Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Abdul Wahid Khan v. *Shaluka Bibi and others, from the Court of the Judicial Commissioner, Oudh, Lucknow; delivered 9th December* 1893.

Present:

LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD MORRIS.
SIR RICHARD COUCH.

[*Delivered by Sir Richard Couch.*]

The suit in this appeal was brought against Abdul Wahid Khan for possession of a half share of property left by Muradi Bibi deceased. She was the daughter of Shaluka Bibi and the wife of Abdul Wahid, and died on the 10th January 1881 leaving them her only heirs. On her death Abdul Wahid took possession of all the property left by her. These facts were not denied by Abdul Wahid. His first ground of defence was that Shaluka Bibi by a deed dated the 1st of February 1881, in consideration of a maintenance of Rs. 50 a month during her lifetime, withdrew her claim to any right and interest in the estate of Muradi Bibi; and the first issue in the suit was, whether this deed was executed by Shaluka Bibi. It has been found by both the lower Courts that it was not, and this ground of defence is therefore disposed of.

Another defence as to part of the property claimed was founded on a right of pre-emption in the Defendant. On the 26th January 1886,

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Shaluka Bibi executed a deed, in which it is stated that Abdul Wahid had taken possession of the whole of the property left by Muradi Bibi, and that Shaluka Bibi could not raise funds to defray the costs of litigation and personal expenses, and that Niamat Khan, Ramzan Khan, and Wazir Khan her brothers and legal heirs, had consented to arrange for payment of all costs of litigation and her personal expenses, on condition that whatever she obtained by way of inheritance and as dower (meaning dower due from Abdul Wahid to Muradi Bibi) should be shared and possessed with them, and that she should join them in the suit against Abdul Wahid. The deed, after providing against any compromise of the suit without the consent of the brothers, and agreeing to the aforesaid terms, concluded thus : " Let it also be known " that Niamat Khan, Ramzan Khan, and Wazir " Khan shall hold themselves responsible for all " costs of suit and my maintenance, and that the " said costs of the suit and the said maintenance " of the executant, which will be incurred from " the Court of first instance to that of the last " resort, will be consideration for the transfer " made by virtue of this deed, which is and will " be binding upon the executant. Approximate " value of the property and the dower &c., to the " extent of a moiety thereof is and will be " rupees 10,000." The three brothers were joined as Plaintiffs in the suit with Shaluka Bibi. The Defendant in his written statement alleged that the sale-deed was invalid, because by the deed of the 1st February 1881 Shaluka Bibi had no longer any power of alienation, and if she had, the Defendant had a right of pre-emption in respect of the property, and that no notice as required by law was issued. He claimed that upon payment of Rs. 10,000, the price entered in the sale-deed, the suit should be dismissed. It is an error to treat the Rs. 10,000 as the price; it

is given as the value of the property sold, apparently for the purpose of stamp duty. The price is really what would be incurred for costs, the amount of which was uncertain and would depend upon the resistance which the Defendant made in the suit.

The law of pre-emption in Oudh is in "The Oudh Laws Act, 1876." By Section 9 the Defendant as a co-sharer with Shaluka Bibi was entitled to a right of pre-emption. Section 10 enacts that when any person proposes to sell any property in respect of which any person has a right of pre-emption, he shall give notice to the persons concerned of the price at which he is willing to sell it. Section 11 enacts that any person having a right of pre-emption in respect of any property proposed to be sold shall lose such right unless within three months from the date of such notice he or his agent pays or tenders the price aforesaid to the person proposing to sell. By Section 13 any person entitled to a right of pre-emption may bring a suit to enforce it, on the ground that no due notice was given, or that tender was made and refused, or in the case of a sale, that the price stated in the notice was not fixed in good faith. This law is not applicable where the person who would be entitled to pre-emption denies the title of the person who proposes to sell, and alleges that they are not co-sharers and that he is entitled to the whole of the property. The Defendant, by setting up the deed of 1881, did this. He being in possession of the property, Shaluka Bibi was obliged to raise money to defray the costs of a suit to recover her share, which she did in the usual and probably the only way available in such cases. The consideration was, the providing the money necessary for carrying on the suit, the amount of which could not be estimated. If the Defendant succeeded and the suit was dismissed there would have been no property to be sold.

In truth the transaction was a sale of a share in a law suit. The position taken up by the Defendant was altogether inconsistent with claiming a right of pre-emption.

The Defendant also claimed that if the Plaintiffs should be held to be entitled to a decree they should also be declared liable to pay according to shares all the debts of Muradi Bibi liquidated by the Defendant, as well as all sums of money which the Defendant expended in good faith in prosecuting suits instituted for protecting the property. The District Judge found that of eleven debts due from Muradi Bibi in a list given by the Defendant, amounting to Rs. 43,956. 5. 4, six remained due which the Plaintiffs would have to pay in proportion to their share. Muradi Bibi died on the 10th January 1881. The suit was brought on the 16th September 1886. The Defendant had therefore been in possession and receiving the mesne profits for upwards of five-and-a-half years. The plaint only claimed mesne profits accrued during the pendency of the suit till the date of obtaining possession. The Defendant alleged that he had paid the remaining five debts, and he contended that, the mesne profits before the suit not being claimed in the plaint, he was entitled to keep them and also to receive what he had paid in discharge of the debts. The District Judge rightly refused to allow this, and the Judicial Commissioner on appeal affirmed this decision. It is true that the Plaintiffs could not claim to have a decree for those mesne profits, but if an account was to be taken of the Defendant's payments it must also be taken of his receipts. Apparently his receipts from the Plaintiffs' share of the property were much more than sufficient to satisfy the debts.

The remaining question relates to the money expended by the Defendant in prosecuting suits for, as he describes them, protecting the property.

The particulars of these expenses are given in a list B in his written statement. A suit had been brought in Muradi Bibi's lifetime against her for a share in the entire estate held by her, and on her death the Defendant and Shaluka Bibi were made Defendants in it as her representatives. The Plaintiffs in that suit obtained a decree in the Court of the Judicial Commissioner in their favour. The Defendant first applied to the Judicial Commissioner for a review. He was unsuccessful in that application, and he then appealed to Her Majesty in Council. He succeeded in this appeal and the decree of the Judicial Commissioner was reversed. There were also suits for mesne profits defended by him which failed in consequence of this reversal. The list B is composed of the costs of these suits and interest on money borrowed to pay them. Shaluka Bibi took no part in these proceedings, having up to the making of the decree of the Judicial Commissioner appeared in the suit and defended separately. In the present appeal the Defendant claimed to be allowed a proportion of those costs, on the ground that the Plaintiffs had got the benefit of the reversal of the decree of the Judicial Commissioner. This is not a ground for making the Plaintiffs liable for any portion of those costs. The proceedings were taken by the Defendant for his own benefit, and without any authority express or implied from the Plaintiffs; and the fact that the result was also a benefit to the Plaintiffs does not create any implied contract or give the Defendant any equity to be paid a share of the costs by the Plaintiffs. This claim has been disallowed by the Lower Courts, and their Lordships will humbly advise Her Majesty to affirm the decree of the Judicial Commissioner and to dismiss this appeal. The Appellant will pay the costs of it.