

Privy Council Appeals Nos. 121 and 134 of 1913.

Oudh Appeals Nos. 12 and 13 of 1911.

Mirza Sadik Husain Khan - - - - *Appellant,*

v.

Nawab Saiyed Hashim Ali Khan and Others - *Respondents,*

Mirza Sadik Husain Khan - - - - *Appellant,*

v.

Nawab Saiyed Hashim Ali Khan and Another - *Respondents,*

Consolidated Appeals

FROM

THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

**JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED 11TH JULY, 1916.**

Present at the Hearing :

LORD ATKINSON.

LORD PARKER OF WADDINGTON.

SIR JOHN EDGE.

MR. AMEER ALI.

[Delivered by LORD ATKINSON.]

These are consolidated appeals from two decrees of the Court of the Judicial Commission of Oudh, Lucknow, both dated the 13th November, 1911, which reversed in part and modified in part two decrees, each dated the 25th October, 1909, of the Court of the Subordinate Judge of Lucknow.

The first of the two suits in which those last-mentioned decrees were made, namely, that numbered 76 of 1907, the appeal in which is No. 121 of 1913, was instituted by Mirza

Sadik Husain Khan, the appellant in both the present appeals, to enforce a mortgage dated the 26th June, 1900, executed in his favour by the third respondent in the first appeal, namely, Nawab Ummat-ul-Fatima, in her own right, and also as guardian of her two sons, then minors, the first and second respondents in the first appeal, to secure the repayment of 20,000 rupees admittedly advanced by the mortgagee to this lady, with interest at 1 per cent. per mensem.

The second of these suits, namely, that numbered 51 of 1908, the appeal in which is numbered 134 of 1913, was instituted by the respondents Nawab Saiyed Hashim Ali Khan and Nawab Kasim Ali Khan, the latter by his guardian against this same mortgagee and one Sultan Mirza, claiming to be the step-brother of the plaintiffs, for a declaration that a second mortgage made by the said Sultan Mirza of his share in all the family property in this mortgagee's favour, to secure the repayment of a sum of 8,000 rupees, with interest, was a nullity, on the ground that the said Sultan Mirza was not entitled to any share in the family property, first by reason of the provisions of a certain indenture dated the 5th February, 1895 hereafter dealt with, and secondly because he was not the legitimate son of his alleged father, the grantor in the said deed. This declaration is the only specific relief prayed for, but there is a prayer for general relief.

The litigation relates to the estate of Nawab Zaigham-ud-Daula, who was the son of the Prime Minister of the last King of Oudh, and a Mahomedan of the Shia sect. He was admittedly regularly married twice. By his first wife, Badshah Begum, he had two sons and one daughter, who pre-deceased him, and one daughter, Raushan Ara Begum, who survived him. By his second wife, the third respondent in the first appeal, married after the death of the first wife, he had two sons, the first and second respondents in that appeal. He died on the 1st August, 1898.

Both these suits were tried by the same Subordinate Judge, who delivered separate judgments. The Court of the Judicial Commissioner dealt with both the appeals in one judgment.

The appellants and the respondents in both appeals agree in stating that the principal questions for decision are (1) whether this trust indenture of the 5th February, 1895, duly executed by the deceased Nawab and registered, was a valid disposition of the properties therein comprised, and, if so, whether the above-mentioned mortgages, so far as they purport to charge these properties, and the alleged share of Sultan Mirza in the family property respectively are invalid; and (2) whether Sultan Mirza was shown to be the legitimate son of Zaigham-ud-Daula, the grantor in the trust deed. It was not, as their Lordships understood, disputed that the sum of 20,000 rupees, purported to be secured by the first mortgage, was, in fact, advanced to the Nawab's widow; nor that it was borrowed for the purpose

of being applied in payment of certain of the settlor's debts, in order to save some of the properties comprised in the trust deed from being sold at the suit of some unsatisfied creditors, nor that it was, in fact, so applied. No question was raised as to whether the first mortgage did not, under the circumstances, capture whatever interest the three respondents might have had in the entire immovable property of Zaigham-ud-Daula, however derived. Their Lordships therefore base their decision solely on the points raised by the parties and dealt with by the Courts below.

It was contended in the second suit by Mirza Sadik Husain Khan, the mortgagee, that between the dates of the marriages of the Nawab with the two above-mentioned ladies he contracted a marriage in the *muta* form with an Abyssinian slave girl, named Zohra Kainam, who had been brought home by his father on the occasion of his making a pilgrimage to Mecca and subsequently given by the father to him, and that Sultan Mirza was the offspring of that union. The fact that such a marriage ever took place was denied by the plaintiffs in that suit, and a vast body of evidence, oral and documentary, was adduced by both sides on the issue of Sultan Mirza's legitimacy.

Now, as to the trust deed of the 5th February, 1895, it is necessary, in order to determine the issue raised in reference to it, to consider first, its provisions; second, the circumstances under which, and the purpose for which it was apparently executed; and thirdly, the mode in which the property purporting to be conveyed by it was subsequently treated and dealt with by those having rights over or interest in it.

The parties to the deed are the Nawab Zaigham-ud-Daula, of the first part; Fatima, described as his second wife, of the second part; and Nawab Mahomed Medi Ali Khan and the aforesaid Fatima, described as trustees, of the third part. After reciting that the Nawab Zaigham-ud-Daula was seized and possessed for an estate of inheritance in possession of certain undivided shares in certain Zemindari villages, and other landed properties in Lucknow, and in the districts of Lucknow, Fyzabad, and Sitapur, and also of a house in Calcutta numbered 13, Russell Street; that on the treaty of the marriage with his said wife, Fatima, he had agreed to give her a dower of one lac of rupees, and also to settle upon her a monthly allowance of 100 rupees; that in part performance of that agreement, and in satisfaction of this monthly allowance, he had by a registered instrument, dated the 14th October, 1887, transferred to her a certain house, described as yielding a monthly rent of 100 rupees which she had since enjoyed; and had, in addition, already paid to her 1,500 rupees in part payment of her dower, leaving the sum of 85,000 rupees, the balance thereof, unpaid; that he had, by gifts of jewellery and effects of the value of one lac and 50,000 rupees, and otherwise, provided for his children by his first wife; that with a view to prevent further disputes, quarrels, and

litigation between his said wife, Fatima, and her children, and the children of his first marriage, he was desirous of making the settlement thereafter appearing, it was agreed between the parties thereto that the said intended settlement should be in full payment and satisfaction of the dower payable by him, as therein mentioned. He, in consideration of the premises, and in payment and discharge of the balance of the dower payable by him, granted, conveyed, and assigned to the trustees and their heirs all the lands, tenements, and hereditaments in the schedule to the deed mentioned to hold the same, subject to a certain mortgage therein specified, to the payment of certain small annuities to the persons therein named, and to the cost of maintaining and managing the said properties, and collecting the rents thereof, in trust to pay the income of the same to his said wife, Fatima Begum, during her life, for her sole and separate use, subject to the cost of maintaining and educating his children by her, and after her death in trust for all the aforesaid children living at his, the settlor's, death, as tenants in common, in equal shares. A power of leasing for a term of six years was given to the trustees, and a provision introduced that in case one of the trustees should die, or be unable or unwilling to act, the Official Trustees of Bengal should be appointed trustees in such trustees' stead. The deed contains, in addition, the usual covenants by the settlor for good title and quiet enjoyment. This deed is in the English language. It does not contain any formal release of Fatima Begum's right to payment of the unpaid balance of her dower. It is executed by the settlor alone. Mr. George Charles Farr, his solicitor, and Priya Lal Mullick, described as a solicitor, but in fact the clerk of Mr. Farr (to whom the mortgage mentioned in it was made), are the witnesses to it. The lady was not examined as a witness. No proof whatever, independent of the deed, was given that any agreement such as is mentioned in it was ever entered into between the settlor and his wife, Fatima Begum, to the effect that she would accept the provision purported to be made for her by it in satisfaction and discharge of her claim for the unpaid balance of her dower. That agreement, however, is the only valuable consideration moving to the settlor given for the grant he makes. Unless and until this agreement is proved to have been entered into, the grant and conveyance to the trustees must be taken to be a purely voluntary gift. Though it should be merely voluntary, Fatima Begum might, no doubt, acting with full knowledge of her rights, deliberately elect to take the benefits conferred upon her by it in lieu of the balance of her dower. If she did so elect, she would be bound by the choice thus made. But that election could not create the agreement between her and her husband, which is the sole consideration for the deed, nor could it enlarge the operation of the deed itself. Notwithstanding it, the grant to the trustees would still remain a purely voluntary gift, and the property which it passed would have to be ascertained on

that footing. Subsequent election could not be held to be a substitute for the original consideration.

The interests granted to the children are contingent on their surviving their father. By the happening of that event, the class to take is to be ascertained. Children born after the date of the dead, but alive at the death of the settlor would be members of that class. In addition, the deed fails to provide expressly or impliedly for the payment of the income of the property held in trust on each of three different contingencies. First, the contingency of Fatima Begum dying childless in her husband's lifetime. Second, of her predeceasing him leaving children, none of whom survived him; and, third, of her predeceasing him leaving children some of whom survived him. In each of these cases a resulting trust in the settlor's favour would arise on the death of his wife. In the first case of the absolute beneficial interest in the trust property, in the second of the income of that property while any of his children lived, and of the absolute beneficial interest in it on the death of the survivor of them, and in the third case of the income of the trust property in the interval between the death of his wife and his own decease. So that the settlor has not by the provisions of this deed divested himself absolutely, but only in certain contingencies of all interest in the property granted and conveyed by it. It was contended by Sir John Simon, on behalf of the appellants, that by reason of the conditional nature of this gift to the trustees, the contingent nature of the provision for the children, and these contingent resulting trusts in the settlor's favour, these dispositions made by the deed were void under the Mahomedan law observed by the Shia sect.

These are no doubt very important points. Owing, however, to the conclusions at which their Lordships have arrived on the other points raised in the case, they do not find it necessary to express any opinion on these points and, therefore, abstain from doing so. By the third section of the Oudh Laws Act (XVIII of 1876) it is enacted that between Mahomedans the Mahomedan law is to be applied to the many important matters therein enumerated, including amongst others, "wills, legacies, and gifts." The Court of the Judicial Commissioner has held that the term "gifts" as here used does not include gifts in trust. Their Lordships cannot adopt such a narrow construction of the term "Gifts" as would exclude any gift where the donor's bounty passes to his intended beneficiary through the medium of a trust, so that while a gift by A. to C. direct would be governed by the Mahomedan law, a gift by A. to B. in trust for C. would be governed by some other law. So to hold would, they think, defeat the plain purpose and object of this section of the statute. The Mahomedan law in their view, therefore, applies to this deed; and the gift made by it, being voluntary, will under that law be void, unless it be accompanied

by a delivery of such possession as the subject of the gift is susceptible of.

In *Chaudri Mehdi Hasan v. Muhammed Hasan* (33 I.A., p. 68) it is at p. 76 of the report, laid down by this Board that, according to Mahomedan law, a holder of property may in his lifetime give away the whole or part of it if he complies with certain forms, but that it is incumbent on those who seek to set up such a transaction to prove that those forms have been complied with, and this will be so whether the gift be made with or without consideration. If the latter, then unless it be accompanied by delivery of the thing given, so far as it is capable of delivery, it will be invalid. If the former, delivery of possession is not necessary, but actual payment of the consideration must be proved, and the *bonâ fide* intention of the donor to divest himself *in presenti* of the property, and to confer it upon the donee must also be proved. The case of *Ranee Khujooroonissa v. Mussamut Roushun Jehan*, L.R. 3 I.A. 291, supports this statement of the law.

As six out of the ten hereditaments granted by the deed consist of undivided shares in certain Zemindari villages and parcels of land, physical possession is, in their case, impossible, and as to them, the receipt of the appropriate portion of the rent or income issuing out of or derived from them is the only form the necessary possession could assume. The validity of the grant of these items of property would depend, therefore, upon whether the trustees of the deed, to the exclusion of all other persons, entered into the receipt or enjoyment of these rents or income. Mr. de Gruyther contended, however, as their Lordships understood him, that the rule of law laid down by those authorities was altered or qualified by the combined operation of "The Transfer of Property Act" (Act IV of 1882) and "The Indian Trusts Act" (Act II of 1882). He insists that if the deed of gift of immovable property be duly registered, delivery of possession is not necessary to make the gift valid, or, if necessary, may be effected at any time during the donor's life, provided he be then capable of giving the property. By section 122 of the first of these statutes a gift is defined to be a transfer of existing movable or immovable property voluntarily without consideration by one person, calling himself a donor, to another, called a donee, and accepted by or on behalf of the donee. The acceptance must be made during the lifetime of the donor, and while he is still capable of giving. If he should die before acceptance, the gift is void. If the subject of the gift be immovable property, then, by section 123, the transfer must be effected by a registered instrument, signed by or on behalf of the donor, and attested by at least two witnesses. By section 125 it is provided that a gift of a thing to two or more donees, of whom one does not accept, is void as to the interest he would have taken had he accepted.

Sec. 55 enacts that, subject to the trust, the beneficiary has a right to the rents and profits of the trust property, and

ec. 56 that where there is only one beneficiary and he is competent to contract, or where there are several beneficiaries competent to contract and all are of one mind, he or they may require the trustee to transfer the property to him or them, or to such person as he or they may direct.

Both these statutes, however, were passed long before the year in which the first of the above-cited authorities was decided. The 122nd section of "The Transfer of Property Act" still requires a "transfer" to be made of the subject of the gift. This would *primâ facie* mean a valid transfer, and would therefore require the transfer to be accompanied by delivery of possession. But it is argued that there can be no delivery without acceptance by the donee of the gift. It implies acceptance, and as acceptance may take place at any time during the donor's life, under the conditions mentioned, it follows that the required delivery of possession may take place at any time during his life under the same conditions. Their Lordships think that this line of argument is unsound, but even if it were sound it is not pretended that during the life of the donor in the present case anything was done by him which would amount to delivery of possession of the properties comprised in the mortgage deed, or anything done by the trustees or by Fatima Begum alone, which would amount to proof of an acceptance of the gift, or of an election to take, under the deed of the 5th February, 1895, save what happened in a friendly suit instituted by the deceased Nawab against the trustees on the 10th September, 1895, to obtain permission to sell the Kothi, 13, Russell Street, Calcutta. This matter will be dealt with in its chronological order.

As to the circumstances under which this trust deed was executed it was contended on behalf of the appellant that the settlor was heavily indebted at its date, and that by it he purported to divest himself of almost all the property then belonging to him, that it was merely designed to protect him against the claims of his pressing creditors, and was never intended by him to be an operative instrument. It is clear from the entries in the day book of Mr. Farr, his solicitor, that Zaigham-ud-Daula did not, at first, intend to make any disposition in trust of the property comprised in the deed, and it is equally clear that he never intended that the deed should contain any clause releasing his wife's claim for the unpaid balance of her dower. A clause to that effect was introduced by counsel into the draft sent to him to settle. It was a natural and proper provision, if the agreement mentioned in the deed between the settlor and his wife had ever in fact been entered into; but notwithstanding that the settlor was advised by his solicitor to allow this clause to be embodied in the deed, he absolutely declined to do so, and it was accordingly omitted from it. Again, while he lived no mutation of names took place as to his shares in the Zemindari villages or lands to which mutation was applicable.

To some of the properties comprised in the deed mutation, no doubt, did not apply. But if this was a genuine transaction, and the deed was intended to be an operative instrument, there was no reason why the names of the trustees should not have been substituted for that of the settlor on the registry in reference to these villages, and many reasons why they should have been so substituted. It would have completed the transaction, and tended to remove all doubt about its nature. That, however, was not all. The income of the trust property was never, during the lifetime of the settlor, paid to the trustees or to the wife. Mehdi Ali Khan, the father of Fatima Begum, one of the trustees, was also Mukhtar of Zaigham-ud-Daula, and at pp. 370-371 of the second record he states that the Hakim Safdar Husain, the 'Thekadar', made the collections; that this man sent the income of these villages to him; and that he, as such Mukhtar, brought the money to Zaigham-ud-Daula during the latter's life. This was a direct breach of trust if the deed was an operative instrument.

These facts are, no doubt, calculated to throw grave suspicion on the genuineness of the transaction of February 1895, but they do not appear to their Lordships to be sufficiently convincing to induce them to rest their judgment upon them rather than upon other points where, in their view, there is less room for doubt.

The written statement filed by the trustees in the friendly suit above mentioned was most relied upon. It is dated the 16th December, 1895. In that suit Mr. Farr was solicitor for Zaigham-ud-Daula. His partner was solicitor for the trustees. Mehdi Ali Khan gave the instructions to this gentleman. There is no proof whatever that he ever communicated with Fatima Begum on the subject.

The plaint is a lengthy document. It sets out, amongst other things, the deed of the 5th February, 1895. The written statement of the trustees begins by admitting all the statements contained in the plaint, and then states that the defendants are trustees appointed under the deed of the 5th February, 1895, and as such hold the several tenements and hereditaments described in the schedule annexed to it upon the trusts created by it. That is all as to the contents or provisions of the deed. In fact, the Nawab himself was then receiving the rents of those hereditaments and continued to do so for two years afterwards; and in the plaint it is stated the Nawab himself had entered into a conditional contract for the sale of the Russell Street premises for 125,000 rupees. This written statement purports to be signed twice by each of the trustees, and signed once by their attorney, Priya Lal Mullick. Over one set of the signatures of the trustees it contains the usual declaration by the defendants that the statements contained in the document are true to their knowledge, except as to matters stated on information and belief, and as to such matters they believe them to be true. And following this is the endorsement—

“Explained by me to the defendants above named, Priya Lal Mullick, articled clerk to Mr. G. C. Farr, solicitor, Calcutta.” That is the Nawab’s solicitor. This witness was not produced, and no explanation was given for his absence. And though Medhi Ali Khan (p. 257) identifies his daughter’s signature to this written statement, exhibit No. 5, he says nothing about the document being read and explained either to himself or to her.

In their Lordships’ view it is impossible under these circumstances to accept this written statement as satisfactory proof that the contents, purport, or effect, of this trust deed were ever brought to the knowledge of Fatima Begum; that she had ever as a trustee accepted the gift purporting to be contained in it, or ever on her own behalf accepted the provision purporting to be made by it for her and her children in satisfaction of her claim for the balance of her dower. Her subsequent conduct and action up to and including the execution of the mortgage sued upon is, they think, entirely inconsistent with any such intention on her part.

These latter are most significant. On the 7th September, 1898, less than six weeks after her husband’s death, proceedings, to which she was a party, were instituted to obtain mutation of names in reference to his undivided share in seven Zemindari villages. She was presumably made aware of the nature and object of these proceedings and the purport and effect of the documents that bear her name. If she was then aware of the existence and provisions of the trust deed, these proceedings amount, first, to a most emphatic repudiation of it; second, to a most emphatic assertion of Sultan Mirza’s legitimacy; and thirdly, a determined effort, against her own pecuniary interest, and that of her children, to confer upon him certain proprietary rights.

Separate applications were made, one for each village. That dealing with the lands of Mahtab Bhagh (p. 237 (1)) may be taken as typical of them all. It purports to be made under the provisions of Section 61 of Act 17 of 1876 (The Oudh Land Revenue Act). Having regard to the contention of the respondents that no weight or significance is to be attached to the statements contained in documents such as those signed by her in these proceedings, unless and until it be proved affirmatively that their contents were fully understood by her, it is essential to examine some of the provisions of this statute. By Section 61, it imposes on all persons obtaining possession of land or the profits thereof, whether by succession, purchase, or other form of transfer, a statutory duty to give notice of the same, immediately after it has taken place, to the Tahsildar of the Tahsil in which the Mahal to which the land belongs is situated, or to the Deputy Commissioner of the district. If the notice be given to the former that officer is bound to report to the Deputy Commissioner. By Section 62 the Deputy Commissioner, on receiving this

notice, is bound to make such enquiry as the Chief Commissioner may from time to time prescribe, in order to ascertain the fact of the alleged transmission of the property, and if the transfer appears to have taken place he must, in accordance with the rules made by the Chief Commissioner, record the same. This entry, no doubt, does not prejudice the right of any person who may claim and establish in a Court of competent jurisdiction a right to an interest in the land to which the entry refers. Section 63 enacts that if the person succeeding be a minor or under disability, the guardian or other person who shall have charge of the property, shall give the notice, and by Section 64 a fine is imposed on any person neglecting for three months to give the notice prescribed by Section 61.

These are the administrative duties of a quasi-judicial character imposed upon these public officials. It is scarcely conceivable that when the application is grounded upon the statement contained in a petition signed by a Purdanashin lady, both on behalf of herself and as guardian of her children, these officials would omit to take adequate steps to ascertain whether she knew the purport and effect of the document she signed. He would utterly fail in his duty if he omitted to do so, and in the absence of all evidence that he did fail in his duty in this respect the maxim *omnia presumuntur recte esse acta* must, their Lordships think, be applied to the proceedings.

Now in the body of the petition it is stated that Zaigham-ud-Daula died on the 1st August, 1898, that the five persons named, beginning with Sultan Mirza, described as his son, were his heirs. The undivided shares of the deceased in the several villages to which these heirs became entitled are stated, namely, two shares to each of the sons, one share to Raushan Ara Begum, the surviving daughter of the first marriage, a married lady who died in the year 1904 but whose husband is still alive, and one-eighth share of the entire property to Fatima Begum. It is further stated that on the 1st August, 1898, these five persons got possession of their respective shares jointly by inheritance. As that was the date of the death of the ancestor, physical possession of an undivided share being impossible, and no rent having been received by the heirs, this can only mean that they got a right to possession by virtue of the interest in his undivided share which they took by inheritance. These five heirs of the deceased Nawab then pray that after due enquiry his name might be expunged, and the names of the applicants, according to their legal shares, may be entered on the Register of the Zamindari Chakdari in his stead. The petition purports to be signed by Sultan Mirza, Fatima Begum, and Raushan Ara Begum, and is endorsed thus: "Lochan Lal, Pleader." Upon this application an order bearing date the 30th September, 1898, was made purporting to be signed by the Pargana officer to this effect: "In accordance with the reports of the Tahsildar the mutation of names is sanctioned. Let this be returned for compliance."

In addition to this, in the application relating to the village of Ghaila, Pargana Lucknow, a consolidated statement is made by the same pleader, bearing date the 28th September, 1898, setting forth the shares of the same several heirs to the Nawab's interest in seven villages, and at p. 81 of the Record the Tahsildar's report, dated the 28th September, is to be found. He reports that Nawab Zaigham-ud-Daula was a shareholder in the thereinmentioned villages, which were *muafidar* (revenue free grants); that he died on the 1st August, 1898; that his heirs, whose names were given, were in possession in place of the deceased; that Proclamation was duly issued, but the time had expired and no objection had been filed. It was therefore submitted that mutation in favour of the heirs in place of the deceased be sanctioned. The names and descriptions and shares of the five heirs are set forth, the males being described as sons of the deceased. A statement in detail of the shares in the villages is then given, and the report winds up with the following passage:—

“In the reports of the other cases a reference was made to this case. In all these cases orders for mutation were passed with reference to this case; all the cases are of the same nature.”

On the same day a statement is made and signed by Chandu Prasad Patwari, setting out the same succession to the shares of the deceased in this village, to the effect following:—

“The above-named five persons (naming them) are the heirs and owners according to their legal shares, and are entitled to mutations of names. Heard and admitted.” And on the 7th October, 1898, an order is made and signed by the officer in charge of the Tahsil to the effect that, the case being proceeded with that day and the Tahsildar's report being perused, it was ordered, in accordance with the Tahsildar's report, that the mutation slips be issued in the names of the deceased; that the fees be realised; that formal orders be issued; and that, after compliance, the files be consigned to the record room. There is nothing to show that the requirements of the Revenue Act of 1876 were not strictly complied with. In the absence of such evidence it must be assumed that they were complied with. These proceedings accordingly amount to something far more important and convincing than a mere admission by Fatima Begum of Sultan Mirza's legitimacy. They amount to the doing of an act by her by which an additional sharer in the property of the deceased is brought in and is given the right to receive portion of the income of that property, which property, if the deed were valid, belonged mainly to her and her children, and if invalid, belonged to them to a lesser extent. Further, the act was accompanied by a statement explaining it and setting forth the grounds on which it was based, namely, the heirship, as a legitimate son, of Sultan Mirza. It would appear to their Lordships that the more probable

inference to be drawn from this treatment of Sultan Mirza is that it is but a continuance of the recognition and treatment he received during the lifetime of the deceased Nawab, rather than an entire departure from the course previously pursued.

It would be strange indeed if the ill-begotten child of a menial servant and a frail negress, never therefore owned as a son of the Nawab, or treated by him as such, should be at once selected for such an honour. Moreover, it was not a barren honour, for if Sultan Mirza speaks the truth (at p. 276 of the second record), from the time of the mutation he and the other heirs "have been realising their shares of the profits separately." He does not appear to have been contradicted or even cross-examined on this point, and the husband of Raushan Ara Begum, who is still alive, was not produced to prove that his wife, though excluded from all further participation in her father's assets by the trust deed, did not also receive her share of the income of these Zemindari villages.

On the 9th June, 1899, Fatima Begum applied under Section 10 of Act VIII of 1890 to the District Judge of Lucknow to be appointed guardian of the persons and property of her two minor sons. The application purports to be signed by her in both her capacities and by the same pleader, Lochan Lal. It contains a final passage in the usual form to the effect that she knew of her own knowledge that the entire immovable property to which the minors are entitled was of the value of 93,300 rupees, of which 60,000 rupees represent the Kothi, 13, Russell Street, Calcutta, and 15,000 rupees the property situate in the city of Lucknow, leaving a balance of 18,300 rupees as the value of the other property; that they were in possession of this property; and that their relatives are, amongst others, Hasan Mirza, brother of the minors, born of a Harem of Zaigham-ud-Daula, deceased.

In the schedule to the application, also purporting to be signed by her, she sets out the shares of each of the properties contained in the trust deed belonging to the minors. For instance, their share of the Kothi, 13, Russell Street, Calcutta, is put down at twelve twenty-sevenths estimated value 60,000 rupees; whereas, under the trust deed, if valid, they would be entitled to the entire interest in this property, subject to their mother's life estate. Every item in this schedule is inconsistent with the provisions of the trust deed.

On the 12th June, 1900, Fatima Begum made an application under Section 31 of Act VIII of 1890, to the District Judge of Lucknow, for permission to mortgage the shares of the minors, together with her own share in the properties therein mentioned for the sum of 35,000 rupees, for the purpose of raising money to be applied in discharge of the judgment debts of the deceased Nawab. Two statements, A. and B., were attached to this application, the first setting out the debts of the deceased Nawab, and the second, the properties of which he died seized or possessed. In the former the name of Fatima Begum appears as an encumbrancer on all the property

of the deceased Nawab for the sum of 85,000 rupees, the unpaid balance of her dower. In the second, the first number is the Machhli-wali-Baradari and seventy-eight shops and land situated in Chauk, City of Lucknow, the ancestor's share being four-ninths and the minor's two-ninths. The annual income is stated to be 1,500 rupees. The income arising out of the four-ninths share, 125 rupees per month and the charges upon it created by the ancestor are put down at rupees 31,755 : 7 : 8, and its estimated value at 25,000 rupees, so that there is no beneficial interest whatever in it.

No. 15 is Machrehta, in the district of Sitapur, and No. 16 the village of Janaura, in the district of Fyzabad, in each of which the share of the deceased was four-ninths, both are stated to be included in a lease, and the estimated value of each is only 600 rupees.

No. 17 is Kothi, 13, Russell Street, Calcutta, the ancestors share in which is stated to be 16 annas, the minor's half, the annual income 7,800 rupees, and the estimated value 55,000 rupees. The amount due upon this under Mr. Farr's mortgage is stated to be rupees 20,023 : 2 : 3, and his costs rupees 5,117 : 13 : 2. The shares of the minors are set forth, they are half their father's share. If the trust deed was valid their share would be the entire of their father's share.

On the 26th June, 1900, the District Judge granted permission to mortgage Nos. 2 to 14 on list B. for 16,000 rupees, as per terms of the draft mortgage filed. The shops in Lucknow, and No. 13, Russell Street, Calcutta, being therefore excluded.

The mortgage now sued upon was executed the same day. It purports to be signed by Fatima Begum on her own behalf, and as guardian of her minor sons.

Her signature is witnessed by her brother and the other witnesses, who are described as identifying her before the Registrar, and is also signed by Syed Mohamed Mirza.

The very first recital in this deed is that Zaigham-ud-Daula died a natural death in Lucknow on the 1st August, 1898, leaving him surviving his widow, the declarant, his two minor sons, and Nawab Sultan Mirza, his major son, and Raushan Ara Begum, his major daughter, as his heirs. It is further recited that the District Judge, under the provisions of the 31st Section of the Act 8, 1890, ordered the declarant to contract a debt of 16,000 rupees on the security of the property of the minors; and that, in compliance with that order and with a view to raise money to pay off the amount due on a certain decree named, she mortgaged her own share in these properties.

In their Lordships' view, the only reasonable inference to be drawn from these documents and proceedings is that Fatima Begum, if aware of the purport and contents of this trust deed, consistently treated it as invalid, and never, with full knowledge of its purport and effect—or, indeed, at all—elected to accept the provision made by it for her and her children as

a satisfaction of the unpaid balance of her dower. If she was never fully informed of its purport and contents, any election by her to accept the provision made for herself and her children by it in discharge of the unpaid balance of her dower would, of course, be of no avail. If this be so the mortgagee's rights cannot be affected, or his security invalidated, by any course of action she might have chosen to take after the execution of the mortgage. As regards the receipt of the rent or income of the property mortgaged, it must be borne in mind that Fatima Begum would have been entitled to an eighth share of it and her sons to their shares of it, even if the trust deed had never existed; and that she, as their guardian, would have been entitled to be paid their share as well as her own, while under the trust deed the trustees or she herself, with their permission, would have been entitled to receive the entire income, so that the receipt by her of a portion of the income of any of the property comprised either in the trust deed or in the mortgage might be equally consistent with her title under the deed or independent of it, and therefore no proof at all of possession under it. In the mortgage deed of the 13th September, 1902, it is recited that a lease of the Kothi, 13, Russell Street, in the city of Calcutta, was executed on the 19th April, 1901, ten months after the date of the appellant's mortgage. The witness, Madho Lal Dagar, proves, no doubt, that he has received the rent due under this lease on behalf of the trustees since the 13th September, 1902.

The letters from the agents of the Bank of Bengal at Lucknow to the trustees acknowledging the receipt from the branch of their bank at Calcutta of different sums to be placed to their credit range from the 21st August, 1901, to July 1902. It is not shown precisely what was the true nature of these lodgments in the bank at Calcutta, but from their dates and amounts and the place of lodgment the inference probably would be that they were the rents of the only property belonging to the deceased Nawab situated in Calcutta. The evidence of Medi Ali Khan on this point is very unsatisfactory. At p. 377 he states that after the Nawab's death he was accustomed personally to bring from Hakem Safdar Husain the shares of Fatima Begum and her two sons in the profits of the *jagir* villages. He then appears to have added that he got the profits for Fatima Begum without any specification as to whose profits they were, and then, having been reminded of his former answer, he said it was true, that both answers were true. Under the trust deed Fatima Begum would have been entitled to all the income, her sons to none of it, so that this evidence is more consistent with the lady's taking against the trust deed than under it. There is no satisfactory evidence therefore, in their Lordships' opinion, that the trustees ever entered, under and by virtue of the trust deed, into receipt of the rent or income of the property comprised in the mortgage sued upon, and consequently that there is no satisfactory proof that the possession of this portion of the property,

the subject of the gift, was ever delivered by the settlor to the trustees.

Even if the proof of the receipt of the rent of the Kothi, 13, Russell Street, Calcutta, were so satisfactory as to support the conclusion that possession of it had been delivered to the trustees at the date of the trust deed, or indeed at any time during the lifetime of the settlor, which, in their Lordships' view, it is not, the receipt of the rent of these premises, differing altogether as they do in nature and character from the property mortgaged, separated by many miles from these *jagir* villages, and not forming with them one concrete whole, would furnish no proof whatever of the delivery by the settlor to the trustees of his shares in the villages mentioned in the mortgage. Their Lordships are, therefore, of opinion that possession of the property mortgaged not having been proved to have been delivered, the gift is, according to the Mahomedan Law applicable to the case, void, and that the mortgage sued upon is therefore a valid and a binding instrument, and a good security.

The only question remaining for consideration is the legitimacy of Sultan Mirza. The burden of proving his illegitimacy rests, according to the pleadings in the first instance at all events, on the plaintiffs in the second suit. It would appear to their Lordships that a fallacy underlies some of the arguments addressed to them on behalf of the respondents on this point. It consists in assuming that the fact, even if true, that Sultan Mirza was treated by the Nawab, and especially by his family, with less care, kindness, consideration, and respect than the sons of the high-born ladies to whom the Nawab had been united by *nikkai* marriages, furnishes proof of Sultan Mirza's illegitimacy. Under the Mahomedan Law and indeed under the English Law, the legitimate son of the most low born, debased, and degraded woman to whom a man could be lawfully united has just the same proprietary right in his father's property as if his mother had been the most well-born and the purest. But it is rather against human nature to suppose that this equality before the law should secure equality of treatment in the domestic circle. It was also urged that the treatment which Sultan Mirza and his mother received in the Nawab's family was quite inconsistent with his position as the legitimate son of the Nawab, and of her position as the legitimate wife, through a *muta* marriage, of the Nawab. The misfortune of that argument is that the position in the family of both Sultan Mirza and his mother, and the treatment both received, especially the latter, is still more inconsistent with her being, as the respondent alleged, the mistress of a menial servant, and he the offspring of their intercourse. Even while she was pregnant with child she was permitted privileges which it is almost impossible to believe would have been accorded to her if, her state being known, as it must have been, it was attributable to her improper intimacy with a menial servant. Sultan

Mirza, when he grew up, turned out to be rather a "mauvais sujet." His connection with theatres displeased the Nawab. His mother had eloped or disappeared. If he was the illegitimate son of the menial servant there was no reason why the Nawab should not have turned him adrift. On the contrary he kept him on in his (the Nawab's) home, undoubtedly associated, to some extent, with him, had him about his person, and, it is apparent on the evidence, had some regard for him. In their Lordships view the reasonable inference from all the evidence on this point is that Sultan Mirza was, at all events, the son of Zaigham-ud-Daula and this negress.

The crucial question then is, was he the Nawab's legitimate son? There is no question that the Sultan Mirza was the son of this woman. That is admitted by all parties. Now four witnesses have proved distinctly that the Nawab acknowledged him to be his son. That *primâ facie* means his legitimate son. (*Fuzeelun Beebee v. Omdah Beebee*, 10 W.R. 469).

The first of these witnesses, Nawab Faghfur Mirza, the son of Prince Mutaz-ud-Daula, belonging to the family of the Kings of Oudh, states that he knew Zaigham-ud-Daula for thirty to thirty-five years, that he knew Sultan Mirza and his mother, that he saw the Nawab and Sultan Mirza treating each other like father and son, that he went to see the deceased Nawab in his last illness, and then found Sultan Mirza attending him, that the Nawab had been displeased with Sultan Mirza because the latter had become addicted to singing and dancing, but that as far as the witness could judge the Nawab had forgiven him, that fifteen or sixteen years had elapsed since then, and that the Nawab on one occasion introduced Sultan Mirza to the witness as his son. The second witness, Khan Bahadur Shujaat Ali Khan, states that Zaigham-ud-Daula told him that the negress, the Sultan Mirza's mother, was his *muta* wife, that he saw Sultan Mirza visiting the family in which Raushan Ara Begum lived at Murshidabad, and that this family treated him as a son, as did also Zaigham-ud-Daula himself.

The third witness, Husain Ali Mirza, son of the Nawab Nazim of Bengal, states that Raushan Ara Begum was married to Mirza Kamyal Baksh, son of the late King of Oudh; that he knew Sultan Mirza; that he saw him with his father Zaigham-ud-Daula, who told the witness that Sultan Mirza was his son by a *muta* woman; and that he saw him one or twice visiting at Murshidabad during Zaigham-ud-Daula's lifetime. This witness was subjected to a cross-examination, presumably considered effective, as to the time of the day at which the deceased Nawab made this statement to him. The last of these witnesses is Munshe Salig Ram. He says that one day, about fourteen or sixteen years before he gave his evidence, he, jesting, asked Zaigham-ud-Daula whence he got this boy Sultan Mirza, and he replied that he was his son by an Abyssinian, his wife by

muta, presented to him by his, the Nawab's, father, that he saw Sultan Mirza many times, and saw his father treat him as a relation, a son, or brother, and not as a servant.

The Subordinate Judge, at pp. 530-535, has criticised in detail the evidence in conflict with these statements, and shows conclusively, their Lordships think, that much weight cannot be attached to it.

Putting aside Sultan Mirza's own evidence, their Lordships cannot find anything in the case to discredit the evidence of the four witnesses above named. They have no interest to induce them to state what they do not believe to be true. The criticism passed upon their evidence was, first, that Sultan Mirza was only introduced to each of them once, and therefore their recollection is unreliable, as if it was to be expected that a father would naturally introduce a son to a friend as his son more than once; and, second, that they speak to what took place many years ago. They profess, however, to have a clear recollection of the events they depose to; and the Subordinate Judge, who had the advantage of seeing and hearing them, believed them. Much reliance was placed upon two documents in addition to the trust deed, which, it was contended, contained a distinct repudiation by Zaigham-ud-Daula of Sultan Mirza's legitimacy, namely, the Tarikh Quaisara and the memorandum bearing date the 15th February, 1893. Both these documents were composed many years subsequent to the dates of the acknowledgments deposed to by the four witnesses mentioned. In the first he names his children by his first wife and those by Fatima Begum, and states that there can be no heirs to him but these; that these persons are the owners of and heirs of his property; and that if any other claimant comes forward his claim should be considered invalid by the Government.

In the memorandum he states that one of his sons by his first marriage having died, his three sons, one daughter, and his wife Fatima, five persons in all, are his heirs, and he proceeds to declare that besides these he has none, and that if any added person comes forward as his heir other than a son or daughter thereafter born to him by his wife Fatima Begum, his claim shall be considered false and unlawful.

It is quite evident from these documents that Zaigham-ud-Daula was very apprehensive that some person would come forward claiming to be his heir, else it would be meaningless and purposeless to write thus. These apprehensions and fears would have been irrational if the person whose claim he desired to defeat was the well-known progeny of the negress and a menial servant. But his fears could easily be accounted for, if in fact he had had a son by a *muta* wife whom he had treated to some extent as a son, and who by reason of that treatment might be a formidable claimant, but yet whose claims he desired, not unnaturally perhaps, to discount. Their Lordships do not think that the evidence of the four witnesses above-mentioned is rebutted or discredited by these documents.

If this be so, the rule of the Mahomedan Law applicable to the case is well established: No statement made by one man that another (proved to be illegitimate) is his son can make that other legitimate, but where no proof of that kind has been given such a statement or acknowledgment is substantive evidence that the person so acknowledged is the legitimate son of the person who makes the statement provided his legitimacy be possible. *Muhammed Allahdab Khan v. Muhammed Ishmal Khan*, I.L.R. 10 Allahabad 289, *Nawab Muhammad Azmat Ali Khan v. Musamut Lalli Begum*, L.R. 9 I.A., pp. 18-78.

It is also well established according to Mahomedan law that if a member of a family, such as Fatima Begum was of her husband's family, makes statements touching the sonship or heirship of a person, such as are contained in many of the written documents she has signed, in reference to Sultan Mirza's heirship, those statements are good evidence of the family repute concerning him. *Anjuman Ara Begum v. Sadik Ali Khan*, 2 Oudh cases, 115, 117, 123, 125, and *Baker Ali Khan v. Anjuman Begum*, 30 I.A., 94-103.

On the whole case, therefore, their Lordships are of opinion that the decrees appealed from in these consolidated appeals are both erroneous and should be reversed, and the decrees of the Subordinate Judge in both should be restored, and that both appeals should be allowed with costs here and below, and they will humbly advise His Majesty accordingly.

Their Lordships, however, do not think that they can, consistently with their duty as members of this appellate tribunal, part with this case without making a few observations on some remarkable features of the litigation out of which the appeals have arisen. First as to the question of the duration of the litigation. The first suit was instituted on the 30th April, 1907. Various applications were made by the parties for extension of time. The issues were fixed on the 26th August, 1907. On the 19th June, 1908, the hearing began, and judgment was delivered by the Subordinate Judge on the 25th October, 1909, two years and five months after the institution of the suit. The petition of appeal to the Court of Judicial Commissioner was lodged on the 28th January, 1910, and judgment of the Court was not delivered till the 13th November, 1911.

An application for liberty to appeal to His Majesty in Council was lodged on the 19th December, 1911. Permission was given on the 13th December, 1912, but the notice that it had been given was not served upon the respondents till the 23rd January, 1913.

The petitions of appeal were lodged at the Privy Council Office on the 15th April, 1914, but the appeals were not set down for hearing till the 27th October, 1915, that is about eight years and six months after the institution of the suit.

The second suit was instituted on the 22nd February, 1908.

The issues were settled on the 30th March, 1908. The hearing apparently began on the 11th June, 1908, and continued at intervals till the 27th June, 1909. It was taken up for argument early in July, 1909, was adjourned till the 21st of that month, and judgment was not delivered till the 25th October, 1909. The petition of appeal to the Court of the Judicial Commissioner was not lodged till the 27th January, 1910, and judgment was not given till the 13th December, 1911.

Such delays as these are discreditable to any judicial system, and their Lordships have no reason to think they are not to a large extent avoidable. They vastly increase the costs, keep litigants in a state of anxious uncertainty, and prejudice their interest in many ways. Next, the cross-examination of witnesses was so unduly prolonged by the repeated asking of frivolous and irrelevant questions, that witnesses had to be recalled two or three times, often at considerable intervals, before their cross-examination was concluded, and, when recalled, the questions already asked and answered were often repeated. The cross-examination was thus broken up into several detached portions. If it were specially designed, as their Lordships are confident it was not, to expose witnesses to the risk of being tampered with, and to promote the fabrication of false evidence, no better system could be devised for that end than this splitting up of the cross-examination of witnesses.

Again, though the application to examine Fatima Begum may possibly have been rightly refused in the first instance, having regard to the time it was made, their Lordships cannot but regret that after the case had progressed, and everyone saw, as they must have seen, that it was vital to obtain her evidence, the Subordinate Judge did not announce to the parties that he was then ready to give permission to have her evidence taken, and did not impress upon the respondents in the first suit that as they sought to have declared void the solemn deed this lady had entered into, and on the faith of which she had obtained the appellant's money, it was their duty to examine her to explain the circumstances under which she entered into it. That was not done, however. The defendants did not again apply, and the case proceeded to drag slowly on without the evidence of the witness who knew all about the facts, and whose evidence would probably have put an end to the controversy one way or another in a few hours.

Finally, their Lordships feel bound to criticise adversely a practice followed in these two cases, which is as illegal as it is slovenly and embarrassing. By the 141st Section of "The Civil Procedure Act, 1877," repeated in "The Civil Procedure Code of 1882," and practically re-enacted in Order 13, rule 4, of the Rules and Orders passed under the Code of Civil Procedure of 1908, it is provided that a presiding Judge shall endorse with his own hand a statement that it (*i.e.*, a document proved or admitted in evidence) was proved against or admitted by the person against whom it was used. That course was in

many instances not followed at the hearing of these two cases, with the result that embarrassing and perplexing controversies arose on the hearing of these appeals as to whether or not certain documents, prints of which were bound up in the record, had been given in evidence. There is no possible excuse for the neglect, in this manner, of the duty imposed by the statutes, since so long ago as the 3rd March, 1884, a circular was addressed by the then Registrar of the Privy Council to the Registrar of the High Court of Calcutta calling attention to the requirements of the then existing law and the necessity of observing them. A copy of this circular was sent not only to the High Courts of Madras, Bombay, and Allahabad, but, in addition, to the Judicial Commissioner of Oudh and other Judicial Commissioners. Their Lordships, with a view of insisting on the observance of the wholesome provisions of these statutes, will, in order to prevent injustice, be obliged in future on the hearing of Indian appeals to refuse to read or permit to be used any document not endorsed in the manner required.



In the Privy Council.

MIRZA SADIK HUSAIN KHAN

o.

NAWAB SAIYED HASHIM ALI KHAN
AND OTHERS.

MIRZA SADIK HUSAIN KHAN

o.

NAWAB SAIYED HASHIM ALI KHAN
AND ANOTHER.

DELIVERED BY LORD ATKINSON.