Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Aga Mahomed Jaffer Bindaneem v. *Koolsom Bee Bee and others, and Cross-Appeal, from the Court of the Recorder of Rangoon; delivered 7th April* 1897.

Present:

LORD WATSON.
LORD DAVEY.
SIR RICHARD COUCH.

[*Delivered by Lord Davey.*]

This Appeal and Cross-Appeal from the Court of the Recorder of Rangoon deal with questions which have arisen in the administration of the estate of Hadji Hoosain Bindaneem, a Mahommedan of the Shia sect. The testator died in February 1890 leaving one widow Koolsom Bee Bee (Respondent in the principal appeal and Appellant in the cross-appeal) and no children.

The contents of the will so far as material may be shortly stated. The testator appointed his nephew Aga Mahomed Jaffer Bindaneem (the Appellant in the principal appeal) his sole executor and trustee, and directed him to sell his property and deduct from the proceeds of sale all costs and charges and a commission of 3 per cent. He devoted one fifth part of the remainder (called Khoons) and a sum of Rs. 3,000 to religious purposes, and directed his executor and trustee to divide the remainder after deduction of the said sum of Rs. 3000 and Rs. 2,500 due to his wife Koolsom Bee Bee for dower into three equal shares and to retain one-third share and divide the remaining shares between his heirs who

95669. 125.—4/97.

were his said wife and brother Aga Abdool Hadee Bindaneem in the shares and proportions in which they would be entitled to the same according to Mahomedan law and made a particular provision of the reserved one-third share. The testator declared that his executor and trustee should have power to charge a commission of three per cent. on the proceeds of sale of his property real and personal and cash.

Part of the testator's property consisted of land with buildings on it.

Several questions were raised on taking the accounts of the executor four of which are submitted for decision in these appeals.

1st. Whether the commission of three per cent. to the executor and trustee is payable out of the entire estate or only out of the one-third which alone the testator could bequeath by his will?

2nd. Whether the widow was entitled to maintenance for any and what period after the testator's death?

3rd. Whether she ought to be charged with an occupation rent for the time during which she continued to reside in the testator's house after his death?

4th. Whether the widow can by Shia law take any share by inheritance in the land on which the buildings stand as well as in the value of the buildings.

The widow also claimed adversely to the estate to be entitled to a sum of Rs. 30,000 owing to the testator on deposit notes of the Bank of Bengal which she alleged the testator had given to her on the Monday preceding the Friday on which he died.

To deal with the last-mentioned question first. The deposit notes signed by the agent of the Bank, are in the form of receipts from the testator of the sum mentioned in them as a deposit bearing interest at the rate mentioned to

remain till notice of 12 months on either side expires. They contain in the margin the words "not transferable" and are not in a form which would entitle the bearer of the notes to the debts created thereby as transferee thereof. The Respondent Koolsom Bee Bee in her evidence stated that on the day in question the testator being then indisposed (but not apparently in contemplation of his early death) handed her the notes with certain formalities and added "after "taking a bath I will go to the Bank and transfer "the papers to your name." Her story to this extent is confirmed by two witnesses who said they were present. The testator never did transfer the notes in the Bank or do any act to complete Koolsom Bee Bee's title.

The learned Recorder has expressed doubts as to the truth of the story told by Koolsom Bee Bee and her witnesses but he has also held that even if her evidence be accepted the gift was incomplete and that she is not therefore entitled to the money on deposit.

As their Lordships entirely agree with the Recorder on the latter point it is unnecessary for them to express any opinion on the value of the evidence. It is quite clear that the effect of handing the notes was not to transfer the debts or to give the widow the dominion over them or enable her to recover the moneys secured by the notes. At most the evidence shows an intention to make such a transfer but the gift is incomplete and no legal effect can be given to it. There is no question here of a *donatio mortis causâ* in the English sense even if such a mode of passing property were known to the Mahommedan law.

Their Lordships also agree with the learned Recorder that the executor's commission can be paid only out of the one-third part of the testator's estate which passed by his will. It is given no doubt by way of remuneration but it is a gratuitous bequest and nothing more than a

legacy to the executor and certainly not in any sense a debt.

The learned Recorder has decided that the widow is entitled to maintenance at the rate of Rs. 150 *per mensem* for one year after the testator's death and he has done so on the authority of a passage of the Koran quoted by Mr. Justice Ameer Ali in his work on the Personal Law of Mahomedans on which the text writer makes the observation that several jurists have held that a wife has a right to be maintained out of her husband's estate for a year independently of any share she may obtain in the property left by him. Unfortunately the writer does not give any references in support of his statement and counsel have not been able to furnish their Lordships with any. On the other hand the Hedaya (Book IV. Ch. XV. Sec. III.) says expressly "Maintenance is not due to a woman "after her husband's decease" and gives reasons for so holding. The Imameea (Baillie p. 170) after saying that it would seem that after the death of her husband the widow has no right to a residence except in the single case of her being pregnant says "A widow has no right to main-"tenance even though she be pregnant."

Their Lordships on these authorities must hold that a Mahomedan widow is not entitled to maintenance out of her husband's estate in addition to what she is entitled to by inheritance or under his will. They do not care to speculate on the mode in which the text quoted from the Koran which is to be found Sura II. vv. 241–2 is to be reconciled with the law as laid down in the Hedaya and by the author of the passage quoted from Baillie's Imameea. But it would be wrong for the Court on a point of this kind to attempt to put their own construction on the Koran in opposition to the express ruling of commentators of such great antiquity and high authority.

The executor in his accounts charged the widow with an occupation rent for the period of eleven months during which she continued to occupy the testator's house after his death. She objected to the charge on the ground that she had never contracted to pay a rent and the learned Recorder has decided in her favour. Their Lordships do not disagree with the Recorder. It is quite true that when one occupies the house of another with his permission there is *primâ facie* an implied contract to pay an occupation rent. But this implication may be rebutted by showing the circumstances under which possession was taken *e.g.* that the house was lent to the occupier or that he was a caretaker. In this case the widow's occupation is referable to the previous occupation by her husband and herself and as one of the heirs and one of the residuary legatees she had an interest in the house (apart from the land). No notice appears to have been given her that she would be charged a rent and their Lordships think that in the circumstances of the case they cannot imply a contract on her part to pay a rent but they must treat her as having occupied the house until sale on behalf of herself and the other parties interested as caretakers.

There only remains the question raised on the widow's behalf that she is entitled to share in the land on which the buildings stand as well as in the value of the buildings themselves. The argument urged by Mr. Branson was that the text from Baillie's Imameea p. 295 quoted by the learned Recorder refers only to agricultural land and that a childless widow is according to the proper construction of that text entitled by Shia Law to share in land forming the site of buildings. The argument is characterized by novelty and boldness. It is unsupported by any authority and is contrary to the accepted doctrine

on the subject. Their Lordships have no hesitation in agreeing with the learned Recorder in rejecting it.

Their Lordships therefore will humbly advise Her Majesty that the final decree of the learned Recorder dated the 14th September 1893 be reversed so far as it decrees "7. That the Plaintiff "Koolsom Bee Bee is entitled to be paid main- "tenance out of the estate at the rate of Rs. 150 "per month for twelve months" and instead thereof it be declared "that the Plaintiff Koolsom "Bee Bee is not entitled to maintenance out of "the estate after the date of the testator's "death" and in other respects that the decree be affirmed. As the appeal of the Appellant Aga Mahomed Jaffer Bindaneem has partly failed and partly succeeded there will be no order as to the costs of that appeal. The Appellant Koolsom Bee Bee must pay to Aga Mahomed Jaffer Bindaneem the costs of her appeal. The other Respondents in each appeal have not appeared and there are no costs.