Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Phear.

NEKRAM JEMADAR *v.* ISWARIPRASAD PACHURI.

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July 6.

Statute of Frauds, 29 Car. II., c. 3, s. 4—21 Geo. III., c. 70, s. 17—Hindu Defendant.

The 4th section of the Statute of Frauds does not apply to suits in which the defendant is a Hindu.

THIS was a case referred for the opinion of the High Court, by the first Judge of the Small Cause Court, under section 55 of Act IX of 1850.

The case was stated as follows by the Judge on referring it :—

" The plaintiff sued the defendant for rupees 266-5-6 on the following cause of action :—' For that you became surety to the plaintiff for one Ratiram Upadhya, and induced the plaintiff to receive him in employ on the guarantee of such suretyship ; and that the said Ratiram Upadhya has not accounted for certain moneys which he had collected in the ordinary course of his duties, whereby the plaintiff has sustained damages to the amount stated.'

" The pleas were these :—

Non assumpsit.

Never indebted.

" The evidence of the plaintiff himself was that he, the plaintiff, was jemadar of durwans at the Bonded Warehouse, and was security for all the durwans, and appointed them all ; that Ratiram was one of those durwans, and had embezzled the sum of rupees 315-10-6 ; that the plaintiff had been induced nearly four years ago to appoint Ratiram at the request of the defendant, whose nephew Ratiram was, and on an undertaking by the defendant which was in the following terms, *viz.* :—' If you suffer any loss by his negligence, or if any money be missing, I will pay ;' but that this undertaking or agreement was not in writing, nor had any written memorandum or note of it been signed by the defendant or any agent of his or him taken by any one.

" I took no further evidence, as Mr. Moodie, counsel for the defendant, contended that the case must be dismissed, under the

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4th section of the Statute of Frauds, and I was inclined to agree with him, on the principle laid down in *Leroux* v. *Brown* (1). I considered that, under section 17, statute 21 Geo. III., c. 70, the Hindu law in matters of contract and dealing was the *lex loci* of Calcutta, and as such regulatad the substantive law applicable to this case; but that the 4th section of the Statute of Frauds (differing in this respect from the 17th section, which relates to the validity of the contract, and not to the mode in which it shall be proved, and which has been held, the case of *Bordodaile* v. *Chainsook Buxyram* (2), not to apply to suits against Hindu defendants) was the *lex fori*, and as such regulated the mode in which suits such as the present should be prosecuted, and the conditions on which they should be heard. I had thought that the carefully considered and separately delivered, but concurrent, judgments of Sir Lawrence Peel, Sir Arthur Buller, and Sir James Colvile, in the case of *Beer Chund Podar* v. *Ramanath Tagore* (3) and others had, in 1849, conclusively settled the effect of the 17th section of statute 21 Geo, III., c. 70, and should have felt no hesitation in dismissing the suit. I was pressed, however, with the recent judgment of the High Court in the case of *S. M. Jagadamba Dasi* v. *Grob* (4), in which a decidedly contrary opinion appears to be expressed. I therefore dismissed the case, but in doing so gave judgment contingent upon the opinion of the High Court upon the question—

"Whether the 4th section of the Statute of Frauds does not apply to suits in which the defendant is a Hindu.

"Should the Hon'ble the Judges be of opinion that that section is not applicable, I shall proceed to hear the case on its merits."

Mr. *Phillips* for the plaintiff.—The law of the Small Cause Court, in cases like this, is substantially the same as that of the late Supreme Court. The statute 21 George III., c. 70, s. 17, applies to Small Cause Courts; as much as to the Supreme Courts or to the High Courts now; and even if the Statute of Frauds, section 4, is a law of procedure of this Court in matters of contract or questions of usage between Mahomedans

(1) 12 C. B., 801.
(2) 1 Ind. Jur., O. S., 70; S. C., 1 Hyde, 51.
(3) 1 T. & B., 131.
(4) *Ante*, p. 639.

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or Gentus, that section (17) would prevail over the law of procedure. But section 4 of the Statute of Frauds is not a law of procedure here in cases where the defendant is a Hindu or a Mahomedan. It is a law affecting the contract itself, which, without a memorandum in accordance with section 4 of the statute, is invalid, and cannot be sued on. The Law of Limitation is different: a plaintiff can avoid that by bringing his action within the time limited; but here there could be no avoidance by the plaintiff; and if the defendant refused to sign a memorandum in accordance with the statute, the plaintiff would have no remedy; compliance with the statute being necessary, not to evidence the contract, but to constitute it—*Lloyd* v. *Guibert* (1); and this is the distinction between cases where the doctrine of the *lex fori* applies, and where it does not. If there have been and cannot be any remedy, it does not apply. It applies in the case of foreigners, because they have their remedy in the Courts of their own country—*Leroux* v. *Brown* (2), *per* Maule and Jervis, JJ. If the statute be a law of procedure in England, it is not necessarily so strict a law here. Section 17 has been held not to apply to Hindus—*Borrodaile* v. *Chainsook Buxyaram* (3), *Muttiya Pillai* v. *Western* (4), and in *Jagadamba Dasi* v. *Grob* (5); section 4 was held not to apply to a Hindu. The case of *Leroux* v. *Brown* (2) does not stand unchallenged—*Mostyn* v. *Fabrigas* (6), *Gibson* v. *Holland* (7), *Williams* v. *Wheeler* (8).

Mr. *Moodie* for the defendant.—It is said there would be a hardship to the plaintiff in such a case as this in having no remedy; but if so, it arises from his own fault, for he might have made the contract in writing; the contract, though it cannot be enforced, may be used for other purposes, and is not absolutely no contract at all—*Lavery* v. *Turley* (9), where a verbal contract was admitted in evidence. If the 4th section of the Statute of Frauds is a law of procedure for British subjects

(1) 1 L. R., Q. B., 115.
(2) 12 C. B., 827.
(3) 1 Hyde, 63.
(4) 1 Mad. H. C., 27.
(5) *Ante*, p. 639.
(6) 1 Smith's L. C., 623.
(7) 1 L. R., C. P., 8.
(8) 8 C. B., N. S.; 316.
(9) 30 L. J. Exch., 49.

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here, it must also be a law of procedure to all who come under the jurisdiction of the Court, for the Court will not change its procedure to suit differnet classes of persons. The point has never been directly decided until very lately. In *Bowrodaile* v. *Chainsook Buxyram* (1), it was held that the 17th section of the Statute of Frauds did not apply to Hindus. In *Ramsagur Dutt* v. *Nobogopaul Mookerjee* (2), the question arose, but the case was decided on another point. In *Muttiya Pillai* v. *Western* (3), the defendant was a British subject. The only direct decision on the point is that of NORMAN, J., in *Jagadamba Dasi* v. *Grob* (4), where it was held that the 4th section is inapplicable to Hindus. As part of the *lex fori*, the 4th section is applicable to Hindus. It is part of the *lex fori* in England—*Leroux* v. *Brown* (5), where the Judges were unanimous. Doubt has been thrown on that decision by Willes, J. in *Williams* v. *Wheeler* (6); but until overruled, it is an authority. Section 4 was introduced into this country as part of the *lex fori*, and applies to British subjects. But if introduced as part of the *lex fori*, it has become a part of the law of procedure of this Court, and as such applies to Hindus, as well as British subjects. To hold the contrary would be to overrule the case of *Leroux* v. *Brown* (5). The arguments used on the other side would be as applicable to the Statute of Frauds as to the Law of Limitation and the old Law of Limitation, 21 Jac. II., c. 16, was held to apply to Hindus as part of the *lex fori*—*Luckmaboye* v. *Lulloohby Mottichund* (7). Hindus and Mahomedans are not exempted from the effect of the *lex fori*, even by statute 21 Geo. III., c. 70, s. 17—*Beerchund Podar* v. *Ramanath Tagore* (8). [PHEAR, J.— How was the effect of the Statute of Limitation as a law of procedure affected by the passing of Act VIII of 1859 ?] There was nothing inconsistent in their being together part of the law of procedure; but a new law, Act XIV of 1859, was passed, making the other inapplicable here; so there is no incosistency in the 4th section of the Statute of Frauds and Act

(1) 1 Ind. Jur., O. S., 70; S, C., 1 Hyde, 51.
(2) Bourke's Rep., 367.
(3) 1 Mad. H. C., 27.
Ante, p. 639.
(5) 12 C. B., 827.
(6) 8 C. B, N. S., 316.
(7) 5 Moore's I. A., 235.
(8) 1 T. & B., 131.

VIII of 1859 existing together as part of the law of procedure. In the charters creating the Mayor's Courts, 13 Geo. I., c. 13, and in that creating the Courts of Requests, 26 Geo. II., c. 27, there are no exceptions in favor of Hindus and Mahomedans, as in the charter of the Supreme Court. The law of the Small Cause courts would be the same as that under these two charters, so that, though section 4 of the Statute of Frauds might not apply to the Supreme Court, in the charter of which there is an exception, yet it would in the Small Cause Court. [COUCH, C. J.—The Small Cause Court is governed by Act IX of 1850, and that Act says the law shall be the same as that of the Supreme Court.]

Mr. *Phillips* in reply.—In some respects English procedure has not been introduced here. It is only introduced as far as it is applicable: *Lavery* v. *Turley* (1) is a case in favor of my contention.

The opinions of the learned Judges were as follows:—

COUCH, C. J.—The First Judge of the Small Cause Court has referred, for the opinion of this Court, the question whether the 4th section of the Statute of Frauds does not apply to suits in which the defendant is a Hindu, having held upon the authority of the case of *Leroux* v. *Brown* (2) that it does apply. In that case it was held that the 4th section of the statute, unlike the 17th, had reference to the mode of procedure, and not to the formality of the contract, and consequently that an action would not lie in the Courts of England, to enforce an agreement made in France (and valid there), which, if made in England, could not, by reason of the Statute of Frauds, have been sued upon. Although this decision has been questioned on more than one occasion by an eminent Judge, Mr. Justice Willes, it has not been overruled, and the First Judge was no doubt at liberty to found his decision upon it. We must, however, see whether it is really a binding authority upon the question which has been put. The Statute of Frauds must be considered to have been

(1) 30 L. J. Exch., 49. (2) 12 C. B. 801

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introduced into Calcutta as part of the English law by the charter of George the First. by which, in the year 1726, the Mayor's Court was established—*Advocate General of Bengal* v. *Ranee Surnomoyee Dossee* (1). Now I cannot suppose that, when it was introduced, any distinction was made between the 4th and the 17th sections, and that one was introduced as a law of procedure, and the other as a law affecting the formalities of the contract. No case had then been decided in the English Courts in which such a distinction was made; and Mr. Justice Story, in his Conflict of Laws, section 262, classes the two sections together, as the effect of saying that no action shall be brought whereby to charge any person upon any of the contracts described in the 4th section is practically the same as saying that the contract shall not be allowed to be good; it is not unlikely that the distinction which was made by the Court in *Leroux* v. *Brown* (2) would not occur to him. Mr. Justice Maule in that case says:—"It may be that the words used operating on contracts made in "England render them void." In the case of *Muttiya Pillai* v. *Western* (3), in which the defendant was a British-born subject, the Court of Small Causes at Tanjore held that the 4th section of the Statute of Frauds was applicable. This decision cannot be supported if the 4th section is only a law of procedure, as no part of the Statute of Frauds has ever been made part of the procedure of a mofussil Small Cause Court. In *Borrodaile* v. *Chainsook Buxyram* (4), Mr. Justice Wells says:—"It is remarkable "that, from the time of the passing of the 21 Geo. III., c. 70, "down to the present time, the Statute of Frauds has never been "pleaded as a defence on behalf of a Hindu or Mahomedan; and "this is a strong circumstance to show that the view I take of "the law is the correct one, as many cases must have occurred in "which the defence might have been raised if applicable to Hindus and Mahomedans." If the 4th section has been considered in India not a law of procedure, but as of the same nature as the 17th section, which it certainly appears to me it has, notwithstanding the difference in the language of the two sections, I do not think we are bound, upon a decision of an English

(1) 9 Moore's I. A., 426.
(2) 12 C, B., 801; see p. 895.
(3) I Mad. H. C., 27.
(4) 1 Hyde, 63.

Court, to alter that state of the law when the effect would really be to make the law of contract for Hindus and Mahomedans in the presidency towns different from what it is in the mofussil. I also think that, as the intention of the 17th section of the 21 Geo. III., s. 70, was to preserve to the natives of India their own laws and usages in questions of inheritance and succession, and matters of contract and dealing between party and party, it may be construed so as to include the proofs or authentication of the contract as being necessary to its validity. They differ from the limitation of the time for bringing a suit upon it. In section 260, conflict of Laws, Mr. Justice Story says :—" Another rule " naturally following, or rather illustrative of that already stated, " respecting the validity of contracts, is that all the formalities, " proofs, or authentications of them, which are required by the " *lex loci*, are indispensable to their validity everywhere else ;" and there is a difference of opinion whether the mode of proof is to be deemed part of the *vinculum obligationis*—Westlake on Private International Law, 160. It remains to mention the case of *Manikja Mehervanji* v. *Rahimtulla Alaibhai* (1), in which it was held by the Supreme Court of Bombay, on a case referred by the First Judge of the Court of Small Causes, that the 4th section of the Statute of Frauds is not applicable to Mahomedans. For the above reasons, I am of opinion that the judgment in the Small Cause Court must be reversed, and a new trial ordered, and that the defendant should pay the costs of reserving this case.

PHEAR, J.—I agree with the Chief Justice, but I desire to guard myself from being supposed to throw doubt upon the correctness of the decision in *Leroux* v. *Brown* (2), so far as that decision goes to lay down that the enactment of the 4th section of the Statute of Frauds is substantially a rule of procedure. Indeed, the more closely the section is looked into and considered, the more nearly impossible it becomes, as it seems to me, to class it under any other head.

It is paralleled, I think, with such a rule as that which would disqualify parties to a suit from being witnesses in their own behalf. The effect of this rule in cases of any parol contract, to which the party alone could speak, would be precisely analogous

(1) 1 Bom. H. C. Rep., 2nd. ed. (Appex.), I. (2) 12 C. B., 801.

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to that of the 4th section of the Statute of Frauds, for obviously the aggrieved party would be deprived by it of the only means which he possessed of proving his contract; and I suppose no one would consider a rule which disqualified a certain class of persons from appearing as witnesses to be anything other than a rule of procedure. But assuming the section to be, strictly speaking, simply a rule of procedure, another question arises, which I take to be the cardinal question in this matter; for let us look at the immediate consequences of the rule. We see that it renders it impossible *ab initio* for the parties to a certain sort of parol contracts to enforce their rights in a Court of law; it does not come in *ipso facto* like a law of limitation; it does not leave the party who may desire to make himself safe the opportunity of doing so within any period following on the contract: if the other contractor will sign a memorandum, all well and good; but one of the parties alone cannot of himself do anything to mend his position. A rule of this nature, pregnant with these consequences, does directly affect the potential rights of parties under the contract from the very moment of the inception thereof; and if it thus operates to deprive the parties of rights, which but for it they would enjoy, by virtue of any special law governing the contract then the rule of procedure is in conflict with that law upon the very merits of the matter between the parties. At such a point it may, I think, well be questioned whether the principles which admittedly guide the Courts of all countries in the administration of justice under a conflict of law, do not in truth necessitate the abandonment of the rule of procedure in favor of the law of the contract. The Court of Common Pleas, in *Leroux* v. *Brown* (1), no doubt went the length of holding that the rule of procedure must still be maintained. I think I should hesitate a long time before I should be able to bring myself to concur in that conclusion. Fortunately, however, the case before us has elements in it which materially distinguish it from that of *Leroux* v. *Brown* (1). The two laws, which are here taken to be in conflict, are laws of the same country and ruling power, not of different countries.

The mode in which these laws are to be adjusted, or to be

(1) 12 C. B., 80 l.

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subordinated the one to the other, must be ascertained by giving a reasonable construction to all parts of the law prevailing here which bear upon the point; and I need hardly say that, if possible, the law should be construed in such a way as to give a remedy to aggrieved persons rather than to take it away. Now, looking at the question in this light, we find ourselves immediately in front of the enactment, section 17 of 21 Geo. III., c. 70, the words of which are:—

"Provided always, and be it enacted that the Supreme Court "of Judicature at Fort William in Bengal shall have power and "authority to hear and determine in such manner as is provid- "ed for that purpose in the Letters Patent all and all manner of "actions and suits against all and singular the inhabitants of the "city of Calcutta, provided that their inheritance and succession "to lands, rents, and goods, and all matters of contract and dealing "between party and party shall be determined, in the case of "Mahomedans, by the laws and usages of Mahomedans; and in "the case of Gentus, by the laws and usages of Gentus, &c."

Now it is at once apparent that, while the first part of this section makes the manner of hearing and determining, which comprises the procedure of the Supreme Court (and therefore impliedly in my opinion the 4th section of the Statute of Frauds) generally applicable to the actions and suits to which its refers, the latter part expressely cut this down by the proviso that, in the case of Gentus, all matters of contract and dealing between party and party shall be determined by the laws and usages of Gentus; in other words, the rule of procedure, if it affects the original rights of the parties, must, in the event of conflict, give way to the law and usages of the Gentus. It appears to me that this section makes the present case perfectly clear.

The operation of the 4th section of the Statute of Frauds, in the matter of a parol contract between Hindus, would be practically to prevent rights from arising and being recognized, while the laws and usages of Hindus could be supported and enforced, consequently the section must not in such a case be allowed to operate.

I concur with the Chief Justice as to the order which must be passed.