Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Khajah Habeeb Oollah and others v. *Khajah Gouhur Ally Khan, from the High Court of Judicature at Fort William in Bengal; delivered 5th November* 1872.

Present:

SIR JAMES W. COLVILE.
SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.

SIR LAWRENCE PEEL.

THE single question raised by this Appeal is whether the Respondent was the son of Wazeer Jan, by which their Lordships understand, either his legitimate son, in the strictest sense of the term, or a son capable of inheriting from him under the Mahomedan law.

The case made by the Appellants, who were Plaintiffs in the suit, was that he was not in any sense the son of Wazeer Jan, who they alleged was incapable of procreating children, that he was a stranger brought in by means of a conspiracy to defeat their rights to the succession of Mahomed Ibrahim, the elder brother of Wazeer Jan, and in fact the original plaint appears to have gone so far as to allege who the real and natural father of the Respondent was.

Now it is admitted that that case has entirely broken down. The effect of the findings of the two Courts upon the remand appears to be what is thus stated in the Judgment of the High Court now under appeal:—"The case has again "been tried by the present judge, Mr. Ainslie, "who has arrived at the conclusion that Gouhur "Ally is really the son of Wazeer Jan and "Allahrakkee, but that he is not legitimate, and "that though his father and mother did cohabit,

" the cohabitation was not that of man and " wife."

The only qualification which their Lordships think might be put upon this summary of the judge's finding is this, that the judge has rather found, after ascertaining the paternity of Wazeer Jan, that the Respondent was not *proved* to be legitimate, and that although his father and mother did cohabit, the cohabitation was not *proved* to be that of man and wife.

Upon appeal from the decision of the Zillah Judge, the High Court came to the conclusion that, upon the evidence, the Respondent must be taken to have been legitimate, and that conclusion their Lordships are disposed to think was the only correct conclusion which they could draw from the evidence, considering the manner in which the case was presented before them.

It has been very fairly admitted at the bar that it is hardly open for the Appellants here, both Courts having concurred in the finding upon that fact, to dispute any longer the paternity of the Respondent. It is admitted that he must be taken to be the natural son at all events of Wazeer Jan. It will have no doubt to be considered what is the effect of that conclusive finding as to the paternity, not only in reference to the consequences immediately to be deduced from it, but also in reference to the credibility of the witnesses for the Appellants, in so far as they attempt to prove not merely that the Respondent was in no sense the son of Wazeer Jan, but that in fact there never was a marriage between Wazeer Jan and the mother of the Respondent.

It was argued by the learned counsel for the Appellants, particularly by Mr. Doyne, that it did not by any means follow that, because many of those witnesses had expressed an opinion as to the incapacity of Wazeer Jan for the procreation of children, a fact which is now conclusively found against him, they were not to be believed

on the other part of the case. Their Lordships, however, deem it right to observe that those witnesses were not merely giving an opinion upon an isolated fact in the cause, but they came into court to prove a case—the whole case made by the Plaintiffs; and that that case was, as I have before stated, a very special case, referring the introduction of this boy into the family to a conspiracy, and undertaking to prove that it was impossible that he should be the son of Wazeer Jan, and that he was the son of somebody else. It, therefore, seems to their Lordships very difficult to say that if those witnesses have been conclusively shown to have come to prove a false case—a case false in its material features—much reliance can be placed upon their evidence as to any particular questions in the cause.

Another consequence of the manner in which the Appellants have presented their case in the Courts below is, that the question which has been chiefly argued to-day at the bar seems never to have been fairly put into a course of trial. They say, "True, we must admit now that the Re- "spondent was the natural son of Wazeer Jan; "but the evidence for the Respondent,—the "direct evidence as to the marriage between "Wazeer Jan and Allahrukke,—is not to be be- "lieved, and all the other facts proved in the case, "the continuous cohabitation between them,— "including the birth of other children,—are all "consistent with the supposition that the Re- "spondent was an illegitimate son, and was "never recognized by his father, and was at "last put forward, as we say, in consequence of "this conspiracy to defeat the rights of the "claimants."

Upon the case thus made it is to be observed that, if it were the true case, the Plaintiffs would hardly have set up that which must now be taken to have been a false case; and further, that the case now relied upon not having been made the real issue between the parties, either when the case was first launched, or at any time

during the long period through which this litigation has lasted, we have not that evidence which might have been given as to the state of the family, as to the manner in which the child was treated in the family, as to the circumstances of the birth, and possibly as to the recognition, by Wazeer Jan, of the Respondent as his son.

It appears, therefore, to their Lordships, that it is extremely difficult to place any reliance upon the case made by the Appellants, so far as it affects the case made by the other side; and the only remaining question is, whether there was sufficient evidence on the part of the Respondent, from which the High Court was justified in inferring that the legitimacy was made out. And in considering this question their Lordships will assume that the Appellants had made a case sufficient to cast upon the Respondent the burden of giving some proof of the marriage between his parents.

Their Lordships think it is a very strong circumstance that upon or immediately after the death of Nawab Jan, alias Mahomed Ibrahim, this boy was produced and placed upon the guddee by Fatima. That is a fact which, as the High Court has observed, admits of no doubt. Fatima seems then to have been the head of the family. She was an old lady, and, as the event proved, near the end of her life. It is difficult to see what interest she could have had in putting a spurious child, or even an illegitimate child of her son, in that position, and treating him as the heir of the family; because the effect of recognizing him as a legitimate grandson was to introduce him as one of her own heirs, and therefore to affect the interests of her own brothers and sisters, her own relations for whom she might be supposed to care more than for the illegitimate child of her son.

But, however that may be, the fact is sought to be met by the suggestion that this was not the act of Fatima, but the act of Ismael Khan (a person who certainly does not appear upon this

record in a manner which entitles him to any respect or credit, since he seems to have sided first with one party, and then with the other); and that it was a contrivance on his part to avoid being called upon to render his accounts as manager of the estate. But there is really no evidence to show that Fatima in what she did was not a free agent. The suggestion seems to be mere speculation, founded upon the proved bad character of this man, and the circumstance that he was steward of the estate.

It is supported by no evidence to which a court of justice can give credit.

Then, how does the case stand? There is a considerable body of direct evidence as to the fact of the marriage; though it may not be of the highest character. There is the evidence of the barber who had performed the rite of circumcision when the child was treated as a child born in the house of Wazeer Jan and the Begum. There is the evidence of various persons, the respectability of some of whom is admitted, as to the fact of this boy having been seen in the house, and having been recognized not only by Wazeer Jan as his son, but by Mahomed Ibrahim as his nephew.

It is said that all these witnesses were not credited by Mr. Ainslie, the judge in the Court below. They appear to have been credited by the Court above, and to some extent, no doubt, they were credited by the Court below. That being so, the evidence, if not so strong as one could desire upon such a question, is at least fortified by those presumptions which the Mahomedan law draws in favour of legitimacy and against bastardy.

The law is stated, and very strongly stated, by Dr. Lushington in the case which has been cited from the 3rd vol. of Moore's Indian Appeals; and although in the case in 8 Moore the Court did not think the legitimacy of the claimant was made out, yet the language of their Lordships shows that their Lordships were careful to avoid throwing any doubt upon the doctrine as to the

principles of the Mahomedan law which had been laid down in the former case.

Under these circumstances, considering that the case originally made by the Appellants must be taken to have entirely broken down, and considering that there is evidence as to the legitimacy of this child, credible in itself, and fortified by the presumptions of Mahomedan law, their Lordships are of opinion that they would not be justified in disturbing the Judgment of the High Court.

They will, therefore, humbly advise Her Majesty to dismiss this Appeal, with costs.