Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Mussumut Hurmut-ool-Nissa Begum vs. *Allahdia Khan and Hajee Hidayat from the late Sudder Court at Agra; delivered 19th December* 1871.

Present:

Sir James W. Colvile.
Sir Montague E. Smith.
Sir Robert P. Collier.

Sir Lawrence Peel.

THEIR Lordships have carefully considered the evidence and the arguments which have been addressed to them on the only question in this appeal which has yet been argued, and have come to a conclusion which will render the argument of the other issues unnecessary.

The reasons which have led them to that conclusion I have now to state.

Allahdia Khan, the first and principal Respondent on this appeal, instituted a suit in the nature of an action of ejectment against the Appellant. He claimed as the residuary heir according to the Mohamedan law, of one Hydur Ali Khan, to recover from his widow the Appellant three-fourths of her deceased husband's estate, of the whole of which for upwards of eleven years she had been in possession. His title as residuary heir was put in issue, and other issues were raised in the suit involving questions concerning the rights of the widow in respect of her dower, the amount of such dower, and whether certain of the lands claimed were part of the estate of the deceased or had been acquired by her own funds.

The Zillah Judge having determined this first

issue in favour of the Defendant deemed it unnecessary to try the others, but the late Sudder Court of Agra having over-ruled his decision on the first issue tried and determined the whole case. Against their decree this appeal is brought.

In the course of the litigation two other persons were brought on the record; one as co-Plaintiff, the other as co-Defendant. Both were purchasers *pendente lite;* the one of part of the Plaintiff's claim, the other of part of the Defendant's interest. Each, therefore, must stand or fall with his respective vendor.

The only question, then, now to be considered is whether the Respondent, the Plaintiff in the suit, has established his title as residuary heir of Hydur Ali Khan. Up to a certain point the parties agree as to the pedigree of Hydur Ali Khan. It is admitted that he was the son of Wajid Ali Khan who was the son of Mahomed Ashruf Khan; but the Respondents contend that Mahomed Ashruf Khan was the son of one Bhekum who died leaving three other sons from one of whom (Hossein Khan) Allahdia Khan the Respondent is descended. On the other hand, the Appellant insists that Mahomed Ashruf Khan was the son of one Mahomed Hossein Khan who had but two sons, namely, Mahomed Ashruf Khan and Mahomed Afzul Khan who died childless, and consequently that there is no proof of the descent of the Respondent and Hydur Ali Khan from a common ancestor.

Before considering the direct testimony on this disputed question of pedigree, it will be convenient to recapitulate certain facts which have been admitted or proved beyond doubt, and the inferences to be drawn from them. Hydur Ali Khan died at Benares on the 12th of December 1852. Upon his death some officious person, styling himself "A well-wisher of Government," presented a petition to the magistrate of the district suggesting that the deceased had died without any legal heir of his caste (I think those are the words) or any lawful widow, and consequently that his property would pass to the Crown. The magistrate directed the Kotwal of the city to inquire into the facts and to submit a report thereon. This Order is dated the 13th of December.

I may here pause to observe that this proceeding was not likely to take place if the deceased had notoriously any recognized relations in the line of succession according to Mahomedan law. There must have been a notion not only that his marriage was incapable of proof, but that there was no person, at least on the spot, who could make out a title to the property as his heir; and so far the fact that this proceeding was taken at all, is in some degree more favourable to the case of the Appellant than to the case of the Respondent.

On the 16th of December the Appellant presented a counter petition to the magistrate, which was also referred to the Kotwal for report. On the 18th of December that officer made a report to the effect that he had made the inquiry in the presence of the "well-wisher" and of two persons described as witnesses, cognizant of the facts of the case, including the Respondent Allahdia Khan; that the marriage of the Appellant with Hydur Ali Khan had been established by the evidence of Abdool Ali Khan who performed the ceremony, and of the two persons who were formal witnesses to it; that she was stated by the above parties to be the lawful heir of Hydur Ali Khan, and that the depositions taken were returned with the report.

Amongst these depositions were those of the Respondent and of his nephew Abdool Ali Khan, who seems to have taken the principal part or a principal part in bringing or prosecuting this suit.

The first deposition is to the effect that Hydur Ali Khan did marry the Appellant, and therefore that it could not be said there was no heir to his property since she, his heiress, was alive. The other proves the performance of the marriage ceremony. The magistrate on this, and after a reference to a principal Sudder Ameen known to have been a friend of Hydur Ali Khan, released the property from attachment on the 29th of December 1852.

On this or some other occasion the Appellant seems to have procured the two papers called "General Testimonials," which are at pages 96–7 of the record, to be signed by her friends and acquaintance. The first of these purports to have been signed by the Respondent Allahdia Khan.

Allahdia Khan when called by the Appellant, the Defendant, denied his signature to this paper, a fact which does not tend to his general credit, inasmuch as his counsel has admitted that his subscription of that document can no longer be disputed.

Again, in due time after the recognition of his title, the Appellant applied for and obtained by proceedings for the mutation of names, the transference from her husband's name to her own in the books of different Collectorates, of the several landed estates belonging to him. She also got herself substituted as his representative in more than one suit; and having thus obtained the sole possession of the property, she remained in undisturbed possession of it until the commencement of this suit on the 2nd of February 1864.

Now if Allahdia Khan were the residuary heir of Hydur Ali Khan (and if now such residuary heir, he was equally so in 1852) why did he fail for nearly twelve years to assert his title and to treat the Appellant as the sole owner of the estate? It is said, and truly said, that he did not in his deposition or the subscription to the testimonial assert that she was the sole heiress of Hydur Ali Khan. It was also said that he could not have so treated her, inasmuch as being the widow merely of Hydur Ali Khan she could take only one-fourth of the estate with such a lien on the whole property as she might be entitled to for her dower. But it is to be observed that the latter proposition, which assumes that if there were no residuaries the three fourths of the property would necessarily go to the Crown, may be contestable. As a general rule, a widow takes no share in "the return." But some authorities seem to hold that if there are no heirs by blood alive the widow would take the whole estate to the exclusion of the Fisc. In the present case the Crown certainly did not press its claim against the Appellant. However this may be, there is no reason why, when seeking to displace the attachment, Allahdia Khan should not have asserted his own title as residuary as well as hers as widow, the latter depending on proof of a marriage which has been called in question; nor is there any reason why afterwards, if he had

a perfect title to three-fourths of the estate, he should have allowed her by mutation of names to get possession of the whole without taking the ordinary steps to assert that title before the Collector. And this conduct is made the more inexplicable by what he has put forward in this suit as his case; for if it be true that, as he has contended on this record, the widow had never been entitled to more than the small Fatimi dower of Rs. 260, and had released her claim for that to her husband on his death bed, it follows that she had no possible claim for a lien on the estate for dower; and again, if it be true, as he has also contended, that he had been recognised as a member of the family in the suit brought in 1832 by Hydur Ali against his stepmother, and had ever since been so recognised, his title as such was far less likely to be disputed by the widow when she was making common cause with him against the attachment than it is now after so many years of adverse possession.

No satisfactory explanation of his inaction has been given. A witness indeed, and a respectable witness, Mahomed Zahoor, has been called, who states amongst other things that a few days after the death of Hydur Ali Khan he made an ineffectual attempt to effect a compromise between Abdool Ali Khan and the Appellant.

The second of the letters produced by this witness (the only one of the two letters which seems to have any bearing on the case), being dated as late as April 1864, obviously refers to a much later and equally ineffectual attempt at compromise soon after the institution of this suit.

But let it be granted that an earlier attempt was ineffectually made immediately after the death of Hydur Ali Khan, and therefore before the widow had obtained possession of the estate—what is the natural inference from that fact? Why, that if the claim were well founded, it would not have been so summarily rejected by the widow, who was dependent in some measure upon the Respondent and his nephew for the proof of the disputed marriage, and that if rejected it would have been at once asserted by him by intervention in the proceedings for mutation of names or by a regular

suit. If, therefore, there was such a negotiation for compromise in 1852, it seems probable that it was based rather on an attempt to extort money from the widow by a threat of a claim than by the assertion of a bonâ fide claim which was certainly as capable of being proved then as it is now.

Their Lordships will now proceed to consider the direct evidence which the Respondent has adduced in support of his title. He examined his mooktear and nephew Abdool Ali Khan who, of course, have deposed to the pedigree as pleaded, but that witness, as the next in succession to the estate, is apparently *dominus litis*, and has almost equally with his uncle committed himself by his acts and conduct in 1852,

Another witness, Abdool Quadir Khan, the dealer in embroidered cloth, was examined. He states that he is of the same caste, and distantly related to the family, but his precise connexion with it is not shown.

The next class of witnesses are the six who are examined under commission at Hoshyarpore, in the Punjaub. Of these, five depose to a pedigree produced by the first of them, which is in some respects inaccurate, since it represents Hydur Ali as the nephew, and not the son of Wajid Ali. The sixth speaks to another pedigree which, though accurate in the last-mentioned particular, differs in some slight particulars from that scheduled to the plaint. All these witnesses are the cultivators or ryots settled in this village. They none of them profess to have any connexion with Hydur Ali Khan or the Respondent, except that they are of the same caste or brotherhood, a term of the widest import, which in one part of the record is admitted to embrace almost all Affghans. The family seems undoubtedly to have been Affghans by race, who migrated eastwards from the village inhabited by these witnesses; the time of this emigration is left uncertain. Wajid Ali, who died in 1822, had before his death settled and become a landed proprietor in Zillah Ghazeepore, though he would seem at one time to have wandered as far south as Hyderabad.

It may be true, as stated by the Sudder Court,

that trustworthy evidence concerning the pedigree might be more likely to be procured from the original habitat of the family than from Benares or Ghazeepore; but the particular witnesses examined of Hoshyarpore do not even state that Bheekum or any of his alleged descendants were known by them as inhabitants of that place, and give no details concerning the family by which their means of knowledge may be tested.

Their Lordships, therefore, concur with the Zillah Judge in thinking this testimony worthless. Nor has the Supreme Court attached much value to it.

If the case of the Respondent had rested on the evidence already considered, it can hardly be supposed that the Sudder Court would have disturbed the finding of the Zillah Judge, or held that the Respondent had established his title. The learned Judges themselves say: "We do not ourselves "attach much value to the oral testimony on "either side."

Now, if the evidence on both sides is untrustworthy, the Plaintiff, on whom lies the burden of proof, must fail. It is clear that the judgment of the Sudder Court, so far as it is unfavourable to the finding of the Zillah Court, proceeds entirely on the materials which have now to be considered. These are the documents and depositions said to have been filed in the suit of Hydur Ali and his stepmother, and to be records or copies of records in the Court of Ghazeepore.

The short history of that suit is this: Some years after the death of Wajid Ali Khan, and apparently in or about 1832, his widow, Raba Begum, contested the legitimacy of Hydur Ali Khan, who, if his son, was his son by a different wife. Hydur Ali Khan brought his suit, in which the principal issues were his right as an acknowledged son to share in Wajid Ali's estate, and the right of Raba Begum to a large dower claimed by her. The cause was first tried and decided in his favour by the Civil Judge of Ghazeepore on the 31st of December 1834, was appealed, remanded by the Sudder Court, retried, and finally decided in the Plaintiff's favour by the Principal Sudder Ameen, who has been a witness in this cause, on the 26th of December 1838.

The following are the documents which have been, as it were, imported from the record of this former suit and made part of the record in this suit.

The first is an alleged copy of a petition said to have been presented by Hydur Ali Khan, without date. The second was a copy of the deposition of Allahdia Khan. The third was a copy of the deposition of Noor Mahomed Khan. The fourth was the final judgment of the 26th of November 1838. The fifth was a copy of the deposition of Makhanna Bebee or Begum, said to have been the mother-in-law of Waris Ali, which was filed at the last moment in the Lower Court. These were brought into the Lower Court, but the Sudder Court saw fit to admit the following further documents. A copy of the deposition of Khyrun, a slave girl who had been a witness for Raba Begum, but was cross-examined on the part of Hydur Ali Khan; a letter, said to have been addressed to Allahdia Khah and Abdool Ali Khan; the first by Raba Begum at the time of Wajid Ali's death, with a postscript by another party; a letter from Raba Begum to Noor Mahomed Khan, of the 20th of May 1823; the list of the papers filed in that suit, and the decree of the Zillah Court of Ghazeepore, dated 31st December 1834.

The questions that arise on all these documents are, can they be used at all as evidence in this suit against the Appellant, and if so, to what extent can they be so used, and what is the effect of them? As to that there is a preliminary question, namely, whether they have been sufficiently shown to be what they purport to be. The Sudder Court in its judgment seems to assume that they were proved to be what they purport to be, and were for all purposes legitimate evidence against the Appellant. To the first of these documents it is now admitted by that judgment some suspicion attaches. The learned Judges say of their doubts concerning it, that those doubts cannot be positively answered, but that they (the Judges) cannot, therefore, confidently conclude the document to be a forgery. This is obviously an incorrect mode of disposing of the question, which

was not whether the document was a forgery, but whether it had been proved to be a genuine document. The proof which is sufficient to establish the latter proposition may well be far short of that which was necessary to establish the former, and the defect of proof must of course fall on the party who propounds the document. The paper as set out in the record does not bear those marks of authentication which the Judges of the Sudder Court state that they found upon it. Their Lordships, however, are willing to assume that such marks were there. Notwithstanding this assumption, however, and considering the objections taken to the paper by the learned judges themselves, the absence of Hydur Ali's name, the absence of any order passed upon it, and the want of any extrinsic evidence to show that it really was presented to Hydur Ali Khan, their Lordships have come to the conclusion that the Zillah Judge was right in treating it as of no value, and that it must be excluded from consideration.

Their Lordships have come to the same conclusion concerning the letters attributed to Raba Begum, on which it may further be remarked that the judgment of the Sudder Court in no way proceeds. The two judgments prove nothing, and are useful only as showing, as they undoubtedly do, that Allahdia Khan and Noor Mahomed Khan were examined as witnesses for the Plaintiff in that suit.

There remain then the depositions, particularly those of the witnesses last mentioned. The Sudder Court, their Lordships think, has given too much importance in their judgment to those depositions. They obviously are not evidence of the facts stated therein, against the present Appellant. They were taken in a suit to which she was not a party, upon issues wholly different from the issue raised in this suit; and she has had no opportunity of cross-examining the deponents. Nor do they seem to their Lordships to fall within the rule according to which declarations by a deceased party are admissible on a question of pedigree, or to constitute admissions binding on her deceased husband, whose heiress the Appellant claims to be. The most that can be said is

that he produced these persons as witnesses and caused them to be examined upon his behalf upon issues upon which the pedigrees of the family and their relationship to it were not in question.

He cannot, therefore, their Lordships think, be taken to have made an admission binding on his heir of everything which these witnesses collaterally stated. The utmost which these depositions can be said to show is, that the alleged descent of Hydur Ali Khan and the Respondent from Bhekum as a common ancestor is not a new story invented for the purposes of this suit, and that Hydur Ali may even to some extent have sanctioned the putting forward of that story by his witnesses. The depositions of the two women on cross-examination do not carry the case further. Admitting that these depositions to the extent which is stated may afford some slight corroboration of the direct evidence given for the Respondents, their Lordships have come to the conclusion that even with that corroboration the evidence for him fails to meet the heavy burden of proof imposed upon him, not only by the nature of the case, but by the strong presumption arising from his acts and conduct already adverted to.

Their Lordships think it of the utmost importance that those who have thus sanctioned a long possession should not be allowed lightly to disturb it, or to escape from those legitimate inferences and presumptions which on a conflict of evidence arise from their own acts and conduct.

They may further remark that according to the Mahomedan law there may be a renunciation of the right to inherit, and that such a renunciation need not be express but may be implied from the ceasing or desisting from prosecuting a claim maintainable against another. Their Lordships do not say that in this case the point was not taken in the Court below, the acts and omissions of the Respondent can be taken to afford an implication of actual renunciation; but they do say that having before them a case in which there is very weak and suspicious evidence in favour of the title, and evidence on the other side conflicting with it, which is not of a stronger character, notwithstanding the apparent respectability of some of the

witnesses called for the Defendant, they have to choose between the case for the Plaintiff corroborated merely by those slight inferences which arise from the depositions already considered; and the case for the Defendant, corroborated by the very strong presumptions arising from the conduct and acts of the Respondent.

They have already stated that in their opinion the Sudder Court has given more effect than ought to be given to the proceedings in the suit of 1832; they think that that Court has not given sufficient weight to the presumptions arising from the Respondent's conduct. And therefore, though unwilling, even when there is a conflict between the two Courts below, to disturb the final finding on an issue of fact, they feel bound to say that in their judgment the Respondent has failed to establish the title upon which he sued, and that therefore the Zillah Judge was right in dismissing the suit.

The result will be that their Lordships will humbly advise Her Majesty to allow this appeal, to reverse the decree of the Sudder Court, and to order that in lieu thereof a decree may be made dismissing the appeal from the decree of the Zillah Judge to that Court with costs. The Appellant must also have the costs of the appeal.