and as to that there can, I think, be no question. The learned counsel for the trustees, who has argued the question of limitation very fully, has not attempted, as far as I can remember, to suggest that there was anything bad in the deed itself or that it failed to convey the legal estate. At that time the plaintiff was not born. About a year after the execution of the trust-deed the settlor died, the plaintiff being then in existence. Up to his death the author of the trust was himself one of the trustees and was in physical possession, occupation and enjoyment of all the trust property. I do not, however, think that that fact has any bearing whatever upon the theoretical argument I have so far unfolded. If there really were any adverse possession, it must have commenced from the moment the legal estate was conveyed and taken possession of by the trustees. Nor is that in any way affected by the fact that one of the trustees happened to be the author of the trusts and the first beneficiary, for I take it to be as clear as day-light that if in such circumstances a donor

(1) (1878) 4 Cal. 455.

chooses to divest himself of his property as donor and accept it as donee, interposing the fictional character of trustee between himself and those two characters, then so far as he is a donor, but as trustee for himself as donee, must hold adversely to himself as donor. Nor can I see that this position is in the slightest degree affected by the conveyance itself originating from himself as donor. For if there were any adverse possession at all, I do not see why it should not begin to run under a conveyance just as it would do in the case of a purchaser against his vendor, once the conveyance be completed.

I make these observations because it seemed to me in the course of the argument that the learned counsel for the plaintiff attached very great importance to the fact of Jairajbhoy Peerbhoy having remained in physical possession and enjoyment of the property during his lifetime. As I have said, if this were really a case like *Churcher* v. *Martin*[1] and if I had been obliged to treat all the so-called trustees as mere trespassers *ab initio*, then I certainly should have felt strongly inclined to press Kekewich J.'s reasoning to its logical conclusion and hold that a man cannot really be a trespasser upon himself upon his own property. So that in that view I should have felt very grave doubt whether any adverse possession could possibly have originated in the lifetime of Jairajbhoy Peerbhoy, but the deed being perfectly good, those considerations do not apply.

Now the trusts are all on the face of them of a kind which an honest trustee might accept and endeavour to carry out, so that I think there possibly arises a further point, namely, whether limitation as against a resultant trustee could commence to run until the question whether or not the declared trusts were good or bad, had been decided. And if that were really so, then in a case of this kind, there could obviously be no question of limitation at all. For it is only after the Court has pronounced some, at any rate, of the declared trusts to be bad that it could arise and then as I began by saying the trustees would have to fall back upon limitation as against one who to

(1) (1889) 42 Ch. D. 312.

1911.

CASSAMALLY JAIRAJBHAI v. SIR CURRIMBHOY EBRAHIM.

that extent is attacking the trust-deed. Until this case is finally decided, I suppose it cannot be known whether the trusts of the settlement of 1886 are good or bad, so that the relation of the resultant *cestui que trust* and trustee has not been established between the plaintiff and the defendants until the final determination of this suit. I do not mean to say that when that relation is established, it would not of necessity go back to the moment when any or all of these declared trusts failed but for the purposes of limitation I do not see how the possession of the trustees can be said to be adverse until so uncertain a question had been answered.

Before the case concluded, I was asked to grant an adjournment more than once by the learned counsel for the plaintiff in order that he might bring further proof of the alleged unsigned will of Jairajbhoy Peerbhoy and he appeared to think that if he could prove that unsigned will, it would have a direct bearing upon this question of limitation. I think by what I have already said I must have made it clear why I do not agree with that view. If as a matter of fact the possession of Jairajbhoy Peerbhoy taking as trustee under his own trust settlement were adverse to himself as donor, no act purporting to be performed by himself as donor could have any bearing at all upon the character of his possession as trustee. It is absolutely necessary in a nice theoretical argument of this kind to keep the personæ of the same man separate and distinct in one's mind. We have Jairajbhoy the donor, Jairajbhoy the trustee, Jairajbhoy the *cestui que trust*, and referring each of Jairajbhoy's acts to its proper persona it will, I think, be apparent that no act done merely in his capacity of Jairajbhoy the donor could possibly affect the adverse possession of property held by him as Jairajbhoy the trustee for Jairajbhoy the donee. There is only one connection in which the proof of this will might possibly have served the plaintiff as against the trustees and that as a revocation of the trusts, if the trusts itself were otherwise good. But that is entirely distinct from the question of limitation.

Before I conclude my discussion of this topic, I would say a word or two upon the case of *Maulvi Saiyid Muhammad* v.

Razia Bibi[1], which is the nearest, I can find, to direct authority in favour of the conclusion I myself have come to.

That was a case the facts of which very closely resembled the facts of the present case. There was a trust with an ultimate gift to *wakf* and in the meantime the property was to be applied to the uses of the settlors and their descendants. Pursuant thereto, professedly taking under this alleged *wakf*, one of the trustees occupied and held the property; then the other settlor died and on her daughter making a claim to her mother's share of the settled property, it was held that the *wakf* was bad for various reasons into which I need not go and the question then arose whether the plaintiff was not barred by adverse possession of the so called *Mutawali* under the *wakf* settlement. The point was treated in the Allahabad High Court as a pure question of fact, namely, whether or not, the possession of the defendant was adverse. And their Lordships held there that it was merely permissive without going into any of the nice and difficult questions which I have had to open up in this case. Unfortunately I think—for we badly need an authority on the question,—their Lordships of the Privy Council satisfied themselves with saying that they saw no reason to dissent from the correctness of the conclusion of the Court below upon this point, that is to say, they found that as a matter of fact the defendant's possession was permissive and not adverse. But they do not appear to have gone into the question whether in any event, while the normal relation of trustee and resultant *cestui que trust* exist in law, the possession of the former could be adverse to the latter. It is really upon that ground and that substantial ground alone that I base this part of my judgment. I am quite clear in my own mind that so long as a trustee occupies the position of a trustee as soon as declared trusts failed and there is a resultant trust in favour of the settlor, the trustee's possession is essentially that of his *cestui que trust* and can only be changed into adverse possession by a conscious and deliberate act; that is to say, that he

(1) (1905) L. R. 32 I. A. 86.

1911.

CASSAMALLY JAIRAJBHAI v. SIR CURRIMBHOY EBRAHIM.

must repudiate all intention of holding for the resultant *cestui que trust* and he must assert his intention of continuing to apply the trust fund to uses which the Court had declared or which are known to him to have failed. Then I do admit that his possession might become adverse to his legal *cestui que trust* and that if that person did not take steps within twelve years, he might not be able to avail himself, under the Indian authorities, of the provisions of section 10 of the Limitation Act. But in this case nothing of the kind has happened and nothing of the kind could have happened, for the plaintiff through most of the intervening period has been a minor and as soon as he came of age, he appears to have contemplated taking steps which had resulted in the present suit, so that until the trustees became aware—I am assuming for the purpose of the whole of this argument that the trusts are bad,—that the trusts were bad, I think as a matter of fact it is too clear to admit of serious argument that they were not holding adversely to him who would then be the resultant *cestui que trust*. That, I believe, is in conformity with all the English authorities. I believe too that it states a principle which will enable us to reconcile all the Indian authorities upon section 10 with what has really been meant in the English authorities and so I trust that we may come to a clear understanding of what really is implied in this branch of the law which has been clearly understood and always clearly stated in the English Courts but which has in this country, I think, given rise to some confusion and divergence of opinion.

I, therefore, find upon the first question that in the event of the trusts being bad, the deed is good and that the plaintiff is not time-barred as against the trustees.

The next question which I shall answer in a very few words is whether or not the whole of this suit is *res judicata* by reason of certain arbitration and other proceedings between the plaintiff of the one part and Nur Mahomed and after his death his widow Khanubai of the other. The trustees disavow their reliance upon this point which certainly is more proper to the case of the seventh defendant Khanubai who has, in the course

of the suit, settled with the plaintiff. If it were a good plea, it would no doubt defeat the whole suit and to that extent support the trustees' position. I think, therefore, it ought to be at least disposed of. There can plainly be no *res judicata* touching the subject matter of this suit and looking to the array of parties in it by reason of the proceedings I have adverted to, I think it is extremely likely that had Khanubai continued to defend the suit, there might have been something very like an estoppel which in that event, I should have pressed as far as I lawfully could against the plaintiff in her favour. But estoppel and *res judicata*, as I have so frequently had occasion to say from this bench, are entirely distinct. Put in the most simple and colloquial way, *res judicata* precludes a man averring the same thing twice over in successive litigations, while estoppel prevents him saying one thing at one time and the opposite at another. And I have never heard of a suit being barred by estoppel except perhaps in the recent case of the *Narielwala's* Trusts, where, I rather think, the learned Judges in appeal did incline to hold that the plaintiff was estopped from bringing his suit. It is also quite common in all text-books upon estoppel to find a very large portion of their subject matter devoted to *res judicata*. I think the distinction is really too plain to need dwelling upon in the present case. What passed in the arbitration and other proceedings I have referred to, was matter in issue between the plaintiff and his brother Nur Mahomed. The present trust settlement was excluded by design from the scope of any decision arrived at in that suit. I do think it very likely that it was a factor nevertheless in the composition arrived at and that it might have been capable of proof, that it was on the understanding that the trust settlement was not to be attacked that the arbitrators made their award: and if that really had been so, then the position might have been awkward for the plaintiff in the present suit had Khanubai continued to defend it. But such an estoppel, if it existed, would have been restricted to Khanubai and the trustees could not have availed themselves of it. This is however happily now merely a matter of conjecture. As a bare plea of *res judicata* it is obviously unsustainable. I take this

1911.

CASSAMALLY JAIRAJBHAI v. SIR CURRIMBHOY EBRAHIM.

opportunity of congratulating the legal gentlemen who have had the interests of Khanubai and Sakinabai in their care upon what I consider the very advantageous terms upon which they have provisionally settled with the plaintiff.

I now come to a consideration of what is perhaps the principal question in the case, whether the trust settlement of 1886 is a good and valid settlement, that is to say, whether the disposition of property thereby made is a good gift according to the Mahomedan Law. And in dealing with that I must observe that there are numerous gifts contained in this settlement, some of which might be good while others might be bad, so that it may not be possible to dispose of the settlement as a whole without going somewhat minutely into its several parts.

Let us first look at the nature of the settlement itself. It purports to convey the trust properties therein mentioned on trusts to certain trustees first for the use and benefit for life of the settlor and first donee Jairajbhoy Peerbhoy himself with monthly sums to certain ladies of the family with which I am not now concerned. On the death of the settlor, like interests to Nur Mahomed who was at that time his only son. In the event of Nur Mahomed having a son, there was to be a re-arrangement in respect of all that follows in this settlement, into the details of which again I need not go. But failing male issue to Nur Mahomed, then the corpus was to be divided into ten portions which were given to various donees, four-tenths being directed in that event to charity. And the question is—a very important question, I think, in this town—whether a voluntary settlement during the lifetime of a Khoja Mahomedan of this kind is a valid gift, or if not a gift, whether it is a will, or if not a will, whether it is a *wakf* and in either of the latter characters good and valid. At the end of the settlement deed there is the usual revocation clause appropriate to all English voluntary settlements in common form. Thereunder the settlor or the donor reserves to himself full power of revocation during his lifetime by signed writings and also power to declare new trusts by such signed or any other writing.

I must take this opportunity of saying that when the case opened, it appeared to me to resemble, for the purpose of deciding this issue, the case of *Jainabai* v. *R. D. Sethna*[1] so very closely that I doubted whether I should be called upon to do much more than re-affirm my decision in that case. But the particular question in *Jainabai* v. *R. D. Sethna*[1] was whether the alleged gift was revocable. In that case the donor did exercise the power of revocation reserved in his lifetime and therefore the central point in that case differs materially from the central point in this case and a great deal of the judgment there has reference to arguments which were more peculiarly apt for the main purpose the plaintiff then had in view. And upon a much fuller argument and somewhat extended researches of my own into the Mahomedan Law I have reason to doubt whether I did not lay down that law in one or two points much too broadly, in *Jainabai's* case[1]; and whether indeed part of that judgment is not incorrect. I say this particularly with reference to what I then held on the reply that the deed was a *wakf*. I was then of opinion that a *wakf* could not be valid if it were postponed to a life interest in the person creating it.

Now, having gone into the standard works upon the Mahomedan Law and listened to a very long and elaborate argument addressed to me by Mr. Tyabji for some of the defendants in this case, it does appear to me to be inconsistent with that law that a Mahomedan may devote his property in *wakf* and yet reserve to himself and his descendants in a very indefinite manner the usufruct of the property. So that I doubt whether it would be correct to hold, as I held in that case, that if the instrument were really a declaration of a *wakf*, it would be necessarily invalid because the *wakf* was postponed to a life enjoyment of the donor and possibly, though this is by no means so clear, to other life interests after his own.

Next, in that judgment I was of opinion, looking to the broad essential features of what the Mahomedan lawyers understood as gift that it would be sufficient to invalidate a

[1] (1910) 34 Bom. 604.

1911.

CASSAMALLY JAIRAJBHAI v. SIR CURRIMBHOY EBRAHIM.

gift, if the donor in the deed purporting to confer it, reserved to himself a right of revocation co-extensive with his life. And if there were any hope of expecting from the vast entanglement of the Mahomedan Law anything like consistent principles or intelligible classifications or accurately expressed notions, it certainly would appear to me that considering the requisites of a gift are amongst others finality and completeness *in præsenti*, then it might and ought to follow that an announcement on the donor's part that he might at any time during his life-time revoke the gift would make the donation entirely invalid. So far from this being the case, Mr. Tyabji points out, and I believe he is perfectly correct, that the general rule is that the power of revocation is inherent in the donor of every gift, so that expressing it, as is usually done by English draftsmen in these voluntary settlements, is merely surplusage and so far from invalidating the gift as a whole would necessarily be implied in it were it not expressed. It is true that this general rule like everything else in the Mahomedan Law which has yet come under my analysis, is open to innumerable exceptions many of which appear to conflict in principle with the main rule. And it is a very strong point in the defendants' case here that although there is an express power of revocation reserved in the settlement and although the power of revocation is implied generally in all gifts, yet where the gifts are to particular persons or where the donor has received from the donees anything in exchange for the gift or part of the substance of the gift itself, then according to the strict Mahomedan Law the gift is irrevocable and the revocation clause in this settlement would have to be regarded as void.

Upon those two questions, I say, I think that my judgment in *Jainabai* v. *R. D. Sethna*[1] would require to be re-considered. But the more frequently I hear arguments upon Mahomedan Law and the further I prosecute my own researches in that somewhat difficult region, the more convinced I am that it is almost impossible in the state of the existing authorities compared with the original text-book writers and standard works

[1] (1910) 34 Bom. 604.

on the subject, to arrive at any clear understanding of what the real underlying principles of that law upon many of the questions which in an advanced civilization have large and practical importance and are supposed to be answered by a reference to that law, really are. The English Courts are constantly making Mahomedan Law for themselves and engrafting upon the extremely crude and primitive notions of the early Mahomedan lawyers, the artificial conceptions of the English law and so endeavouring to mould and shape the whole into a somewhat practical form, which while it may flatter the conservative prejudices of good Moslems, does not in the least resemble anything which the authors of the Moslem Law had themselves laid down; but is rather an attempted compromise between the rigidity and inadequacy of the legal notions of a people then living under very primitive social conditions with their now highly complex social needs and requirements.

I say this to explain with what diffidence I always approach the solution of any question which has to be argued before me first with referenee to the Mahomedan Law proper and next with reference to the judge-made authority upon that law. And if I failed in the case of *Jainabai* v. *R. D. Sethna*[1], as I believe I did, to go far enough afield and take into account many very subtle differences and exceptions to be found in the Mahomedan Law books I am very much afraid that even in the present case where the arguments have been much fuller and where I myself have gone much deeper into the original works I may again fall into error. I shall not therefore start criticizing this deed with the assumption that it is necessarily bad because of the power of revocation reserved to the donor in it. I still think that if analysis were pressed far enough, that ought to be a complete answer to the validity of any Mahomedan gift *inter vivos* but assuming that it is not, then I have to look to the nature of the gift or gifts which this deed purports to make. To the first of these, that is the gift to the donor himself, I do not

(1) (1910) 34 Bom. 604.

1911.

CASSAMALLY JAIRAJBHAI v. SIR CURRIMBHOY EBRAHIM.

think that any serious exception either in theory or practice can be taken, except this that it is entirely meaningless. I am not now overlooking the fact that while the gift reserves full beneficial enjoyment of the settled property to the settlor for his life, it might be said that it is not meaningless inasmuch as it curtails his power of disposition and therefore that is giving to himself something less than he possessed before. That appears to me to make it still more meaningless. How a person can give to himself less than he had in the ordinary sense of gift, I confess I fail to understand. Moreover, there are a great many passages in the most highly accredited works on Mahomedan Law to show that where a gift is conditioned by a power restricting alienation, the gift is absolute and the condition is void. So that if there seem any useful purpose to be served by trying to apply the principles in this region of the law we might say that however restricted be the gift in form to Jairajbhai, it is in effect a gift absolute to him for life and that entirely irrespective of the power of revocation in the concluding clause. So far as his life estate is concerned, however, it is unnecessary to be too nice in discussing or criticizing it except in so far as it might possibly invalidate all that follows. And in the case of *Jainabai* v. *R. D. Sethna*[1], I was very strongly of opinion that a gift to the donor himself for his life and then over to others could not be reconciled with any recognized principle of the Mahomedan Law of Gift and must necessarily therefore, so far as the remoter donees were concerned, be bad *ab initio*. I still adhere to all that I said upon that and kindred heads in *Jainabai* v. *R. D. Sethna*[1]. I have no doubt that though I may have tripped on some minor points, that judgment is substantially right; and the more important principles which I then attempted to state are sound and were correctly stated.

Thus in the case of Nur Mahomed who follows on the life estate of Jairajbhai Peerbhoy, is the gift to him valid by Mahomedan Law. I am of course here confronted with a very great difficulty arising upon the cases of *Umes Chunder Sircar*

(1) (1910) 34 Bom. 604.

v. *Mussummat Zahoor*[1] and *Banoo Begum* v. *Mir Abed Ali*[2], where in the one case their Lordships of the Privy Council, in the other a Bench of this Court consisting of the Chief Justice and Heaton, J., held that both according to the Sunni and Shiah Schools of Law, a Mahomedan might create a succession of life estates which were said to be something like what we in England call vested remainders. I have to observe upon both those cases that what is principally in controversy here and what was principally in controversy in *Jainabai* v. *R. D. Sethna*[3], never seemed to come prominently forward either in the argument or in the decisions of the Courts and that is whether an estate of this kind can be made the subject of a gift *inter vivos*. In the Privy Council case, it was only those persons who were interested in the gifts over on failure of issue to the donee with the life estate who came before the Court and the question really seemed to be in their Lordships' opinion whether a postponed estate of that kind could be validly transferred or as I prefer to say trafficked in. I have never been able to understand how in that case it was held that the gifts over to the two sons were more than contingencies, although apparently their Lordships thought they were something less than vested remainders. For they are very careful to say that they are something like vested remainders. The facts were that these gifts over were only to take effect in the event of the lady whose life estate was interposed not having a son. Now, in the case of a child-bearing woman married, I cannot conceive of a more uncertain event than that of her having or not having a male child. And whatever nice refinement of meaning the law may place upon such a condition, I am quite certain that any person waiting upon it would have to regard it as a contingency, and a very uncertain contingency indeed. I can quite understand that if their Lordships of the Privy Council had had their minds upon that point and if it had been really a case of vested remainders, they might have come to the conclusion,

(1) (1890) L. R. 17 I. A. 201.

(2) (1907) 32 Bom. 172.

(3) (1910) 34 Bom. 604.

1911.

CASSAMALLY JAIRAJBHAI v. SIR CURRIMBHOY EBRAHIM.

though I do not think they ever did, that such a vested remainder could properly be made the object of a gift *inter vivos*. But I cannot conceive how it ever could have been held, as I am sure it never has yet been held, that a gift *in futuro* contingent upon the happening of uncertain events, could be given consistently with the requirements of the Mahomedan Law of gift *inter vivos*, nor do I see how in the particular case the vested remainders could have been any more made the object of such a gift because they were called vested remainders (liable to be displaced by the happening of an uncertain event than if they had been called simply contingent interests or contingent remainders). I am not dwelling upon this for the purpose of splitting hairs but because there is very real reason in my opinion why a vested remainder in the strictest sense of the English words and a *fortiori* a contingent remainder could not possibly by any stretch of ingenuity be made the subject of a valid Mahomedan gift *inter vivos* consistently with the requirements of the Mahomedan Law on that head and for this very simple reason that no man can give possession *in præsenti* of that which may never come into possession at all. Thus though the theoretical legal meaning here given to vested remainder may seem obscure, the point is equally true whether the interests be of that kind or a mere contingency. For it is of the essence of a Mahomedan gift *inter vivos* that the donor should divest himself of the actual possession of the thing given and transfer it to the donee and if the donee does not take physical possession of it at the time of making the gift, then until he does, the gift is revocable. Nor was there ever such a conception in the minds of the Mahomedan lawyers who worked out their theory of the law of gift *inter vivos* as the fictitious possession of intermediaries as between the donor and the donee which would suffice for the divesting of the donor *in præsenti* and the taking of the donee *in futuro*. Nor is this difficulty in the least reduced, much less removed, by taking all trustees as donees. Trustees were in no sense known to the Mahomedan Law as donees of a thing given, so as to be able to take and hold against the donor for a third person, the real and true donee, who again does not

receive the corpus, that is to say, the physical possession from them but merely gets usufruct.

This attempt to ingraft the whole of our artificial system of trusts and settlements upon the Mahomedan Law has superinduced such a hopeless confusion of thought and mis-use of language that I believe it now to be quite impossible to avoid, endeavouring to administer the Mahomedan Law on this subject, coming into conflict on the one hand with the standard authorities and on the other with the reported cases. But what I commenced by insisting upon is that even a vested remainder, that is to say, an estate always ready to come into possession upon the determination of some intermediate estate is a thing which clearly never could, according to the conceptions of earlier Mahomedan lawyers, have been given *inter vivos*.

When we come to *Banoo Begum's* case[1], it is very easy to trace how this misconception has arisen. In the first place, their Lordships there followed the case of *Umes Chunder Sircar* v. *Mussummat Zahoor*[2], so far as to take from it the broad and general proposition that the Mahomedan Sunni Law recognizes the creation of a succession of estates something like what we in England call vested remainders. Then their Lordships proceeded to consider the Shiah Law, which is much more favourable, I think, than the Sunni Law to this proposition. A number of Arabic texts were translated and laid before their Lordships from which they drew their conclusions that the lawyers of the Shiah school had a very clear conception of, and had always intended to sanction the giving away of, a succession of life estates. In that case what their Lordships were really deciding, was, I think, whether one of these future estates could be made the subject of transfer within the meaning of section 6 of the Transfer of Property Act, that is to say, whether it was something more than a mere expectancy or *spes successonis*. But, assuming that estates of the kind might be more than a mere *spes successonis*, a reference to the texts upon which that decision is founded and a reference to that topic of law to which they

(1) (1907) 32 Bom. 172. (2) (1890) L. R. 17 I. A. 201.

1911.

CASSAMALLY JAIRAJBHAI v. SIR CURRIMBHOY EBRAHIM.

belong in the standard works will show that neither the branch of law itself nor the particular texts cited have any reference whatever to the creation of estates like vested remainders. All these texts belong to what is called in Mahomedan Law the doctrine of *hoobs* or the tying up of certain limited interests, and a very cursory examination of the whole subject will show that the law never did go any further in this direction than allowing a donor to give residence (*sukna*) or an interest for life (*umra*) or a use for a term (*rukba*) in the corpus of his property to one or more persons in succession. But the vested remainder, if there was any thing in the least like a vested remainder, was the donor's own, for it is the common feature of all these *hoobs* that the corpus on the exhaustion of the interests given must return automatically to the donor. And that is the exact opposite of all the cases which I have had to consider. In that connection it is the exact opposite of the present case.

There is, I believe, no authority to be found anywhere in the Mahomedan Law books themselves for the proposition that a man giving *inter vivos* may give an estate first to himself and then to A for life and then to B absolutely.

It has been strenuously contended on behalf of the defendants by Mr. Tyabji that all these highly artificial notions of the English law were well known to and fully developed by the subtle intellects of the Moslem Law schools during the height of Moslem intellectual powers in the early middle ages, and he points to a rare allusion here and there to the doctrine of *Amanat* or trust. But that is a misuse of the word, if it is intended to be synonymous with our extraordinarily elaborate and artificial law of trust. It is perfectly true that in simple instances, Moslem lawyers recognize a fiduciary relation, as in the case of a bailee or the father of a minor receiving property for the use of his child. Further than that I am unable to see that they ever went or intended to go, and I am still of opinion and repeat what I said in *Jainabai* v. *R. D. Sethna*[1], that I do not believe the English notion of trusts had any counterpart whatever in the brains of any Mahomedan lawyer or text book

(1) (1910) 34 Bom. 604.

writer or that it could have been applied as it is applied, in England in making voluntary settlements to the Mahomedan law of gift *inter vivos*. For, if we take the actual cases, then we shall see that as in *Banoo Begum's* case[1], there could have been no possible delivery of seisin in favour of those who took remoter estates. And if we take the other case of *Umes Chunder Sircar* v. *Mussummat Zahoor*[2], it is equally clear that not only could there have been no possession given but that there could have been no intention of giving possession to the remainder man until the time had passed in which the tenant for life might have had a male child. And what of such vested remainders as these being capable of transfer under the Transfer of Property Act? Here, for example, to apply the rule in *Banoo Begum's case*[1] and if we suppose that they were vested remainders after the death of Nur Mahomed, for if there were vested remainders in *Umes Chander's case*[2], I really cannot see why there should not be vested remainders in this case, who would have given anything for them during Nur Mahomed's life and while he was still capable of having a son? These gifts over after the death of Nur Mahomed, notwithstanding the decisions in *Umes Chander Sircar* v. *Mussummat Zahoor*[2] and *Banoo Begum* v. *Mir Abed Ali*[1], appear to me to be too plainly contingent to admit of any dispute. But apart from their contingency and restricting myself at present to Nur Mahomed's own case, that too was a gift *in futuro*, I do not see how it could possibly be perfected by a delivery of seisin and actual possession to Nur Mahomed during the life-time of Jairajbhai who had reserved to himself actual possession and enjoyment as well as the power of revocation. It is only by introducing the machinery of our English Law of Trust that it is possible to make any approach at all to what the Mahomedan Law required as an indispensable condition precedent to a valid gift and that machinery, as I say, was totally unknown to the Mahomedan Law.

Now it is said that this gift to Nur Mahomed at any rate was not only good but irrevocable for two reasons, first that the

(1) (1907) 32 Bom. 172. (2) (1890) L. R. 17 I. A. 201.

1911.

CASSAMALLY JAIRAJBHAI v. SIR CURRIMBHOY EBRAHIM.

donor Jairajbhai received a return for the gift from the donee and this only, I think, shows how perverted the arguments, which really belong and are proper to a primitive system of law dealing with primitive facts, become when they are carried over to very complicated transactions, such as those arising upon the execution of a settlement. It is undoubtedly a rule of the Mahomedan Law that where a donor makes a gift and accepts in exchange something, whether that something be independent of or part of the original gift then the rest of the gift is irrevocable. And it is seriously contended here that inasmuch as Jairajbhai reserved to himself a life interest in the settled property, that was a return which he accepted from the other donees who were only at that time donees *in futuro*. It hardly needs, I think, to go further by way of answering this argument than to take the actual cases given by the Mahomedan lawyers as illustrations of their meaning. In every one of these cases which are usually examples of simple barter between simple people, it will be seen that the return which makes the gift irrevocable is a return made by the donee implying his distinct volition in the matter. In the present case the donees had no volition one way or the other. They were merely passively expectant upon the death of Jairajbhai Peerbhoy. What he took for himself under his own gift he took without consulting them and it is only by a strained and utterly false analogy that it can be argued that his reservation of a life interest in the settled property was a return made to him by the postponed donees making the ultimate gift to them irrevocable.

It is also said that this gift is irrevocable because it was made to one within the prohibited degrees but that entirely depends upon whether there ever was a gift to a person within those prohibited degrees. I agree with Mr. Tyabji that the words "within the prohibited degrees of consanguinity" in this connection would certainly cover the case of a father and a son, as they have been directly held in the text books to cover the case of a mother and daughter. And if there had been an actual gift to Nur Mahomed *in præsenti*, a gift given in all respects, that is to say, accompanied by delivery of possession and acceptance of possession, then I do not doubt that that gift would

have become irrevocable, notwithstanding any revocation clause contained in the deed. But to a gift of that sort, no deed would have been necessary and no difficulty of this kind could have arisen.

My first point, therefore, is that, in my opinion, no gift *in futuro* can be made by a Mahomedan *inter vivos*. I adhere to the opinion I have always felt and expressed that to validate such a gift, there must be an actual delivery of seisin to the donee, there must be a transfer of possession and that transfer of possession must be from the donor to the donee. In the present case the only alleged transfer of possession—and I shall come to that later—was from the donor to himself and others as trustees primarily for himself and only on the happening of future events for Nur Mahomed. I will purposely refrain from saying anything about the small monthly payments reserved by the settlor for the ladies. Those do not, I think, now come into question or require any comment. But whatever may be the case as regards Nur Mahomed, all that follows in the trust-deed is made contingent upon Nur Mahomed, dying without male issue and as such it is clear beyond all doubt or question. I say that with confidence that a contingent gift cannot by any stretch of ingenuity or language be brought within the contemplation of the Mahomedan Law as a valid gift. The subject is entangled and difficult enough where we are only dealing with the gifts express to be certain but taking effect *in futuro*. Out of the fog of ideas, cases, precedents, and decisions upon that point and all connected with it, this one thing does emerge beyond all question clear and I believe a universally valid proposition of the Mahomedan Law that no gift made contingent upon the happening of uncertain future events is or ever has been held by any accredited Mahomedan lawyer to be valid. So that touching all those portions of the deed which purport to bestow contingent remainders or contingent interests perhaps I would prefer to call them, upon various persons, should Nur Mahomed die childless, I have no hesitation whatever in saying that those are not good gifts under the Mamomedan Law and no effect can be given to them.

1911.

CASSAMALLY JAIRAJBHAI v. SIR CURRIMBHOY EBRAHIM.

I have explained why, I think, all the gifts in this trust settlement subsequent to the life estate of Jairajbhai are bad and why I am sure that all the gifts made contingent upon Nur Mahomed dying without male issue are bad.

There remain one or two further questions. It has been contended that this settlement creates in law a valid *wakf* in favour of the trustees of the Mahomedan Khoja Benevolent Association. Now, in the first place, I may refer to my observations in *Jainabai* v. *R. D. Sethna*[1] upon the blending of gifts to charity with gifts to private individuals. I adhere to the opinion I expressed in that case. While the Mahomedan Law insists that a gift to private person should be free of all pious and religious purposes, I do not think that this necessarily prohibits the making of the gift to *wakf* which may be contained in a deed which makes other gifts at the same time to private persons. If the two gifts can be completely separated, then for the purposes of that argument, I think, the answer is complete that gifts to private persons are not necessarily invalid because there is a separate gift made at the same time in *wakf*. It also appears to be the Mahomedan Law that a donor may give his property in *wakf*, that is to say, appropriate and dedicate the corpus to the service of God, while reserving for himself a life interest in the usufruct. But as in the case of gifts to private individuals, I believe that I am correct in saying that the Mahomedan Law never contemplated and will not allow a merely contingent gift in *wakf*. This necessarily flows from the jural conception of a *wakf* which is the immediate appropriation and consecration of specified property to the service of God and the reservation of the donor's life interest in that property does not in any way clash with that conception, for the corpus is there and then definitely and finally appropriated to its intended purpose. But it is plainly otherwise, while the gift is conditioned upon the happening of some future uncertain events. There can, in such circumstances, be no appropriation synchronizing with the declaration because should the future

(1) (1910) 34 Bom. 604.

events happen, it is neither the donor's intention then nor after the happening of that event that the property ever should be appropriated to the service of God. In the case of this instrument, had Nur Mahomed had a son born to him, there would have been no gift over to charity. So that I have no hesitation in holding that that portion of the instrument which purports to create a *wakf* in respect of four-tenths of the settled property, is bad and void.

This likewise disposes of the argument that because the deed is imprinted with the character of a *wakf*, the whole of it is irrevocable. It is certainly true that a good *wakf* cannot be revoked. It is equally true that a bad *wakf* needs no revocation.

Then there is a question whether the gift is bad for want of contemporaneous delivery of possession. On that point I am inclined to hold that it is. But I do not insist strongly upon it because I am conscious that it may very well be argued on the evidence adduced by the trustees that there was a formal and paper transfer of possession from the donor to the trustees, when the donor opened an account in his books of this property as trust property. In my view, however, that would not be a sufficient compliance with the requirements of the Mahomedan Law on this subject. There was no surrender of the property in fact to anybody except the donor himself in his character as trustee for himself if indeed the evidence goes that length. And it appears to me that that falls very far short of the transfer of possession to the donee next in succession, namely, Nur Mahomed. It is quite likely however that Courts, which are inclined to take a more liberal view than I am of the powers of Mahomedans to make gifts *inter vivos* in the form of a succession of estates, might hold that possession was sufficiently transferred by one of the trustees keeping in his own books an account of this property as trust property. I do not think in view of the much stronger objection I have already stated to the validity of all the contingent gifts in this deed that I need elaborate that point further.

1911.

CASSAMALLY JAIRAJBHAI v. SIR CURRIMBHOY EBRAHIM.

Then it might be suggested that while this is in form a voluntary settlement or gift *inter vivos*, it is in fact and in substance a testamentary disposition of the property contained therein. That was one of the main defences in the suit of *Jainabai* v. *R. D. Sethna*[1], because if the instrument in that case were held to be a will, it would of course have been revocable during the testator's life-time.

Here, it does not appear to me that the point possesses much importance but I adhere generally to everything which I said in *Jainabai's case*[1] upon it.

I only wish to make one or two observations of a general character upon the very unsatisfactory position in which the influential and wealthy Khoja community stands in Bombay. On more than one occasion when a will made by a member of this community has come in question before the Courts, it has been tacitly assumed or conceded by counsel that the custom of the community over-rides the general law and permits them to dispose of the whole of their property by will. I am not, however, aware that this has ever yet been judicially decided and I very much doubt whether on a point of law so deeply rooted in the social and religious sentiments of the people as a whole the custom of a small community would be allowed to over-ride their ancient and universal law. *Usus et convéntio vincunt legem* is a maxim peculiarly appropriate to the constantly shifting needs and requirements of a growing commercial community; and in this country no doubt it has been extended in every direction. But there are limits to its application and I am disposed to think that those limits would be passed where it is sought to be shown that the Kojas are allowed by local usage to over-ride the Mahomedan Law which prohibits any Moslem from disposing of more than one-third of his property by will. Nor I believe has it ever yet been definitely decided in the Courts whether in respect of making a will, a Khoja is governed by his own or by the Hindu Law. And it certainly does appear to me that the position of this rich and flourishing community is a peculiarly unfortunate one

(1) (1910) 34 Bom. 604.

in respect of many of the most important acts of their lives. But the only remedy for that that I can see would be by legislation. At present it is hard to say what their precise legal rights are in many highly important details relating to the disposition of their property.

It is quite true in the present case that the effect of this trust settlement would be a disposition of the whole of the settled property after the death of the settlor. During his life-time he remains in full enjoyment of it subject only to being unable to deal with the corpus. So that as in *Jainabai's case*[1], it may well be said that this is in fact and substance a testamentary disposition of the settled property. Nevertheless, it is not so in form and looking to the fact that the settlor's intention appears to have been, however, wrongly conceived and badly carried out to make gifts *inter vivos*, I do not think it necessary to go further and decide that this was a will. The point would, as far as I can see, only become practically important in connection with the alleged revocation of this deed of settlement by the unsigned will which the plaintiffs have propounded here. And whether it were a will or whether it were a settlement in the nature of a gift *inter vivos*, provided that gift were not irrevocable (and I have already given reasons for holding that it does not appear to me to be irrevocable) for any reason, the effect upon it of the alleged unsigned will would be precisely the same.

And now of this question whether or not, if the settlement be revocable, it has in fact been revoked. This point has not been very much laboured in the concluding arguments on either side, and holding the opinion that I do of the general character of the settlement itself, I should not be disposed to spend much time over it. But it is possible that a different opinion may be held upon the various points I have discussed should the case go further. And in that event the revocation or otherwise of the settlement by the intended second settlement would become vitally important to the plaintiff. So that I must consider the evidence upon this point and state what I consider to be the legal results flowing from the facts proved.

(1) (1910) 34 Bom. 604.

1911.

CASSAMALLY JAIRAJBHAI v. SIR CURRIMBHOY EBRAHIM.

In the course of the trial I suggested to the learned counsel for the plaintiff that there might be considerable difficulty in connection with the law of registration but very little argument, and none of any value, was addressed to me upon that point. The position briefly is this. The evidence shows clearly and beyond all doubt that on the birth of another son, the present plaintiff, the settlor, did wish and did intend to exercise the power of revocation reserved to himself in the concluding clause of the deed of 1886. He took advice upon the subject and finally after a great deal of discussion the draft deed was engrossed and taken to his house for signature. I do not think that any of the defendants will seriously dispute any of the facts upon which the plaintiff relies on this part of the case.

Now the revocation clause in the deed of 1886 provides that the settlor may revoke, vary, etc., any of the trusts, etc., by a signed writing and further that he may declare new trusts by any such or other writing. So that if his powers in this respect are limited by the terms of the revocation clause, his intention could only be evidenced by a writing and that writing as it would affect the immoveable property to the extent of considerably more than Rs. 100 would be compulsorily registrable under the Registration Act. Not being registered the law peremptorily forbids the Court to take any notice or make any use of it as evidence of any transaction affecting such immoveable property. So that I have always felt considerable embarrassment in deciding how I ought to deal with this portion of the plaintiff's evidence and I much regret that the question was not more deeply and fully argued. The reason for that probably was that plaintiff's learned counsel put his case upon a special ground which in his opinion evidently made all reference to the Law of Registration superfluous. In the first place it was contended that the unsigned second deed or intended deed of settlement declaring new trusts was not an instrument and therefore did not fall within the terms of section 17 of the Registration Act. Next, it was contended that the Court was not asked to give effect to the writing as an instrument but merely to take

it as proof of the intention to execute the power and so to aid what owing to the act of God, that is the sudden and unexpected death of the settlor, proved to be defective execution.'

Upon this topic the learned counsel for the plaintiff addressed the Court at very great length in opening his case marshalling a large array of English authorities in support of the proposition that the Courts of Equity in England will always aid the defective execution of a power in favour of any of the five so-called favoured classes, and the plaintiff is of course among the favoured classes. Now, that proposition of law is, I take it, indisputable and not likely to be seriously challenged by any of the defendants. But what is too often lost sight of in arguing from English authorities to the conclusions which the Courts in India are asked to adopt, is that the English Courts are not hampered, as we are hampered, in some details by the provisions of our Registration Act. But I have felt very grave doubt and uncertainty. I do indeed still feel much doubt and uncertainty whether I ought to look at this unsigned and unregistered writing as evidencing the way in which the settlor intended to execute his power and so as a Court of equity aid the defective execution. Both in reference to this paper and the second will I think it was contended that these not being instruments the Court might treat them as parol and so make them a ground of the exercise of its power in aid of defective execution. But so far as declaring new trusts upon the trust originally declared in the settlement of 1886 goes, this argument might be met by a reference to the revocation clause itself. For there the settlor's powers are confined to revoking by signed writing and declaring new trusts by writing of some sort, and I do not think that the Court would be justified where the settlor has chosen to impose such restrictions upon himself in enlarging them and conferring upon him a power of declaring new trusts merely by parol. So that I am always brought to this point that I have here a writing which ought to be but is not an instrument and which if it were an instrument would certainly require registration and without registration could not be treated as evidence. Then is the plaintiff in any better case because

1911.

CASSAMALLY JAIRAJBHAI v. SIR CURRIMBHOY EBRAHIM.

the writing was not signed? To this extent I think only that it then fails to fulfil the definition of an instrument but it would only be by a process as it appears to me of rather fine and strained reasoning that the Court while admitting that it could not be used were it signed as evidence of any transaction affecting the property to hold at the same time that because it is not signed it could be used for that purpose.

Now, I must return for a moment to the facts under this head which are alleged and which are material. Those facts are, as I have said, that there were long consultations as to the form the execution of the power should take. It is clear that the settlor wished to make provision for his second son, the present plaintiff. It is natural that he should have wished to do so. The evidence is, that he wished to provide for him practically upon the same terms as he had already provided for his elder son Nur Mahomed with this difference only collected from the wills that Nur Mahomed as elder brother was to have one lac more than the plaintiff. But in respect of the trust properties settled by the deed of 1886 I think I may take it as proved that Jairajbhai wished both his sons to share equally. It is also abundantly clear that he wished the two brothers to take the corpus of the property in such a way that if either of them had children, those children should come in as co-sharers with the rest. But a settlement of that kind proved to be almost beyond the ingenuity of Jairajbhai's legal advisers. Its importance is that it makes abundantly clear Jairajbhai's intention. Shortly before he died, he clearly intended to revoke every one of the contingent gifts in the settlement of 1886. Finally, it was suggested that what Jairajbhai had in mind could be best attained by giving to Nur Mahomed and Casamally the corpus of the settled property as members of a joint undivided Khoja family. I will not pause upon the legal validity of such a phrase in such a connection. I am only now concerned with its use as throwing the strongest light upon what the settlor really wished to effect. He did not wish to create a joint tenancy apparently and he could not bequeath one son's share to that son's children as yet unborn,

so that this device of counsel was considered a very happy expedient and whether it was so in fact or not it shows clearly enough that Jairajbhai did not intend the corpus of this property to go any further by way of gift than the two brothers and any children they might have. Had the case been further contested by Khanubai and Sakinabai, I gather that it would have been strenuously contended that this was merely a provisional draft and that there was nothing whatever to show that Jairajbhai really approved of it or that it expressed his true intention. And that I think would be a perfectly fair argument. I doubt very much whether merely as a matter of fact the Court would say, upon such evidence as has been laid before it, that Jairajbhai finally made up his mind to declare new trusts in the precise form as shown by the unsigned second deed of settlement. But this much the evidence does clearly prove, and I do not think that it can be disputed, that no sooner was Cassamally born to Jairajbhai than he intended to execute his power under the concluding clause of the deed of 1886 and make provision for Cassamally in the trust as well as by will. Now, it may be doubted how far English Courts of Equity would go in aiding defective execution of a power, when they felt uncertain as to the exact way in which that power was intended to be executed. It might be that in accepting the engrossed second deed of settlement as exactly and truly representing Jairajbhai's intention, the Court would go much too far. But that he had the intention of benefitting the plaintiff under the Trust Settlement, no Court could possibly doubt and if the whole of my reasoning upon the preliminary issue of limitation were wrong, here would be found, once the objection for want of registration is surmounted, a complete and final answer to the Trustee's defence on that head.

I have then to consider whether I really can look at this paper unsigned as it is, unregistered as it is, for the purpose of drawing therefrom the settlor's intention and then impressing that intention upon the conscience of the trustees so as to make that effective which was only defective because of the act of God. I believe that this again is an entirely new point

1911.

CASSAMALLY JAIRAJBHAI v. SIR CURRIMBHOY EBRAHIM.

so far as the Courts in this country are concerned and it is a point which never could have arisen in the English Courts, so that I am entirely without authority and must decide upon what I conceive to be the true principles of law applicable. Is this paper offered as evidence of a transaction affecting the immoveable property? Strictly speaking, both Yes and No. The plaintiff says that there was no transaction affecting the property, no complete transaction, that is to say, but there was an incohate intention to which this Court operating upon the conscience of the trustees, should give effect and the defendant would say that so used, the writing, although not an instrument, is certainly being used as evidence of a transaction, that is, the final form which after the Court's order the whole matter would assume very materially affecting the immoveable property. Then in such a dilemma it appears to me that one has really to look to what is the plain justice of the case. If this paper really represents what was the intention of Jairajbhai, then but for his sudden death, he would undoubtedly have signed it and it is equally certain that it would have been registered. Is an intention of that kind to be defeated merely upon a highly technical ground such as this? I doubt it. I cannot bring myself to believe that Courts of justice are to be so tied by technicality as not to be able to do what is clearly right. All this depends upon my being satisfied that had Jairajbhai lived, he would have executed this writing and registered it in due form. But he had no time. He was taken suddenly and in circumstances the most unfortunate, for it is proved that but for a clerk's blunder, the right engrossment would have reached him while he was yet alive and in that event it would hardly be doubted. I do not myself doubt it for a moment that he would have signed and duly executed it. After that there could have been no difficulty in getting the instrument duly registered and that too I am satisfied would have been done in due course. So that I think that this is a case, if ever there was a case, in which the Courts may act upon those principles which have always guided the Courts of Equity in England and aid defective execution of a power, defective not through any fault on the part of the person intending to

execute it but by reason of the act of God. So that I should hold upon this point that the unsigned second deed ought to be effectuated by the Court to the extent of making it binding upon the consciences of the Trustees and that would put an end to all further discussion of the difficult point of limitation, and also of all those other considerations to which I have adverted as making the settlement of 1886 bad and void in itself at any rate so far as all the contingencies it contains, are concerned.

I think now that I have touched upon every point which is necessary for me to consider in arriving at the conclusion upon all matters in issue between the plaintiff and those defendants who have not settled with him and the effect of what I have said is that the plaintiff is entitled to succeed in this suit as against the Trustees and all the remoter beneficiaries under the settlement of January the 7th, 1886.

By consent, costs of all parties excepting the plaintiff, and the defendants, Khanubai, Sakinabai and Sakinabai's children who are to bear their own costs should be paid half by the plaintiff and half by Khanubai and Sakinabai jointly. Costs of the Trustee-defendants to be paid as between attorney and client. Defendant No. 5 to get costs up to 4th March 1910 as between party and party and costs of one counsel for appearing on 20th of February 1911 should be paid by the plaintiff.

Attorneys for the plaintiff:—Messrs. *Payne & Co.*

Attorneys for the defendants:—Messrs. *Thakurdas & Co.*; *Surajmal B. Mehta*; *Matubhai, Jamietram & Madan*; *Edgelow, Gulabchand, Wadia & Co.*; *Kanga & Sayani*; *Jamsetji, Rustomji & Devidas.*

B. N. L.