

The decree must therefore be modified, by deducting from the sum thereby ordered to be paid, equivalent of the sum of £188-5-6, at the exchange of 1s. 11 7/16d., and each party must bear his own costs of this appeal.

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v.  
FLEMING.

*Decree modified.*

Attorney for the appellant : Mr. Carapiet.

Attorneys for the respondent : Messrs. Berners and Co.

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*Before Mr. Justice Norman.*

SRIMATI JAGADAMBA DASI *v.* J. M. GROB AND ANOTHER.

*Guarantee—Statute of Frauds 29 Car. II, c. 3, s. 4—21 Geo. III., c. 63, s. 17.*

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A contract of guarantee is a "matter of contract and dealing" within the terms of section 4 of 21 Geo. III., c. 63, and therefore such a contract made by a Hindu is not affected by section 4 of the Statute of Frauds. When a defendant raises a claim of set-off, on the trial of that issue he must be considered as plaintiff.

THE plaintiff, as widow and executrix of Lalchand, who served the defendants as banian from 1st December 1866 till April 1867, sued the defendants to recover rupees 22,040 as the balance due to him in respect of the banianship account. The defendants admitted a debt to Lalchand, and agreed to the accounts being taken, but they sought to set off against the plaintiff's claim a corresponding amount due to them, as they alleged, under Lalchand's guarantee. His sons had previously served the defendants as banians, and the defendants alleged that Lalchand had guaranteed their debts. The guarantee sought to be set off was a verbal guarantee.

*The Advocate-General* (offg.) Mr. Evans with him) for the plaintiff, contended (*inter alia*) that the defendants must fail, as the alleged guarantee was not in writing. The 4th section of the Statute of Frauds is applicable to this case. The defendants come under English law and the law of the defendants must determine the case—21 Geo. III., c. 70, s. 17. This has been held with reference to a case in the mofussil—*Muttiya Pillai v. Western* (1). Even if this decision is wrong, the 4th

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section of the Statute of Frauds is applicable in any case as being part of the procedure of the Court; and as that section enacts that "no action shall be brought," this suit is not maintainable—*Leroux v. Brown* (1). The case of *Borrodalle v. Chainsook Buayram* (2) only decided that the 17th section did not apply. The question was raised in *Ramsagur Dutt v. Nobogopaul Mookerjee* (3), but does not appear to have been decided, Section 4 stands in the same position as the old Law of Limitation, 21 Jac. L., c. 16, which was held to apply as part of the law of procedure to Hindus and Mahomedan, as well as Europeans in the Supreme Court—*Ruckmaboye v. Lulloobhoy Mottichund* (4). In *Williams v. Wheeler* (5), the case of *Leroux v. Brown* (1), though doubted, was held to be law. If section 4 is part of the procedure of the Court, neither 21 Geo. III., c. 70, s. 17, nor 37 Geo. III., c. 142, s. 13, had any effect so as to make it not applicable.

Mr. Cowell (Mr. Goodeve with him), for the defendants, was not called upon.

NORMAN, J.—In this case there are two issues: first, what is the amount due to Messrs. Grob & Co. on the banianship account of Rajkrishna Mitter & Co., as between the defendant and the plaintiff as representing Lalchand Mitter. This question has been disposed of, and the exact state of the account will be ascertained by reference to Baboo Kadarnath Bose; secondly, did Lalchand guarantee to the defendants, Messrs. Grob & Co., the payment of the amount of that account? The alleged guarantee is not in writing; that which the defendant seeks to prove is an agreement by word of mouth. (His Lordship held that Lalchand did guarantee the debt, and continued.) An ingenious point of law has been raised by the Advocate-General on the 4th section of the Statute of Frauds, which enacts that "no action shall be brought whereby to charge the defendant, upon any special promise, to answer for the debt, default, or

(1) 12 C. B., 801.

(3) Bourke's Rep., 367.

(2) 1 Ind. Jur., O. S., 70; S. C., 1. (4) 5 Moore's I. A., 234.  
 Hyde, 51.

(5) 8 C. B. N. S., 316.

“ miscarriage of another person, &c, unless the agreement upon  
 “ which such action shall be brought, or some memorandum or  
 “ note thereof shall be in writing, and signed by the party to be  
 “ charged therewith, or some other person thereunto by him law-  
 “ fully authorized.” The Advocate-General argued that this is  
 not so much a law relating to contracts as a law of the forum  
 regulating the procedure of the Court, and he referred to *Lerouz*  
*v. Brown* (1), in which it was held that a verbal contract made in  
 a foreign country cannot be enforced in a Court of law in Eng-  
 land if required under the 4th section to be in writing. The  
 decision is certainly a very startling one that a contract, valid  
 and binding, according to the law of the place where it was made,  
 shall be treated by an English Court as of no force, because the  
 parties making it have not observed certain formalities required  
 by English law of the requirements of which at the time of mak-  
 ing the contract, the parties might have had no means of inform-  
 ing themselves. I think that no lawyer can read the judgment  
 in that case without surprise. Its correctness has been ques-  
 tioned, but it never has been overruled. But whether that case  
 be law or not, it does not govern that now before me. The  
 statute 21 Geo. III., c. 70, s. 17, provides that “ the Su-  
 “ preme Court shall have full power and authority to hear and  
 “ determine in such manner as is provided for that purpose the  
 “ Character of Letters Patent all and all manner of suits against the  
 “ inhabitants of the city of Calcutta, provided th at their inherit-  
 “ ance and succession to land, rents, and goods, and all maters  
 “ of contract and dealing between part y and party shall be de-  
 “ termined, 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 ; and where only one of the parties shall be a  
 ‘ Mahomedan or Gentu, by the laws and usages of the defend-  
 “ ant.” Now I have no doubt that a contract of guarantee is a  
 matter of contract and dealing, and therefore the validity of it,  
 and the decision or determination of this Court, must be, in the  
 case of Hindus, according to the laws and usages of Hindus.  
 The Advocate-General raised a second point on the construction

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of the 2nd clause of the 17th section of 21 Geo. III., c. 70, that, where only one of the parties is a Hindu, the case must be determined according to the laws and usages of the defendant. I think that the 1st clause is quite general; matters of contract and dealing between party and party, in the case of *Gentus*, are to be determined by the laws and usages of *Gentus*. The 2nd clause does not appear to me to limit the operation of the first. It is merely intended to make it clear that no person shall be made liable on a contract, except according to his own, whether it be Mahomedan or Hindu laws. However that may be, in another view of the section in question, the present case would fall within the 2nd clause. Messrs. Grob & Co. seek to set off a debt alleged to be due to them from the estate of Lalchand. Mr. Grob is an actor; and Jagadamba, for the purposes of this issue, must be treated as a defendant, and exactly in the same position as if there were two cross-actions, in one of which she was defendant. I am of opinion that the contract of guarantee may be proved, though not in writing as required by the 4th section of the Statute of Frauds. I am satisfied it has been proved, and, subject to the enquiry as to the amount due to the defendant, the rupees 23,000 may be set off.

*Judgment for plaintiff.*

Attorney for the plaintiff : Mr. *Hart*.

Attorneys for the defendant : Messrs. *Judge* and *Gangooly*.

*Note.*—The plaintiff appealed. The memorandum of appeal was filed before the decision in *NekramJemadar v. Iswariprasad Pachuri* (1), but the appeal was not heard until after that decision. It was argued before Couch, C. J., and Markby, J.

tended that the 4th section of the Statute of Frauds was part of the procedure of the Court and applied to the present case. The question was not noticed in the judgment of the Court which reversed the decision of Norman, J., on the ground that no sort of contract of guarantee had been proved by the evidence.

Mr. *Woodroffe*, for the appellant, con-

(1) *Post*, p. 643.