Nicholas Vs. Asphar and anr.

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Court : Kolkata

Decided On : Jun-08-1896

Reported in : (1897)ILR24Cal216

Judge : Ameer Ali, J.

Appellant : Nicholas

Respondent : Asphar and anr.

Judgement :

Ameer Ali, J.

1. The plaintiff seeks in this suit to recover possession of two houses situated in Calcutta, being No. 97, Canning Street, and No. 2, Portuguese Church Street. Originally she had also included in her claim No. 96, Canning Street, but when the case came on for trial that portion of the claim was abandoned.

2. The circumstances which have given rise to this suit are shortly these.

3. On the 9th of February 1816 a deed of settlement in contem(sic)tion marriage was executed by a gentleman named Moradkban, belonging to the Armenian community. The lady whom he was going to marry, together with the trustees of the settlement, were parties to the deed.

4. By that deed Moradkhan assigned a sum of Rs. 25,000, which he had lent out to some people, to the aforesaid trustees, named Manuk and Gasper, upon certain trusts, to which I shall refer more particularly later on, with a power to them to invest the money when realised in 'real or Government securities.' In pursuance of or acting under that power the trustees on the 7th of May 1817 acquired the two houses which form the subject-matter of the present suit. Varvar Kalloos, the lady who had married Moradkhan, died on the 9th of August 1837, leaving her surviving her husband and a daughter named Mariam. On the 5th of January 1839 there was a deed executed between Gasper Vardon Gasper, who was going to marry Mariam Moradkhan, of the first part, Mariam Moradkhan, of the second part, her father Moradkhan of the third part, and the surviving trustee of the old settlement of 1816 of the fourth part, and two persons named Peter Jacob Paul and Carapiet Jacob of the fifth part, by which the properties in question were given to the trustees under the new deed upon certain trusts which require particular attention.

5. It was provided by this new deed that, during the life-time of Moradkhan, half of the rents and profits of these two houses should be taken by him and half by Gasper, the intended husband of Mariam; that after the death of Moradkhan the rents and profits should go to Gasper and Mariam, and upon the death of either of them to the survivor; and after the death of the survivor to the use absolutely of the issue of marriage, if any.

6. The marriage between Gasper and Mariam took place on the 10th of January 1839, and on the 8th of January 1839 two persons, Shircore and Bristow Judge, were appointed trustees of this new settlement.

7. Moradkhan died in 1841; the date does not appear, nor is it of any importance. Gasper, the husband of Mariam, died on the 23rd of November 1841, and Mariam, who, shortly after the death of her husband Gasper, married a man named Aratoon Sarkies, gave birth on the 8th of April 1842 to a female child, who was named Elizabeth.

8. It should be stated that Mariam Gasper's marriage with Sarkies took place on the 21st of December 1841. Mariam died in 1850. By Aratoon Sarkies she had children, one of whom is the plaintiff Varvar Nicholas, and the other was a son

Gregory Sarkies, who died on the 18th of March 1892.

9. Elizabeth appears to have been brought up in the house of Sarkies, and to have lived there till her marriage with Thorose. After the marriage of Elizabeth with Thorose disputes seem to have arisen between Sarkies on the one side and Elizabeth and her husband on the other.

10. There is very little question in the case that Sarkies had practically the possession of these houses at that time, and had been appropriating to himself the rents and profits thereof. On the 7th of November 1859 a bill of complaint was filed in the Supreme Court by Elizabeth Thorose, in conjunction with her husband, against the trustees of the settlement of the 5th of January 1839, and against Aratoon Sarkies and Gregory Sarkies who was then an infant, for the purpose of obtaining (inter alia) certain declarations and accounts against Aratoon Sarkies. In that bill of complaint Elizabeth alleged that Aratoon Sarkies was disputing her legitimacy as also the validity of the deed of the 5th of January 1839. She claimed in that suit to be the legitimate child of the Gaspers, and she alleged that the deed of the 5th of January 1839 was valid, and that she was, under that deed, entitled to the properties absolutely.

11. On the 21st of June 1860 a decree was made dismissing the suit against Gregory Sarkies declaring that the properties covered by the deed of the 5th of January 1839 were personal property, and directing that those properties should be sold; that half of the proceeds should go to the plaintiff Elizabeth Thorose; and that the balance, after deducting the costs of the plaintiff and of the infant against whom the suit was dismissed and whose costs were directed in the first instance to be paid by the plaintiff, should be paid to Aratoon Sarkies. In pursuance of that decree the trustees, in conjunction with Thorose, the husband of Elizabeth, and Aratoon Sarkies, assigned these houses to one Hadjee Jackariah Mahomed. The assignment is dated the 29th of September 1860. On the 12th of July 1870 Hadjee Jackariah Mahomed conveyed No. 29, Canning Street, to Asphar, one of the defendants in this suit, and in June 1893, after the death of Aratoon Sarkies, who died on the 5th of November 1891, the second defendant acquired No. 2, Portuguese Church Street, from Ayesha Bibee who had purchased it from

Jackariah.

12. The plaintiff's case is that Elizabeth was illegitimate, and that the premises in suit are realty; that upon the death of Mariam the property came to her son Gregory Sarkies, subject to a tenancy for life by the courtesy of England in favour of her husband Aratoon Sarkies. Her case, as developed in the address of the learned Counsel, which, having regard to Section 147 of the Civil Procedure Code, I took into consideration as supplementing the case made in the plaint, amounted to this: that, inasmuch as Aratoon Sarkies was entitled to a tenancy for life by courtesy in these properties, there was no limitation as against Gregory Sarkies until the death of Aratoon Sarkies in 1891. Further, that the decree of the Supreme Court cannot bind Gregory Sarkies, inasmuch as he was dismissed from the suit; and, secondly, because, apparently, it was a decree by consent. Upon these contentions very important questions have arisen and been discussed.

13. I may, however, observe at the outset that, so far as the statements in the plaint are concerned, they disclosed, as the defendants contended, no cause of action; but, as I have already said, I think I was justified under Section 147 in allowing the statements in the plaint to be supplemented by the statements made in Court by the Counsel for the plaintiff. It was upon that basis that the issues were framed.

14. As regards the contention that the properties were vested in fee simple in Gregory Sarkies on the death of his mother, but that he had no immediate right to possession in his father's lifetime, as the latter had an estate by courtesy, that question is of importance only in case it is established that Elizabeth Thorose was illegitimate; for if Elizabeth was the legitimate child of Gasper, the question whether this property was realty or otherwise is, it seems to me, wholly immaterial.

15. As regards the deed of 1839 it is not suggested in the plaint, nor was it argued at the bar, that it was invalid, and I take it that it is accepted as a valid deed; and if treated as a valid deed, unless it can be established that Elizabeth was illegitimate, there is no question that, on the death of Mariam, she, Elizabeth, became absolutely entitled under that deed to the premises in question.

16. So far as the positive evidence relating to the illegitimacy of Elizabeth Thorose is concerned, I hold that it is wholly unworthy of credit. The only person who has attempted to speak on the subject is the plaintiff, and I regret to observe that her statements gave me the impression that she was giving expression to her imaginings rather than to facts. She says that when she was very young, about 8, 9 or 10 years old, Elizabeth and she and her brother used to quarrel. On these occasions Aratoon Sarkies used to tell them not to quarrel, because they were born of the same father and mother; but when the children of Sarkies, by his other wife, quarrelled, he used to tell them not to do so, because they were children by another mother. Surely, the plaintiff did not expect any sensible person to accept her statements as founded on fact. I certainly am not inclined to do so. She states further that, after Elizabeth had filed her suit in the Supreme Court, Aratoon Sarkies, whose character and conduct have been commented upon in no favourable terms by the plaintiff's own Counsel, often told her that her mother, who was dead, had disgraced herself by livinig with him before her former husband's death, and that Elizabeth was the fruit of that adulterous connection. Even assuming all that Mr. Avetoom said about Aratoon Sarkies to be true, I am not prepared to believe that he would tell his young daughter, who could have been only 14 or 15 years of age at the time, about the shame of her mother.

17. There is absolutely no other evidence on this point, or any data whatsoever, beyond certain suggestions based on the fact that Elizabeth bore the name of Sarkies before she married. To my mind it is perfectly natural that this child, who had lost her father before she was born, should bear the name of her mother's husband, in whose house she was being brought up. The question which I have really to consider is whether, having regard to the fact that there was a valid subsisting marriage between Gasper and Mariam, and conception having taken place during the subsistence of that marriage, there is anything to rebut the presumption of legitimacy, assuming even that everything Mrs. Nicholas has said be true. There is no evidence of want of access, and Section 112 The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two, hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access

to each other at any time when he could have been begotten] of the Evidence Act, in the absence of such evidence,- regards the presumption of legitimacy arising from conception during a valid subsisting marriage as conclusive. Elizabeth died about 30 years ago. The purchasers, who are the defendants, are, of course, not in a position to adduce evidence to establish the relations between Gasper and his wife; but the onus was on the plaintiff, and it seems to me she has failed to discharge it. In 1859 Aratoon Sarkies attempted to question the legitimacy of Elizabeth, but, as I shall show later on, he wholly abandoned his position, and the case proceeded upon the accepted status of Elizabeth as the legitimate child of Gasper and his wife Mariam. It is extremely improbable that, had Aratoon Sarkies been able to adduce any evidence to question the legitimacy of Elizabeth Thorose, he would have refrained from so doing.

18. I, therefore, find as a fact on the evidence in this case and the presumption of law under Section 112 of the Evidence Act, that Elizabeth Thorose was the legitimate child of Gasper and Mariam. That being so, whether the property be realty or personalty, it must, under the deed of 1839, come to her; the fact that in 1860 a decree was made by which the properties were directed to be sold, half of the proceeds going to her and half to Sarkies, does not make any difference in the matter, or give any right to the plaintiff. She claims through Gregory Sarkies, and if he had no title, this suit must fail.

19. But, as other questions have been raised, it is necessary that they should be considered.

20. It was contended that the houses in question were realty or partook of the nature of realty and descended as freehold; and that Mariam, on the death (sic)ner husband, took an absolute estate which, upon her death, descended to her son Gregory, and that upon his death without issue it came to the plaintiff and the widow of Gregory. This proceeds on the assumption that Elizabeth was illegitimate. Learned Counsel for the plaintiff admitted that, apart from the question of legitimacy, if the property was found to be personalty, he would have no case.

21. In order to consider whether or not the property is realty, it is necessary to go back in the history of the two houses to a time when they were possessed by one

D'Costa. In 1783 D'Costa became indebted in some way or other to the Wardens of the Portuguese Church in Calcutta. He was the owner of, amongst other properties, these two houses, and by an indenture of mortgage, dated the 16th of June 1783, made between D'Costa of the one part, and D'Conto and Rodrigues of the other part, D'Costa purported to create a mortgage for securing the repayment of the sums of money which were found due by him. The contention of the learned Counsel for the plaintiff is that what was mortgaged was the freehold estate, and that the term of 1,000 years set out in it referred to the redeemable period.

22. I cannot agree in that view. I have studied the document with some care, and I find that what was mortgaged was a term of years and nothing more. The document in question, after reciting the circumstances under which D'Costa had become indebted, and other facts, and setting out the premises, 'grants bargains and sells the premises,' which are described, to Mathew Antonio D'Conto and Bonifacio Rodrigues to have and to hold the same from the day before the date of these presents for and during and unto the full end and term of 1,000 years from thence next ensuing and fully to be completed and ended, yielding and paying therefor yearly during the said term one peppercorn if demanded.'

23. This is followed by a provision as to the payment of interest on certain dates, a proviso as to cessor and a covenant for quiet enjoyment, and by the words 'to hold the premises above granted, etc., for and during all the rest, residue and remainder of the said term of 1,000 years which shall be then to come and unexpired, etc.;' and lastly, there is the covenant for further assurance.

24. There is nothing to show that anything more was intended to be mortgaged than the term of 1,000 years carved out of the freehold estate.

24. In 1789 default having been made in the payment of interest the mortgagees brought a suit for foreclosure or sale. The decree was for sale and also for foreclosure 'of the said several mortgaged premises.' There was no sale under that decree. The direction for foreclosure must therefore have, come into effect with all its incidental results. The mortgaged premises in suit are nowhere referred to as freehold.

25. In 1806 the trustees of the Protuguese Church conveyed the houses in suit to one D'Abro, and here again it is perfectly clear that what was assigned was the residue of the term which had been carved out of the freehold by D'Costa. The witnessing part runs as follows: ' That for and in consideration of the said sum of 9,450 sicca rupees to the said Joseph Barretto Lius, Barretto P. D'Cruz and John D'Abro in hand well and truly paid by the said John Lewis D'Abro at or before the sealing and delivery of these presents in full for the absolute purchase of all the estate right, title, interest, term of years and equity of redemption of them, etc.' And the Habendum runs thus:.' To have and to hold the said premises unto the said So-and-so for and during all the rest, residue and remainder of the said term of 1,000 years in and by the said indenture of demise granted.'

26. Nor is there anything in the covenant to show that what was conveyed was the fee. It runs thus: ' And that the said hereby assigned term of 1,000 years so granted of and during the said premises as aforesaid for so much thereof as is therein respectively to come and unexpired is a good valid and subsisting term in the law and not forfeited, surrendered or made void or voidable.'

27. The covenant for further assurance is to the same effect.

28. On the 7th of May 1817 the trustees of the marriage settlement of Moradkhan and Varvar Kalloos acquired these two houses, and there again there is no vagueness in the interest which was assigned to or taken by the trustees. The deed of assignment first of all points out what was being assigned, and it goes on to say: 'And all the estate, right, title, interest, term and terms for years now to come and unexpired, trust-property, possession, claim and demand whatsoever, into out of or respecting the said premises hereinbefore mentioned to be hereby assigned and every part and parcel thereof for the now residue of the said terms of 1,000 years.' And, again, in the Habendum: 'To have and to hold (the said premises) for and during all the residue and remainder of the said term of one thousand years in or by the said hereinbefore recited indenture of demise granted and demised and hereby assigned.' And the covenants run in the same way. So far there is no vagueness or doubt as to the interest which was taken by the several persons who came in under the indenture of mortgage of 1783.

29. Learned Counsel for the plaintiff referred to particular terms used, especially in the later documents, to show that those expressions could only have been used in relation to real property. To my mind it is perfectly clear that, in the original interest was of a limited character, no words subsequently used, inadvertently or otherwise, could have the effect of enlarging such interest. No authority has been cited for such a proposition, and in fact there is none.

30. It is further contended that, after the year 1789, the term was kept alive for the benefit of the purchasers. I am afraid this contention proceeds upon some misapprehension. A term of years may be kept alive to attend on the inheritance for certain purposes, viz., to protect the purchaser of a freehold, subject to a term against any incumbrance that might have been created by the previous owner, and of which the purchaser is not aware. Of course, if the purchaser is aware of such incumbrance or charge he cannot have the benefit of the term, even if he chooses to keep it alive. But in order that he may have something to fall back upon, in case it is found that the inheritance is charged with an incumbrauce which would practically reduce his interest to nothing, it was usual to take an assignment of the term in the names of trustees for the benefit of the purchaser and his heirs. In that way the term was protected from being merged in the freehold. I do not see how a term attending on the inheritance has any bearing on the present matter.

31. Next it is contended that, assuming that the mortgaged premises did not constitute a freehold estate of inheritance, and although under the English law a term of years would be personalty, yet the English law should be applied only sub modo and not in its entirety. It is difficult to follow exactly the (sic)ment put forward, but I suppose the meaning is, though it was not fully was pressed, that all lands and all interest in land, limited or otherwise, must be taken as realty, and must be subject to the laws of descent applicable to realty. This view seems to me to be opposed to the whole course of decisions in this Court or the late Supreme Court.

32. There were, so far as one can judge from the reported cases, two conflicting views propounded from the time the Charter of Justice was promulgated in 1774. On one side it was contended that everything was personalty in this country, and that British subjects did not hold any realty governed by the laws applicable to real

property in England. On the other, it was urged that the whole real property law of England was introduced bodily into Calcutta. These two divergent views were discussed in a number of cases to which I shall briefly refer. In the case of Doe d. Savage v. Bancharam Tagore Morton (Montriou) 105 (1785) the question arose as to whether lands in the possession of the personal representatives of the deceased were liable for his debts. The learned Judges there held that ' the common law of England is generally introduced by Charter; but two provisions in the Charter are a material alteration of the common law as to land. The effect is to render land in Calcutta real property sub modo only; for the personal representative takes the land as a trustee, to pay debts in the first instance, and, secondly, for the heir.'

33. In another case, which was decided in the year 1815 Gasper v. Paddolochun Doss Morton (Montriou) 110 the Advocate-General contended that real property in Calcutta stood exactly on the same footing as personalty, and that, so far as the Armenians were concerned, this was especially so, and lands held by them were to be considered as personalty. The learned Judges overruled the contention, and held that lands, undoubtedly, were realty which were held in fee simple, but that they were subject to certain modifications, that is, they were liable to be taken in execution in the hands of the executor or personal representatives.

34. In Joseph v. Ronald Morton (Montriou) 111 (1818) the question, whether there was any real property in Calcutta, or whether everything, lands included, was to be regarded as personalty, was discussed at great length. A majority of the Judges held that the law relating to real property was applicable to lands held in absolute ownership in Calcutta, subject to the modifications contained in the Charter. Macnaghten, J., held that there was no such thing as realty; that all was personalty.

35. That point was again discussed in 1826 in Jebb v. Lefevre Morton (Montriou) 152 and Chief Justice Grey dealing with the question which was attempted to be raised then, said: ' It has been contended that in Calcutta and Bengal there is no distinction between land and goods, in respect of the s(sic)sion to them; and inasmuch as it is admitted that goods and chattels are distributable according to

the Statute of Distributions, this is an assertion that the British law in Bengal does not acknowledge any estate of inheritance, and that the term 'heir' has here no meaning.' He then discussed the law on the point and traced the enactments to the Charter of 1774, and came to the conclusion that the English law, as to real property, was applicable in its entirety to lands in Calcutta. Franks and Buller, JJ., held that no doubt an estate in inheritance could be held in lands, but subject to the modifications contained in the Charter.

36. So far as the Courts in this country were concerned, there the matter stood.

37. Then came Freeman v. Fairlie 1 Moo. I. A. 305 decided by the Judicial Committee. The divergent propositions, to which I have referred, are stated by the Master whose report contains a lucid exposition of the views heretofore held by the Judges in this country. At page 307 he gives exactly the cont(sic)tions of the two sides who were seeking, one to reduce lands held by a British subject to chattels real, and the other to make the English law relating to realty applicable in its entirety to such property. At page 308 he gives the views of the Chief Justice and Buller, J., on the one side, and Macnaghten, J., on the other, and at pages 323, 324, 325 and 326 he states his own view on the subject: 'It is true, as remarked by Sir Anthony Buller, that if a new country is discovered and settled by British subjects, they carry with them the English law, but with this modification unnoticed by the learned Judge, that is, so far only as that law is applicable to their local circumstances.' And, referring to the Charter of 1774, he says: ' It seems highly probable that the same general adherence to English law, and the same partial adoption of the existing laws and customs of the country, were applied to immoveable property when acquired by British subjects.' Then he gives further reasons for the view why the British law should have been introduced subject to certain modifications, having reference to local circumstances. The report came before Lord Lyndhurst, and his Lordship, in discussing the subject, said as follows: ' The next question is, what is the law, as far as British subjects are concerned, now existing in that settlement? Undoubtedly, at present it is the law of England.' Then he gave his reasons for the opinion just expressed to which it is unnecessary to refer. But in page 344 there is a paragraph which is of importance: ' Further than this, if we refer to the Charter of justice in the year 1774, granted by the Crown, we

find in the language of it a distinction, expressly drawn and in terms, between personal and real property. It has I think, been said, by one of the learned Judges to whom I have referred, or it has been glanced at that that may be satisfied by considering this property as a chattel real; but looking further into the Charter, it will be found that this explanation will not avail, because the Courts have jurisdiction expressly, and in terms, in all actions and pleas, real, personal and mixed; a recognition, therefore, by the Grown (the highest authority), that real property exists in that country, according to the meaning of that term as used in the law of England.'

38. The last case on the point decided in the Privy Council is that of the Mayor of Lyons v. East India Company 1 Moore I. A. 175. There it was taken for granted that, so far as British subjects were concerned, the English law was the law under which they held, property in India. The only question was whether it had been so modified as to make it conformable to local exigencies and the circumstances of the country. Lord Brougham, after describing the imperceptible manner in which the British had acquired power in this country, and how from being subjects of the Moguls they had assumed independent authority, says as follows: ' Can it then be contended that the general introduction of the English law draws after or with it that branch which relates to aliens.' After pointing out various circumstances, which rendered it impossible to hold that the English law was introduced into India with its disqualification in respect of aliens, he expressed himself thus: ' Upon the whole, their Lordships are of opinion that the law incapacitating aliens from holding real property to their own use, and transmitting it by descent or devise, has never been introduced into Calcutta'

39. Between 1836 and 1881 there was no case on the point in this Court.

40. But in Sarkies v. Prosonomoyee Dossee I.L.R. 6 Cal. 794 the same question, viz., whether lands and houses held in Calcutta were or were not personalty, was again attempted, to be raised. The Chief Justice, who delivered the judgment of the Full Court put that aside as an argument which had been answered long ago, but dealing with the point whether the real property law was subject to any modification, he expressed certain views, which are to be fo(sic) on page 804, and

which have an important bearing on Mr. Mitter's con(sic)ter on: ' The learned Judge in the Court below has alluded to the judgment of (sic)re Privy Council in the case of the Mayor of Lyons v. East India Company 1 Moo. I. A. 175 as affording an authority, that the English law of inheritance was not introduced here in its entirety, but only so much of it as was applicable to the state of things in India. But that case, as I read it, does not mean to decide that the Courts of this country are justified in adopting just so much of the law of inheritance or of dower, or of any other law, as they consider equitable, and rejecting the rest. It only points out that there are certain portions of the English Statute law, which, from their very nature, were only passed for reasons connected with England, and which would not be applicable to India or any other colony of the British Crown, as, for instance, the Mortmain Acts, the law of aliens, and the like.'

41. The question, as to the applicability of the English law in this country, came up again, though on a different subject, in Lopez v. Lopez I.L.R. 12 Cal. 706 (711). There Cunningham, J., said as follows: 'The question of the extent to which the law of England was carried by the English into India has been frequently considered by high authority, as, for instance, Freeman v. Fairlie 1 Moo. I. A. 305. In the Advocate-General of Bengel v. Surnomoyee Dossee 9 Moo. I. A. 387 it was observed by Peacock, C.J., that in construing the Charter of George I., there can be no doubt that it was intended that the English law should be administered as nearly as the circumstances of the place or the inhabitants would admit.'

42. I have referred to these cases in order to show that there was no question at any time that what was reg(sic)irded as personalty in English law was to be treated as realty in this country. The consistent endeavour was to reduce realty into personalty, and the course of decisions has been to apply the real property law of England to lands held by British subjects in Bengal to the same extent, and no more, but subject to certain modifications the nature of which are indicated by Lord Brougham and Chief Justice Garth. And in the case of Savage v. Bancharam Tagore 1 Morton (Montriou) 105. Mr. Justice Chambers pointed out a further modification, viz., that lands in the hands of executors were liable to be taken in execution. That was the ' sub modo' referred to by him; and local circumstances and local exigencies and the policy of the country explain whatever other

modifications have been introduced into the English law applicable to real property. There is no authority for saying that an interest of the character in question in this case, that is a term of years, has ever been regarded as otherwise than personalty.

43. The learned Counsel for the plaintiff contended that the English law relating to personalty should be applied sub modo. He has not referred to any principle on which the suggested modification should be based. As Chief Justice Garth pointed out, it is impossible for a Court to regulate the applicability of any law on the basis of any particular case; the application of the law must proceed on principle; I hold, therefore, that the English law relating to personalty applies to personalty in this country held by British subjects, and others to whom the English law is applicable.

44. It is not necessary to refer to any modifications introduced by the Indian Succession Act, as they do not affect the question raised in the present case.

45. There is no question that Armenians, although Asiatics, are subject to the English law, and the reason for that is perfectly clear; the law of the country was retained for and guaranteed to the Hindus and Mahomedans, but for all others the English law was made applicable. In Gasper v. Paddolochun Doss. Morton (Montriou) 110 the law applicable to Armenians was taken, to be the English law; so also in Joseph v. Ronald [Morton (Montriou)(sic) I need not refer to the other cases mentioned at the bar in which that win(sic)id down. In Sarkies v. Prosonomoyee Dossee I.L.R. 6 Cal. 794 the(sic)itiy claiming dower was an Armenian. I hold therefore that there is no autth(sic)ty in support of the proposition that this property, though personalty under the English law, was to be treated as realty for the purposes of descent in this particular case.

46. Then it was argued that even if personalty, it became realty by reason of the power in the trust deed of 1816. It becomes necessary, therefore, to refer to that deed.

47. In that document Moradkhan, after setting out the circumstances under which he makes the settlement, grants and assigns to the trustees, their executors, administrators or assigns, Rs. 25,000 secured by the bond of some people who

were apparently in his debt, upon certain trusts which he sets out. First, to get in the money, and on receipt thereof to lay out and invest Rs. 20,000, part of the Rs. 25,000, ' in or upon any real or Government securities, or in or upon any public funds at interest in their or either of their own name or names,' and after the purchase of the said real or Government securities ' to pay the balance to him, Moradkhan.' Then there are other trusts to pay the interest, &c.;, arising therefrom to him for life, and after his death to his wife, and on her death to apply it for the maintenance and education of the children of the said marriage; and, finally, to pay the corpus to them absolutely on their attaining majority.

48. It will be observed that the direction to invest is 'upon real or Government securities.' There is no direction to invest in real property. But, assuming that the words ' real securities ' mean real property, the power is of an optional character, and certainly not imperative; and it has been decided that, unless the direction is of an imperative character, it does not alter the character of the original property. The text on this point in Jarman is perfectly clear, and the cases point to the same conclusion, and no authority has been adduced to the contrary. On page 586 of Jarman, Vol. I, will be found the following passage: ' In order to work a constructive conversion, an actual sale or purchase either immediately or in future, and either absolutely or contingently at a specified time, must he directed expressly or impliedly. A direction that real estate shall not he sold, but shall be considered as personal, or vice, versa, is insufficient, since the law does not allow property to be retained in one shape, and yet to devolve as if it were in another. But when a sale is not expressly excluded, such a direction would generally amount to a trust for sale.'

49. In De Beauvoir v. De Beauvoir 3 H. L. C 524 (547) the Lord Chancellor, dealing with a contention similar to that in this case, says as follows: ' At the end of this will there is a power which has properly been commented on at your Lordship's Bar. It is the power to the trustees, 'with the consent of the person who may be in possession and entitled to the profit thereof,' to invest the residue and surplus of the personal estate in the purchase of freeholds in England, and to convey the same to such uses, &c.;, as has been declared concerning his manors devised by his will as should be then existing, undetermined or capable of taking

effect, and for no other use or purpose whatsoever. Now, on the one side, it has been contended that this is an absolute power which must be exercised, and that the effect is at once to convert the personal property into real property, to impress that property with a real character, and to dedicate it to those uses to which the real property is dedicated, so that upon that alone the case must be decided-an argument which, if well founded would put an end to the case of the appellant. That is a view in which I do not, concur. I think no authority has been cited and I am not aware of any authority which carries a power of this sort to that extent. Cowley v. Hartstonge 1 Dow. 361 and the other cases which have been alluded to, certainly do not authorize your Lordships to say that this was an absolute conversion. Take that very case which was before this House. There was, in point of fact, a power, or it may rather be called a trust, to invest the property either in real estate or upon personal security. The trust never was exercised. This House did not say that the trustees could not have exercised, but they never did exercise, the discretion thus reposed in them; and, therefore, it was held that this House, sitting as a Court of Equity, would exercise the discretion which they had failed to exercise; and that as the whole course of limitation showed that the property was intended to go in the way in which the real estate should go, the discretion must be considered as restricted, and the power must be exercised in directing the property to go according to that destination. So far that case is no doubt an important authority bearing upon this question; but I am not prepared to advise your Lordships to decide that the power here is an absolute conversion. But then it is said, on the other side, that even if that power had been exercised, considering it as a power which it was not absolutely imperative to exercise, the estates which had been purchased with the funded property would still have gone according to the construction of the will contended for by the appellant, namely, to the next-of-kin. The learned Counsel seems when addressing to your Lordships that argument, to have lost sight for a moment of the words of the power. It is impossible to read this power without seeing that the uses which are referred to are the uses of the real estate, and not the uses of the funded property.'

50. In the case of Pitman v. Pitman I.L.R.(1892) 1 Ch. 279 (282) again there was a similar contention. Mr. Justice North says: 'It is quite clear that there was a mere power to sell the land, and it was entirely optional with and not imperative upon the

trustees to sell, and the distinction between a power and trust for sale is important. There was a power of interim investment, and also a trust for investment in land of freehold, copyhold or leasehold tenure with the consent of the tenant for life; no such consent was given, and for some reason, not explained, the property was allowed to remain in the interim, investment till the time when the life estate of Thomas Pitman, the elder, came to an end. Nothing has happened or could have happened since the death of Thomas the younger to change the nature of the property. What was the interest that he had at that time? In my opinion it was in the nature of an interest in real estate, and remains so still. The property was real estate in the first instance; all the limitations in the will respecting it were applicable to real estate, and real estate only; there was a power of sale, but the exercise of that power did not of itself amount to a conversion; the proceeds might be invested in real estate, or optionally in leasehold estate.'

51. The question here is, what are the uses referred to in the trust deed of 1816? To use the language of the Lord Chancellor in the (sic)se in 3 House of Lords, adapted to suit the converse circumstances of the present case, all the uses in this deed refer to personal property; all the trusts relate to personal property; all the limitations have reference to personal property. How can it be contended then that there was a conversion into real property of what was undoubtedly originally personalty? The point is so perfectly clear that it is unnecessary to refer to the texts cited at the Bar. I may add that so far as the mortgage is concerned, it is personal property.

52. I think I have exhausted those two points, and I proceed now to deal very shortly with the decree of the Supreme Court of 1860.

53. Learned Counsel for the plaintiff contended that it was a consent decree obtained by the fraud and collusion of Aratoon Sarkies and therefore not binding on his client. Of course, a decree inter partes may be impugned on the ground of fraud and collusion, but there is a limitation of time for a suit in respect thereof.

54. First, let us consider the circumstances under which the decree came to be made. As I have already stated, Aratoon Sarkies had obtained possession of Elizabeth's or her mother's property. He was realizing the rents and profits, and as

she stated in her bill of complaint he was impugning her legitimacy. She brought her suit to establish her legitimacy as well as the validity of the deed of 1839.

55. In that suit the trustees, as well as Aratoon Sarkies and the plaintiff's brother Gregory, were parties. It was necessary that these two should be joined, because, if the property was personal, and Elizabeth legitimate, and the deed valid, the question at once would be solely between her and Aratoon. If she were illegitimate the property would go to him. If legitimate she took the whole. If the property was real and she was illegitimate the property would go to Gregory, subject to the tenancy-for-life of Aratoon. Therefore all the parties interested in the property and in the questions which were being litigated were joined as parties. In the bill of complaint it was alleged that the property was chattel real, but subsequently before the suit came on for hearing an application was made for amendment based on an affidavit of the attorney in the case, who stated he had been misled by what he had seen in the deed of 1839; but that from the documents since shown to him by the trustees he had come to know that the property was personalty, and therefore prayed for an order for leave to amend the bill. That was done. Aratoon Sarkies filed his answer, and Gregory, through his guardian ad(sic) litem, submitted his interests to the Court, and apparently the trustees also filed their answers.

56. On the 21st of June 1860 the case came on for hearing, and the decree recites that the case was heard or 'debated;' and that the deposition of Shircore was taken viva voce; it then orders that the suit he dismissed as against the infant, and that his costs and those of the trustees be paid by the plaintiff in the first instance, and afterwards deducted from Aratoon's share. Then there is this declaration: 'This Court doth declare that the said property is in the nature of personal property.' This does not purport to be made by consent, and up to and including this declaration there is no mention of any consent; only the order as to the sale appears to have been made by consent. But Mr. Avetoom, in reply, referred to the minute book of that date in order to show that the declaration was made by consent. The evidence afforded by a note recorded in the Court Minute Book cannot be accepted in preference to the evidence afforded by the decree itself, which was prepared and completed with reference to that note, and to the brief of Counsel, and was read

and signed by the Judges, and never questioned by the parties to that suit.

57. But apart from this it is quite clear from the answers of Aratoon Sarkies, portions of which were read, that he had abandoned all question as to the legitimacy of Elizabeth and the validity of the deed of 1839. The portions, which were read, are set out and clearly indicated in the decree. The moment it was discovered what the real character of the property was, and that became apparent as soon as the amendment was made, the presence of Gregory became unnecessary, and thereupon the Court, treating him as an unnecessary party, dismissed the suit as against him with costs to be paid in the manner already stated but, be it observed, to come ultimately out of the share of Aratoon Sarkies himself. The plaintiff then, that is, Elizabeth Thorose, waived all accounts as to the rents and profits which Aratoon Sarkies had appropriated or misappropriated. He alleged that he had spent a considerable sum of money on improvements, and I think I am justified in holding that the consent by which, after deduction of the costs, he was to take half of the proceeds of the sale, was founded on the fact that the plaintiff conceded he had spent money on the property. Mr. Avetoom says that there was no reference to see whether the arrangement (assuming there was one) was for the benefit of the infant. In the first place, it must be observed, that a reference is necessary only in cases where there are question of fact which require an enquiry, and the only question here was whether the property was real or personal. Having regard to the provisions of Section 114 of the Evidence Act, which only embodies the general principle that an act of Court must be presumed to be done validly, I must hold that everything was done which was required to be done in the interests of the infant.

58. On the whole, therefore, there is nothing to show that the decree was not binding upon Gregory Sarkies, or the persons who claim to derive their title from him. I say this, irrespective of the question whether the plaintiff is entitled to question the validity of the sale to Jackariah. Considering that the property was vested in the trustees, the legal estate was in them, and they conveyed under an order of the Court.

59. Let us assume, however, that this was a consent decree of the character contended for by the plaintiff, then what is there to induce the Court to set it aside.

60. A consent decree is just as binding on the parties to the proceeding as a decree after a contentious trial. The principle is enunciated in a number of cases.

61. In In re South American and Mexican Company L. R. (1895), 1 Ch., 37 (45), Mr. Justice Vaughan Williams, speaking on the very same point, says:

Under these circumstances I have only to consider, with reference to the second question, Mr. Moulton's suggestion, that a judgment by consent upon which the Court has not exercised its mind, does not and cannot raise an estoppel inter partes. I can only say this is the first time I have ever heard such a proposition suggested. It has always been the law that a judgment by consent or by default raises an estoppel just in the same way as a judgment after the Court has exercised a judicial discretion in the matter.

62. Similarly in The Bellcairn L. R., 10 P. D., 161. There the Master Of the Rolls and Lord Justices Cotton and Lindley were of opinion that a provision by consent was binding on the parties: and in Nilakandhen v. Padmanabha I.L.R. 18 Mad. 1 (7) Mr. Justice Muthusami Aiyar and Mr. Justice Best say: ' It is sufficient to say that the right of joint management was brought into controversy in a Court of Justice, and that it was by way of compromise recognised as a subsisting right, and as being in accordance with the prior usage of the institution. It was held by the Privy Council in Gajapathi Radhika v. Gajapathi Nilamani 13 Moo. I. A. 497 : 6 B. L. R. 202 that, when a state of facts is accepted as the basis of a compromise, whereby a suit pending decision is amicably adjusted, and when the compromise is not vitiated by fraud, those who were parties to it and their privies should not afterwards be heard to say, for the purpose of reviving the controversy, that the real state of things was otherwise.'

63. Nor has any case been made out for opening up the decree of the Supreme Court. A shadowy allusion is made to fraud and collusion, but no basis is made for it in the evidence. There is not the least ground on the evidence of the plaintiff, or anywhere, to suggest fraud.

64. But even had a case of fraud been made, the plaintiff, it seems to me would be barred under the statute of limitation. There is no doubt that this family knew of this sale for many years. The plaintiff admits in her evidence that they all knew that the houses belonging to Mariam were sold, and a portion of the proceeds taken by Elizabeth Thorose, but no attempt was made to question the sale. Gregory must have attained his majority nearly 20 years ago, as according to the plaintiff's evidence he was 41 when he died. The case seems to me hopelessly barred.

65. Then there is the question whether Aratoon Sarkies could have an estate by courtesy in these properties.

66. In Coke on Littleton, Chapter 4, Section 5, it is laid down that an estate by courtesy arises only in respect of an estate held in fee simple, or an estate in tail general. The same rule is given by Williams in his valuable work on Real Property, llth edition, page 283. It has not been shown that in an interest of this character the husband is entitled to an estate by courtesy, and if he were not so entitled, limitation would run as against Gregory from the time he attained majority.

67. It is unnecessary to dwell on the question of estoppel by conduct, as what I have already said is sufficient to show that this is a hopeless and unfortunate attempt to set aside a decree made 36 years ago. The result is, the suit must be dismissed with costs, including the reserved costs.