7/1962

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
29 MAR 1963
25 RUSSELL SQUARE
LONDON, W.C.1.

IN THE PRIVY COUNCIL

No. 40 of 1958

ON APPEAL FROM
THE COURT OF APPEAL FOR EASTERN AFRICA

B E T W E E N:

68148

(1) SAIF BIN SULTAN HUSSAIN AL'QUAITI (Original Plaintiff No. 1)
(2) SULTANAH MULUK, widow of Sultan Hussain (Original Plaintiff No. 2)
(3) SULTANAH FATIMAH daughter of Sultan Hussain (Original Plaintiff No. 3 and 19)

Appellants

- and -

(1) H.H. SULTAN AWAD DIN SULTAN SIR SALEH BIN GHALIB
(2) HAMEEDUNNISA BEGUM daughter of SULTAN SIR SALEH BIN GHALIB
(3) SAEEDUNNISA BEGUM daughter of SULTAN SIR SALEH BIN GHALIB
(4) LATEEFUNNISA BEGUM widow of SULTAN SIR SALEH BIN GHALIB

(All four being heirs and legal representatives of SULTAN SIR SALEH BIN GHALIB original Defendant No.2 brought on record by Order of Her Majesty's Supreme Court of Aden dated 6th day of August 1956).

(5) SHARFUNNISA BEGUM (Original Defendant No.10)
(6) GHORI BEGUM (Original Defendant No. 8)
(7) ZAINAB BEGUM (Original Defendant No. 9)
(8) SALEH BIN MOHSIN (Original Defendant No.11)
(9) MOHAMED BIN OMER (Original Defendant No. 3)
(10) SALEH BIN OMER (Original Defendant No. 4)
(11) HUSSAIN BIN OMER (Original Defendant No. 5)
(12) AWAD BIN OMER (Original Defendant No. 6)
(13) GHALIB BIN OMER (Original Defendant No. 7)
(14) MIR AHMED ALI PASHA (Original Defendant No.13)
(15) ZAIUNNISA BEGUM (Original Defendant No.12)
(16) OMER BIN SULTAN MUNSSAR (Original Plaintiff No. 4)
(17) SULTANAH FATIMAH (Original Plaintiff No. 5)
(18) MOHAMED BIN MOHSIN (Original Plaintiff No. 6)
(19) SALAH BIN MOHSIN (Original Plaintiff No. 7)
(20) AHAMED BIN MOHSIN (Original Plaintiff No. 8)
(21) GALIB BIN MOHSIN (Original Plaintiff No. 9)
(22) NOOR BEGUM (Original Plaintiff No.10)
(23) ABDUL QAVI DIN NASIR (Original Plaintiff No.11)
(24) NUNASSAR BIN NASIR (Original Plaintiff No.12)
(25) NOOR BEGUM (Original Plaintiff No.13)
(26) SALEHAH BEGUM (Original Plaintiff No.14)
(27) MOHAMED BIN ALI (Original Plaintiff No.15)
(28) ESA BIN ALI (Original Plaintiff No.16)
(29) SALEH BIN ALI (Original Plaintiff No.17)
(30) SULTANI BEGUM (Original Plaintiff No.18)
(31) SALTANAH FATIMAH (Original Plaintiff No.19)
(32) SALIM BIN AHAMED (Original Plaintiff No.20)

Respondents

AND B E T W E E N

(1) H.H. SULTAN AWAD DIN SULTAN SIR SALEH BIN GHALIB
(2) HAMEEDUNNISA BEGUM daughter of SULTAN SIR SALEH BIN GHALIB
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(15)	ZIAUNNISA BEGUM	(Original Defendant No.12)

Appellants

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(14)	SALEHAH BEGUM	(Original Plaintiff No.14)
(15)	MOHAMED BIN ALI	(Original Plaintiff No.15)
(16)	ESA BIN ALI	(Original Plaintiff No.16)
(17)	SALEH BIN ALI	(Original Plaintiff No.17)
(18)	SULTANI BEGUM	(Original Plaintiff No.18)
(19)	SULTANAH FATIMAH	(Original Plaintiff No.19)
(20)	SALIM BIN AHAMED	(Original Plaintiff No.20)

Respondents

CONSOLIDATED APPEALS

Record

1. This is an Appeal and Cross-Appeal from a Judgment of the Court of Appeal for Eastern Africa dated the 6th April, 1957, setting aside a Judgment of the Supreme Court of the Colony of Aden dated the 6th September, 1955, and substituting a fresh decree in place of that of the Supreme Court, in interpleader proceedings instituted by the Financial Secretary of Aden under the Sultan of Shihr and Mukalla's Fund Ordinance, 1945. p.171. p.145. p.206. p.1.

2. The claimants to the Fund to which the said Ordinance relates (hereinafter called "the Fund") fall into two groups, viz. the heirs of Sultan Awadh bin Omer, who were made Defendants Nos. 2 to 13 in the Suit, and the heirs of Sultan Awadh's nephews, Husein and Munasser, who were made the Plaintiffs. The Appellants in this Appeal are the said Plaintiffs and the Respondents are (i) the said Defendants (save that Respondents Nos. 1 to 4 are the heirs and legal representatives of the original Defendant No. 2) and (ii) the rest of the said Plaintiffs. The Appellants in the Cross-Appeal are the said Defendants (save that Appellants Nos. 1 to 4 are the heirs and legal representatives of the original Defendant No.2); the Respondents to the Cross-Appeal are the said Plaintiffs. The said two groups of claimants are for convenience hereinafter referred to respectively as the Plaintiffs (i.e. the heirs of Husein and Munasser) and the Defendants (i.e. the heirs of Sultan Awadh). In the Supreme Court there was also another claimant, namely, the Government of Mukalla which was made Defendant No. 1, but this claimant was held by the Supreme Court not to be entitled to any share in the Fund and it did not appeal against that decision. p.62. p.61. p.62. p.155, 1.42.

3. The Fund is derived from a sum of Rs. 2,14,500 deposited by Sultan Awadh in the National Bank of India on the 1st August, 1903, in the circumstances hereinafter set out. It now consists of securities the market value of which on the 15th August, 1955, was Rs. 987,808.12.0 (Shs. 1,481,713.20). By the said Judgment of the Supreme Court it was decided that the Plaintiffs were entitled to the Fund but that the Defendants were entitled to be paid Rs. 182,771.6.0 (Shs. 274,157.10) by the Plaintiffs as damages for breach of contract. From the said Judgment the Defendants appealed and the Plaintiffs cross-appealed. The Court of Appeal allowed both the appeal and the cross-appeal; the effect of their Judgment is summarised below in paragraph 9. p.223 p.151, 1.5. p.154, 1.23. p.155. p.157, p.163. p.205, 1.47.

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4. The origin and history of the Fund, and the circumstances out of which the proceedings arose, are conveniently set out in the following passage in the Judgment of the Court of Appeal:-

p.173, l.23 to p.183, l.25.

"..... It will however be more convenient to postpone consideration of this until we have set out the history and origin of the Fund.

"It begins with one Omer al Qu'aiti, a soldier of fortune and the founder of the present ruling family of the Sultanate of Shihr and Mukalla. He is referred to in some of the documents in the case as Shamsheer-ud-doula and we shall refer to him as Omer I. The Qu'aiti family held the lordship of Shibam, Houra, Hijrain and other places in the Hadhramaut which they had wrested from another local tribe. Omer I, like many other Hadhramauti Arabs in the first half of the 19th century, took service with the Nizam of Hyderabad (Deccan): he there became a commander of the Nizam's Arab troops, a noble of consequence in the State and a man of considerable wealth. Among other benefits he enjoyed in his lifetime a number of royal grants called jaghirs and mukhtars, the nature of which we shall have to consider later in this judgment. Omer I died at Hyderabad in 1865 leaving five sons, Awadh (also known as Nawaz Jung), Abdullah, Saleh (alias Barak Jung), Ali and Muhammed. Ali and Muhammed took their portions and went their separate ways: we are not concerned with them or their heirs.

p.289.

"Omer I left a will which is an important document in the case (Ex.24). By it he created a Wakf of one-third of all his possessions "which he holds in the country of Arabia, Hadhramaut etc. together with all produce of the villages ("Wadi"), all property in Cities, Forts, Fields, Trees, those grown through the effects of rain, and those grown under artificial irrigation, Wells, Ships, Houses, Cash, Weapons, Gold, Silver, Goods in trade, debts due and all property which can be seen, and all things which can be called property great and little, and one third of all properties and goods which he leaves behind in Hyderabad, Hindoostan, together with debts, and all property which can be

seen, Cash, Silver, Gold, all Goods in trade, Mukhtars, Jaghirs, Weapons, Houses, Karkana (Establishment) of Arabs etc. and all its belongings in the shape of animals etc. that is to say the one third of all his property and rights in Arabia and Hindoostan, or in any other country. "The objects of the Wakf were to meet the expenses of the city of Shilham (Shibam) and the city of Horah (Houra) and other cities which may after this be taken into his possession", to maintain the dignity of his descendants, to carry on war and suppress rebellion and generally for the welfare of his realm and subjects. For the management of the Wakf, he appointed his three sons, Abdullah, Saleh and Awadh jointly "one is to aid and assist the other and whichever one of these is in Hindoostan will be able to represent the other two, and whichever of these three may be in Hadhramaut he will have the power to represent the other two: in like manner for the other cities". They were also to have power to appoint a successor.

"After the death of Omer I, Awadh and Saleh remained in Hyderabad and in 1866 the jaghirs and mukhtars which their father had enjoyed were confirmed, or re-granted to them by the Nizam. Abdullah's name does not appear as Jaghirdar or Mukhtardar. He lived mostly, if not wholly, in Arabia, where he had ruled Shibam and its dependencies as his father's deputy and continued to rule de facto after Omer's death. Between 1866 and 1873 the possessions of the family in Arabia were greatly enlarged by conquest and their wealth and power proportionately increased. During this period they gained control of the coast and the port of Shihr, and perhaps Mukalla, Brum and other places mainly, it would seem, through the energy and leadership of Awadh who brought troops from Hyderabad for that purpose.

"The remaining two-thirds of the estate of Omer I, after allowing for the shares of Omer's widow and the two sons Muhammed and Ali, was held in accordance with the Sharia in equal undivided shares by Awadh, Abdullah and Saleh. On 24th May 1873 these three brothers entered into an agreement which has been variously referred to as a "family compact" and a partner-

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ship deed. The original document is missing, nor was any translation of it produced, but the parties are agreed that it provided for ownership in common of their properties, each having a third share; and for each to be the agent for the other two and to look after the interests of the others in Arabia or India, wherever each happened to reside. Abdullah appears to have continued to live in Arabia, administering the family property and exercising the power of government; Awadh and Saleh continued to live mostly in Hyderabad.

"Early in 1878 a bargain was concluded between Awadh and Abdullah which is the prime source of the present dispute. It is now common ground that Abdullah sold to Awadh, for the sum of One hundred and eighty six thousand Maria Theresa dollars his one-third share of the properties held in common under the partnership, whether in India or Arabia, excepting, as to Arabia, his share in the original family lands and villages in the interior (which we shall refer to as the Hadhramaut property). But the respondents contend that Abdullah had a beneficial interest in the jaghirs and mukhtars which had been confirmed to Awadh and Saleh by the Nizam and that this interest was not included in the transaction. The appellants contend that, if Abdullah did have any such interest which they do not admit, then it was included in the property sold. We shall examine this question at length later in this judgment. It is also common ground now that only $46,000 of the purchase price was paid at the time of the sale, and that the balance of $140,000 remained unpaid at the time of Abdullah's death in 1888.

"The original sale deed (also called "the letter of vow") is missing and neither of the
p.378 two alleged translations of it (Ex.25 and p.95 of Secretariat Record) which were produced at the trial was agreed as correct or admitted in evidence in the Supreme Court. Some confusion has been caused by the learned Judge having marked certain documents as exhibits when they were first tendered, and before considering the question of their admissibility, instead of marking them for identification in the first

place and as exhibits only when actually admitted in evidence. A further difficulty arises as to the set of documents known as the "Secretariat Record". This is a large bound volume containing originals, translations and copies of all kinds of documents relating to the early history of this case, and evidently collected in the Aden Secretariat for purposes of permanent record. It is the primary source for all the relevant facts. Many documents which have been obtained from Hyderabad and put in evidence are only copies of copies earlier obtained from this volume. The volume was admitted in evidence as a whole by consent of all parties and its contents are all clearly evidence, for what they are worth, being public records over thirty years old and produced from proper custody. Some parts of the book have been copied and included in the record for this Court, but we have also relied on many parts of it which have not been copied or included in our record. So far as we deal with matters of fact which do not appear from our record itself, this is the material on which we base our remarks.

"Reverting to the two alleged translations of the sale-deed, it has been suggested that the original may be in Hyderabad. At all events, it cannot be produced and there is no suggestion that it is being deliberately suppressed. At one time it was contended that the original was a forgery, but that part of the respondents' case has been abandoned. The two translations, although naturally not identical, are not so different as to lead to any inference that they are not both bona fide translations from the original document. In the circumstances, we think they should have been admitted in evidence, though it would be necessary to use them with some caution. Similar remarks apply to a letter alleged to have been written by Abdullah to the Resident, Aden, on 15th August 1888. The original has disappeared, perhaps in Hyderabad, and its authenticity is still challenged. At the time of the arbitration referred to later it was an essential part of Husein and Munassar's case that this letter must be a forgery, and they so contended. But Government appears to have considered at all material times

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p.293.

that it was genuine, and the Mansab (to whom we refer later) certainly thought so. We think that the purported translation of the letter (Ex. 26 at p.94 of the Secretariat Record) was admissible and should have been received in evidence, again with mental reservations. We shall have occasion to refer again to this letter.

"Going back to the sale-deed of 1878, it is apparent from the translations that it had a much more important purpose than the mere sale of Abdullah's possessions. It settled in Awadh's favour the right of succession to the Sultanate. This might seem a somewhat strange thing for Abdullah to do; but one must remember the provisions of Omer's will and the circumstances of the family as a whole, including the terms of the partnership deed, so far as we know them. Awadh's military record made him the obvious choice as the next head of the family and, if he succeeded, his sons must later do so. Abdullah may have recognized that this was inevitable. If so, his principal concern would be to secure adequate portions for his own sons. The sale-deed had this effect.

"It seems highly probable that this transaction was kept secret from Abdullah's sons, Husein and Munassar. Although Abdullah had parted with his birthright, both as landowner and as Sultan, he continued to be the de facto ruler of the family territories in Arabia. By 1881 the British Government was taking an interest in the control of the Southern coast of Arabia and in October of that year, with the assistance of a British warship, Awadh and Abdullah were enabled finally to take possession of the ports of Mukalla and Brum. This was followed by a treaty signed on 29th May 1882 by which Abdullah, for himself and his brother Awadh and his and their heirs and successors, undertook not to dispose of any of the territories of Shihr and Mukalla and their dependencies to any power other than the British Government and, inter alia, to accept the advice of that Government on foreign relations. This was followed on May 1st 1888 by a second treaty establishing a British Protectorate over the Sultanate: this was also signed by Abdullah

on behalf of himself and Awadh. Awadh was in Hyderabad during these years and, ex facie, the treaties recognized him and Abdullah as joint rules of the State. This is probably the explanation for Abdullah's letter of 15th August 1888. In it he stated with regard to the treaties that he had, for himself and his heirs, transferred his interest in the Government of the Sultanate to Awadh by the agreement of 21st January 1878. It may well be that this letter was not unconnected with the state of Abdullah's health, for he died on 25th November 1888. The signature of the treaties by Abdullah as a ruler in his own right might after his death have cast doubt on the authenticity of the sale-deed of 1878. This letter would remove any such doubts. There is every reason to believe that Awadh and Abdullah were on good terms right up to Abdullah's death, and, if so, he would be anxious to make the position clear. On the other hand the sale-deed and letter would come as a great shock to Husein and Munassar, and if they heard of them only after Abdullah's death they may honestly have believed that they were not genuine. If they wished to maintain any pretensions to the Sultanate, they would be obliged to adopt that attitude, whatever their own opinions might be. We think the probabilities are in favour of the authenticity of Ex.26. It appears from the Secretariat Record that after Abdullah's death the British Government formally recognised Awadh alone as Sultan. He did not, however, go to Arabia but left Husein and Munassar in charge of the Sultanate: the Secretariat Record shews clearly that the British Government considered them to be deputies to Awadh.

"There appears to have been no serious disagreement between Awadh and his nephews until 1896, perhaps because they were still ignorant of the existence of the sale deed of 1878. The two nephews, having started the year 1896 with a violent quarrel between themselves and having appealed to Awadh, then joined forces and began to put forward claims to have inherited their father's share in the property and in the Government of the State. Awadh, urged on by the British Government, visited Mukalla. He deprived his nephews of their administrative

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functions and installed his own son, Ghalib, in their place. Husein and Munassar were, however, given money allowances and continued to live in the Sultanate. This arrangement lasted until late 1900 when Husein and Munassar again put forward their claims to share both in the sovereignty and in the property, and on 5th November 1900 in accordance with custom the dispute was referred to the arbitration of a "Mansab". (A mansab is a leading and respected Sayyid who is appealed to to decide family and tribal disputes). Awadh appears to have returned to Mukalla early in 1901. It appears from the Secretariat file that this submission was made on the parties' own initiative, and in no way at the instigation of the British Government.

"Although Husein and Munassar had joined in this submission, and the question of the Sultanate rights was undoubtedly within the submission, they were apparently unwilling to abandon their political pretensions and continued to claim and to exercise rights of sovereignty in the State. Accordingly in September 1901, the Resident, Aden, went to Shihr and Mukalla and found Husein and Munassar in open rebellion against their uncle. His endeavours to bring about a settlement were unsuccessful, and eventually he informed them that they would have to leave Arabia. They apparently did so, but were later allowed by the Government of India to return for a time. Further endeavours to promote a settlement were equally unsuccessful and in July 1902, the Resident, doubtless in accordance with instructions of higher authority, arrived at Shihr in company with Awadh, and, under threat of bombardment, obliged Husein and Munassar to deliver up to their uncle the towns in their possession (Shihr and Al Ghail) and took the two nephews back with him to Aden. They were never allowed to return to the Sultanate. There is thus no doubt that they were dispossessed by an Act of State, and Sultan Awadh was put into undisputed possession of the lands and Government of the Sultanate by the same Act of State.

"The arbitrator had not yet given his award, but, although the British Government was

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determined for reasons of State to prevent Husein and Munassar from disturbing the peace and good order of the Sultanate, it was equally anxious to ensure that they were fairly compensated for any loss of property rights. A time limit was fixed for the conclusion of the arbitration and the award was eventually delivered at the beginning of May 1903. An Arabic copy of the award signed by the arbitrator and witnesses and by Sultan Awadh is in the Secretariat Record and an agreed translation was admitted at the trial (Ex.1). The arbitrator states p.215. that he had before him the following documents, inter alia, - the partnership deed of 1873, the sale deed of 1878, and Abdullah's letter of 1888. The effect of the award may be thus summarized:

(a) the sale of Abdullah's one-third share to Awadh was declared valid and effective;

(b) the claim of his heirs, including Husein and Munassar, to have inherited their father's one third was therefore rejected, but they were declared entitled to receive the unpaid balance of the purchase price, namely $140,000;

(c) Husein and Munassar's claim to share in the chiefship and government of the Sultanate was also rejected;

(d) the heirs were entitled to be compensated for their shares in the Hadhramaut properties which were not included in the sale. These shares were valued at $70,000;

(e) Awadh's claim for Rs.24,00,000 representing monies remitted from India for the maintenance of the Government etc. during Abdullah's and the nephews' time, and his claim for an account of their stewardship were both dismissed.

(f) The heirs were awarded $50,000 "as a matter of sympathy and mercy".

"There were two main issues on the arbitration, first, the authenticity of the sale-deed

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and of Abdullah's letter, and secondly, the effect of the sale-deed, if authentic, under Muslim law. The Mansab considered both issues with scrupulous care, and the whole award, which is of considerable length, impresses us as being the production of a man of learning and integrity, anxious to give a just decision on difficult and complex questions. Awadh, as has been said, accepted the award and at the instigation of the Government of India, paid into the National Bank of India at Aden Rs.2,14,500 (representing M.T. $162,500) on 1st August 1903. See Ex.3. This represented the shares of Husein, Munassar, and Husein's mother of the total sum of M.T. $260,000 awarded. The Bank placed the money to the credit of an account entitled "The Political Resident, Aden". Husein's mother (Sultanah Salma) died shortly afterwards. When Husein and Munassar refused to accept the award the money was invested in India Government paper, the account being styled "The Sultan of Shihr and Mukalla's Nephews Trust".

p. 223.

"It is not necessary for us at this point to go in detail into the protestations made by Husein and Munassar that they had withdrawn their authority to the arbitrator as early as 1901 (Ex. 30 and p.86 of the Secretariat Record). They refused even to accept a copy of the award, and sought the permission of the Government of India to sue the Sultan in the Courts of British India. This permission was refused and they then turned their attention elsewhere.

p. 304.

"In 1904 they left Aden for Hyderabad, where the sought to get a fresh adjudication on their claims. Awadh's opposition and the consequent correspondence with the Government of India were probably responsible for the ensuing delay and it was not until December 1909 that the Nizam's Government decided to refuse them permission to sue in the ordinary Courts of the State in respect of the private and personal property of Awadh, but permission was given them to institute claims in respect of the jaghirs and mukhtars in the Revenue and Finance Departments (Ex.51). Husein and the heirs of Munassar then petitioned the Revenue Department alleging that the jaghirs and mukhtars, which had been confirmed to Awadh and

p. 360.

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Saleh, were first held jointly by these two and their father Abdullah and that Saleh had then taken his one-third share and separated; they therefore claimed, as heirs to Abdullah, one-half of the remaining two-thirds, and arrears of profits (Ex.38). By that time Munassar was dead, Awadh died early in 1910 and their heirs were substituted as parties. (Ghalib succeeded Awadh as Sultan). In due course Husein died (1924-1925) and his heirs were substituted. The heirs of Awadh in their answer to the petition denied that Abdullah had had any interest in the jaghirs and mukhtars: they also relied on limitation and on the arbitral award, which they said covered the Hyderabad properties. The petitioners replied, inter alia, that the award was invalid and had not been accepted by Husein and Munassar.

p.314.

p.317.

p.320.

"It is important to remember that the Hyderabad proceedings were not proceedings in a Court of law and therefore cannot afford any basis for res judicata. Inquiries were held and reports made by different persons and, sometime in 1924, a commission of three was appointed to examine the claims. It reported in 1926 (Ex.21(d)); the Nizam accepted the opinions of the majority and issued orders accordingly, (Ex.21(e) and Ex.21(f)). There can be no doubt that these were administrative decisions. The attitude of the Hyderabad Government appears to have been that the Nizam's authority to dispose of the jaghirs and mukhtars as he thought best was not ousted or restricted by either the sale deed or the arbitral award, even if these two documents, or either of them, purported to deal with these grants. Nevertheless, the Commission firmerly rejected the contention that Abdullah had had any claim to the jaghirs or mukhtars in his capacity as an heir to Omer I: they also rejected the contention that, although these properties were re-granted to Awadh and Saleh only, the intention of the Nizam was that Abdullah should have a beneficial one-third interest. They came to this conclusion in spite of the fact that, when these properties were divided between Awadh and Saleh the former took a two-thirds share. But, although rejecting the legal claims, the Commission advised and the Nizam agreed that there was a moral

p.249.

pp, 272, 275.

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obligation on the possessor of the jaghirs to maintain and support the descendants of Omer I. The Commission accordingly recommended allowances to be paid to the Claimants out of the income of the jaghirs. Eventually, in June 1932, the allowance to the respondents (or those under whom they claim) was fixed at Rs. 5250 a year, with arrears payable from 1922: this allowance was charged upon the jaghirs and mukhtars held by Awadh and his heirs. In 1948 or 1949, jaghirs and mukhtars were abolished by statute, and, by way of compensation, the State Legislature granted to the heirs of Abdullah a commuted allowance of Rs. 2362.8 annas a quarter payable until 1960. It is agreed that the total payments which the respondents and their predecessors have received or will receive in respect of these allowances amount in all to Rs. 1,52,771.6.0.

"We can now return to events in Aden. By 1924, Ghalib, the elder son of Awadh, had been succeeded as Sultan by the second son, Omer bin Awadh, whom we shall refer to as Omer II. On January 24th of that year, Omer II wrote to the British Agent, Aden, complaining that the heirs of Abdullah had repudiated the award by their proceedings in Hyderabad and therefore forfeited their rights in the Fund. He asked that the Fund should be paid to the heirs of Awadh or reserved pending the decision of the Nizam's
p.231. Executive Council (Ex.14). The effect of this letter will be further considered with reference to the respondents' alleged repudiation of the award. We do not know what reply was sent to this, but in October 1926, Omer II again applied for payment out to him. This time the Government of Bombay replied to the effect that Omer II should produce the written consent of the other heirs of Awadh to his receiving the amount then in the Fund on their behalf as head of the family. This consent was apparently never obtained and in 1932 the Government contemplated filing an interpleader
p.368. suit in the Bombay High Court (Ex.55). It is not clear whether these proceedings were ever begun; it is clear that no determination on the claims was ever made by the High Court.

"The next step of importance is that, on April 7th 1942, the heirs of Husein and Munassar

applied to the Chief Secretary, Aden, for payment out of the Fund to them (Ex.16). It will be recalled that neither Husein nor Munassar, nor any of their heirs, had ever previously expressed willingness to accept the arbitral award, and that this application was made ten years after the decision on their claims in Hyderabad. The Government of Bombay replied that their intention was to have the trust transferred to the Government of Aden and to provide by legislation for the manner of determining the disposal of the Fund. This was eventually done and Ordinance No. 11 of 1945 was passed after Aden had become a separate Colony. Before then the heirs of Husein and Munassar had again laid claims to the Fund in a letter addressed to the Chief Secretary, Aden, on January 16th 1945 (Ex.18)." Record p.234. p.236. p.237.

The relevant provisions of the Ordinance referred to in the above passage, the Sultan of Shihr and Mukalla's Fund Ordinance, 1945, are set out in the Annexure hereto.

5. The interpleader suit was instituted by the Financial Secretary by a Plaint dated the 11th July, 1952, and notices to Claimants were published dated the 15th July, 1952. Thereafter pleadings were submitted by the respective claimants. The Plaintiffs by their Claim Petition dated the 15th August, 1953, prayed that the Fund should be paid to them as the heirs of Husein and Munassar. The Defendants, other than the original Defendant No.2, by a Claim Petition dated the 16th December, 1952, submitted that they were entitled to two-thirds of the Fund and that the original Defendant No.2 and his sisters and mother were entitled to one-third. The original Defendant No.2 submitted a Claim Petition dated the 3rd January, 1953, whereby he contended that the Government of Mukalla was entitled to the Fund; alternatively, that the said Government was entitled to one-third of the Fund and that of the remaining two-thirds he and his sisters were entitled to one-third and the Defendants as heirs of Sultan Awadh were entitled to the other two-thirds. In view of the rejection of the claim of the Government of Mukalla by the Supreme Court the differences between the original Defendant No.2 and the rest of the Defendants disappeared, and they now stand together as the heirs of Sultan Awadh and claim that the Fund should be paid to them.

p.1. pp.4, 5. pp.6-61. p.18. p.8. p.15. p.155, l.42.

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p.61. 6. On the 16th September, 1953, the Court directed that issues be joined between the heirs of Husein and Munassar as Plaintiffs and the Government of Mukalla and the heirs of Sultan Awadh as Defendants. On the 30th September, 1953, the Financial Secretary was discharged from further appearances in the suit and awarded his costs out of the estate. On the

p.63. 7th June, 1954, the Court specified the issues to be tried, including the following:-

1. Do the plaintiffs prove that they are entitled to the fund or part thereof by reason of the award of the arbitrator, Syed Ahmed bin Salem?

2. If not do the plaintiffs prove that they are entitled to the fund or part thereof by inheritance?

3. Do the defendants or any of them prove that the award is null and void by reason of:-

   (a) The conduct of the plaintiffs or that of their predecessors in title?

   (b) Any act of Government?

4. Do the defendants Nos. 3-13 prove that they are entitled to the fund or part thereof by inheritance?

pp.64-156. 7. The suit was tried (cor. Knox Mawer, J.) on various dates between the 3rd August, 1954, and the 6th September, 1955, and the facts as set out above in paragraph 4 were proved or admitted. On those facts the learned trial judge stated his conclusions in terms as follows:-

p.151, l.26 to p.156, l.12.

> "Having resolved the facts, the question that next falls to be decided is what law is to be applied in relation thereto. I have found that there was a valid submission by the parties in dispute to the arbitration of a "Mansab". Its basis is, I am satisfied, entirely contractual. The essential validity, interpretation and effect of a contract and the rights and obligations of the parties to it, are governed under the law of Aden, by the law which the parties have agreed or intended shall govern it or which they may presume to have

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intended. This law is generally known as the proper law of the contract. Prima facie, the proper law of a contract is presumed to be "lex loci contractus", (Halsbury Laws of England, 2nd Edition, Vol. 6, page 266 - and cases cited therein). In South African Breweries Ltd. v. King (1899) 2 Ch. page 173, it was held that preference should be given, all things being equal, to the law of the place with which the transaction has the most real connection. Here there was a submission to the arbitration of a Moslem Holy Man by the Shafi'i Moslem member of the ruling family of the Islamic Sultane of Shihr and Mukalla. The agreement was made and the arbitral award concluded entirely within the Sultanate. Professor J.N.D. Anderson has pointed out in his book "Islamic Law in Africa", pages 12-22, that the Sharia is the fundamental law of the Sultanate in every particular. Referring in more general term to inter alia the population of the Quaiti State he writes, "With isolated exceptions all follow the Shafi'i right, to the tenets of which many cling with fanatical devotion." Articles 9 and 10 of a Sultanate Decree (No. 5 of 1940) provide, "The law of Islam is, and is hereby confirmed to be, the fundamental law of Our Dominion. In the application of which decree our courts shall also be guided by and have regard to the general principles of the law of Islam, and to any tribal laws, customs or usages not repugnant to Islam, justice, equity and morality."

"I am in no doubt therefore that the law to be applied in this case is the Sharia law and the Shafi'i tenets in particular. It has however been unnecessary for this court to hear expert evidence from without because among Counsel appearing on behalf of the plaintiffs is Mr. Mansoor, and among Counsel appearing on behalf of the defendants is Mr. Rehman. It so happens that both these lawyers have actually held office as Judges in the State of Shihr and Mukalla. Both can speak with authority therefore, and they are agreed that the only principle of law which can be derived from the Sharia in deciding the issues arising in this case is that the decision arrived at must be just and reasonable in all the circumstances and in accordance with natural justice equity and morality.

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"In assisting the court therefore in arriving at a decision which is "just and reasonable in all the circumstances, and in accordance with natural justice, equity and morality," Counsel have cited in varying connections certain judicial precedents from the courts of British India and England. Such assistance as I may properly derive from these cases is, however, particularly limited by the fact that in England and, correspondingly, in British India, the law of arbitration has developed from early times into a highly technical body of statutory law. Thus as early as 1698 an English Statute 9 and 10 Will III. C.15. provided that an arbitral award could be made a rule of court enforcible as a judicial decree. No statutory enactments are relevant here, and as I have already stated the basis of the arbitration agreement and award in this case is purely contractual. I have found on the facts that Hussain and Munasser on the one hand and Awad on the other agreed to submit all matters in dispute between them comprising their claims and counter-claims to properties in Arabia, Bombay and Hyderabad, to the decision of the "Mansab". His authority derived from the agreement of the parties. They constituted him their private tribunal, and mutually agreed to accept his decision as final. The obligation to accept this decision rested entirely on contract (see the case of Braemer v. Drewry (1933) 1.K.B. p. 753, where the English Common law principles are discussed in this connection). The arbitrator has set out his findings, Exhibit 1, learnedly, exhaustively, and in a clear and certain manner, and I see nothing to rebut the presumption of their essential validity. In direct breach of their contractual obligation to forego all their claims and to accept the "Mansab's" decision as final and binding, Hussain and Munasser commenced proceedings in Hyderabad. However, it is surely a clear principle of natural justice that repudiation by one side alone cannot of itself terminate a contract, (the English common law principle in this connection is discussed by Lord Simon in Heyman v. Darwins Ltd. (1942) A.C. at page 361: he cites with approval the words of Scrutton, L.J. in Golding v. London and Edinburgh Insurance Co. Ltd. (1932), 43 LI.L. Rep. 487, 488

viz: 'I cannot understand what effect the repudiation of one party has unless the other party accepts the repudiation'.) In this case, Awad had the option either to accept the repudiation and treat the award as no longer existing and binding upon him or to keep it alive by abiding by his side of the bargain complying with the award, paying over the money as decreed therein, and pleading it as a defence to any action commenced by the other side in breach of contract. Assuming such an action failed, the damages thereupon claimable by Awad would normally be his costs in defending the action brought in breach of the arbitration award. While it is true that in point of fact the Hyderabad authorities were not prepared to treat the existence of the arbitration agreement and award as initial bar to the claim of Hussain and Munasser, and the ultimate rejection of the plaintiffs' claim was based on another ground, it is equally true that the defendants relied upon the arbitration agreement and award as a defence throughout the Hyderabad proceedings. Having taken up this position and chosen to treat the award as still subsisting and to rely upon it, it is surely contrary to "natural justice, equity and morality" to permit the defendants after a lapse of 21 years to change their ground and assume an entirely contrary position. In English common law this is known as the principle of estoppel. In accordance with the decision of the arbitrator, Awad paid the sum of 162,500 M.T. dollars (Rs.214,500) to the British Political Resident who was acting as a Conciliator and mediator in this matter. I have no doubt that he had divested himself of all property therein in favour of his nephews upon whose behalf the money was henceforth held by the British authorities. I am satisfied that this is the position despite the somewhat conflicting expressions of opinion made by various British administrators connected with the matter over the years. The status of the British authorities in holding the money became, in English legal parlance, that of a "Trustee". The present plaintiffs, as the legal successors in title of Hussain and Munasser, are therefore entitled, not only to the original sum of money deposited and held for them throughout the years

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but also to the interest which accrued thereon as a result of the investments made on their behalf by the "Trustee".

"At the same time I have also found that the action of Hussain and Munasser in bringing the proceedings before the Hyderabad authorities was a clear breach of contract, in respect of which the defendants are entitled to claim damages. The question therefore arises as to whether in these proceedings this court should now assess those damages. Strictly it would be open to the defendants to commence yet another action for damages for breach of contract. Having regard to the feeling between the two contesting sides of the family, the court cannot hope that such a suit would be settled out of court. This dispute has already involved the family in bitter litigation for over half a century, and it would in my opinion be highly undesirable for this court to limit itself to a finding which will make further litigation inevitable. Furthermore, it is conceded by both sides that, at this late date, no further satisfactory evidence is available in this respect other than that which is before me. Accordingly, no other judge will ever be in any better position finally to resolve this matter. This then is surely a case in which the court may properly exercise its inherent power to act in the interests of justice as it thinks fit. The damages to which the defendants are entitled are therefore assessed as follows.

"Firstly, I am satisfied that had the plaintiffs not pursued their claims in Hyderabad in breach of contract the Nizam would not eventually have been moved to grant them an allowance charged on the Crown Grants of the defendants.. It is agreed by both parties to this dispute that from 1922-1960 the total charge on the defendants' Crown Grants in respect of this allowance will amount to Rs. 152,771-6-0. (Sh. 229,157-10). Furthermore, while technically the plaintiffs lost their action in Hyderabad, no costs were awarded in favour of the defendants. Clearly the defendants were bound in their own interests to resist the plaintiffs' claims in Hyderabad. I am thus satisfied that,

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in addition to the sum of Rs.152,771-6-0, there also "directly flowed" as damages from the plaintiffs' breach of contract the costs sustained by the defendants in conducting their defence in Hyderabad. The defendants admit that they can adduce no evidence whatsoever in support of their claims to costs amounting to Rs.240,000. Although the matter was before the Hyderabad authorities for many years, legal representation and advice was only occasionally required. Counsel for the plaintiffs has conceded the figure of Rs.30,000 in respect of these costs and that, I think, is a proper and reasonable estimate. The total damages to which the defendants are thus separately entitled to recover from the plaintiffs is Rs. 182,771-6-0 (Sh.274,157.10). It must of course be conceded by Mr. Kazi for Defendant No.1 (The Government of Mukalla) that in the light of this judgment his clients alone among the defendants have in fact, no claim to any share in this sum.

"The final order of this court is therefore as follows. The Financial Secretary is ordered to sell the Trustee securities and to pay the sum realised into court forthwith. In order to avoid the artificiality of a separate payment into court, by the plaintiffs, of the sum of Rs.182,771-6-0 (Shs. 274,157.10) representing the damages to which defendants (apart that is from defendant 1) are held entitled, and a separate withdrawal by the defendants of this sum, the parties can no doubt agree that this sum may be deducted from the plaintiffs' trust monies paid into court by the Financial Secretary.

"The plaintiffs and defendants will bear their own costs. The costs incurred by the Financial Secretary and the Registrar in respect of these proceedings will be deducted equally from the respective sums to which the plaintiffs and defendants have been held entitled."

8. The decree of the Supreme Court, dated the 6th September, 1955, provided that the Financial Secretary should sell the securities and pay the sum realised into Court, that the Defendants should be

p.156.

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entitled to withdraw the sum of Sh. 274,157.10 representing damages, subject to deduction of one-half of the costs of the Financial Secretary and the Registrar, that the Plaintiffs should be entitled to the balance subject to a similar deduction, and that each party should bear his own costs.

pp.171-208. 9. The Judgment of the Court of Appeal (Worley P., Sinclear V-P. and Briggs, J.A.) is lengthy. The principal conclusions of law and fact at which the Court arrived in relation to the substantial issues in the suit, can be summarised as follows:-

pp.191-193 p.193, l.28. p.193, l.35. (1) That the money deposited by Awadh in the National Bank of India was held by the Political Resident on behalf of Awadh with authority to pay it to the heirs of Abdullah, but only on condition that they should accept the award and receive the money in full discharge of Awadh's obligations under it. And that until the heirs of Abdullah indicated that they were willing to receive the money as due under the award, the sum deposited, including any accretions thereto, belonged to Awadh or his heirs.

pp.187-189. pp.189-190. pp.189-190. (2) That Abdullah had a beneficial interest in the jaghirs and mukhtars, which he sold to Awadh by the deed of sale in 1878, and the arbitration award extended to that interest, whatever it was.

p.196, l.4-31. (3) That the heirs of Abdullah, in bringing proceedings in Hyderabad for a share in respect of the jaghirs and mukhtars, were in breach of their obligations flowing from the submission to arbitration and the award.

p.196, l.32-41. (4) That the heirs of Abdullah, by refusing to accept or be bound by the award, and by instituting and prosecuting the proceedings in Hyderabad, acted unconscionably and in breach of agreement entered into by Abdullah and the moral obligation to observe and be bound by the award.

pp.196-199. p.198, l.48 to p.199, l.9. (5) That by the relevant principles of Sharia law the award would not cease to operate as a result of "repudiation" by one party even if such repudiation was "accepted" by the other party, but only as a result of a distinct and

clear subsequent agreement to that effect, and there was never any such agreement in this case.

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And that even if the award could be annulled by a "repudiation" and an "acceptance" thereof, it would be essential that both parties should be restored to the position in which they stood before the award was made, which was impossible in this case, or never contemplated, as Awadh took substantial benefits under the award, namely, the properties in the Hadhramaut. That the Defendants could not therefore claim repayment of the Fund to them.

p.199, ll.10-17.
pp.197-198.
p.198, l.26.
p.199, l.22.

(6) That the heirs of Abdullah made sufficient demand by their letter dated the 7th April, 1942, and therefore on that date they became entitled to the money deposited and the accretions thereto but subject to accounting for such part of the accretions as are attributable to the period prior to that date.

pp.202-203.
p.202, l.32.
p.203, l.36.

(7) That as regards the allowances paid to the heirs of Abdulla as a result of the proceedings in Hyderabad, and the costs of resisting those proceedings, there was no jurisdiction to award damages for breach of contract, but in accordance with the principles of justice, equity and good conscience, the Plaintiffs must, as a condition of enforcing their claim to the Fund, account to the Defendants for the sum of Shs. 274,157.10. The costs of all parties of the appeal and cross-appeal were ordered to be paid out of the Fund.

pp.199-202.
p.200, l.46.
p.201, l.19.
p.202, l.4.
p.204, l.45.
p.208, l.11.

10. In these circumstances it is submitted that the main issues that arise and the arguments which may properly be advanced on behalf of the Defendants are as set out below in paragraphs 11 to 17.

11. The main question is whether the Plaintiffs can now, in the present proceedings, succeed in their claim to have any portion of the monies lodged in the National Bank of India paid out to them. It is submitted that they ought not now to be held entitled to payment out of any portion of this money, and that the whole sum lodged with the bank, together with the interest thereon which has accrued to date, should be returned to the Defendants. The reasons

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advanced in support of this contention are as follows.

12. As appears from the summary of the facts set out above, the Mansab pronounced his award in May, 1903. By agreeing to refer the matters in dispute between the heirs of Abdullah and Sultan Awadh it is respectfully submitted that both parties to this agreement must be taken to have undertaken to be bound by the result of the award. Alternatively, the award itself made by the Mansab, it is submitted, contractually binds each of the parties to the arbitration proceedings to be bound by its terms. The heirs of Abdullah in 1904 and thereafter refused to be so bound. They thereby committed a breach of contract going to the root of the contract which entitled Awadh himself to refuse further to comply with his obligation to be bound. Awadh, however, in the circumstances above described, paid into the National Bank of India the sum of Rs.2,14,500/-. As the Court of Appeal, it is submitted rightly, found, this sum remained the property of Awadh and his heirs and was tendered solely upon the terms that the property in this sum would be divested from them only if it was accepted by the heirs of Abdullah in full settlement of their claim under the award. This tender, it is submitted, amounted to an offer by Awadh, in spite of the breach already committed by the heirs of Abdullah, nevertheless to abide by the award. In refusing to accept the money tendered the heirs of Abdullah emphatically rejected this offer, which accordingly, after a reasonable time, lapsed. Alternatively in 1924 the offer was withdrawn in that by their letter dated 24th January, 1924, the heirs of Awadh called for the return to them of the money so deposited together with the interest which had accrued thereon, and repeated this demand by the letter dated the 20th October, 1926.

p.231.

p.371.

13. From the above circumstances it is submitted that in refusing to comply with the terms of the award, the heirs of Abdullah committed a breach going to the root of their contractual obligations thereby entitling Awadh and his heirs to decline further to be bound by their own contractual obligations to observe the terms of the award. Having made an offer which was not accepted within a reasonable time and which was thereafter in 1924 formally withdrawn, Awadh and his heirs must, it is

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submitted, be taken to have accepted the repudiation by the heirs of Abdullah of all obligations on either party to observe the terms of the award. The award in these circumstances and any obligation to abide by its terms, it is submitted, wholly lapsed for all purposes and the property in the Rs. 2,14,500/- deposited by Awadh never having passed from Awadh or his heirs, this sum ought, in law, to be repaid, together with all interest which has accrued thereon to the Defendants.

14. Further and in the alternative, it is respectfully submitted that in any event as found by the learned trial judge and accepted by the Court of Appeal, the law applicable for the purpose of determining the respective obligations of the parties arising out of the making of the award is the Sharia law applicable in Southern Arabia. As was found by both Courts and as was conceded by Counsel on both sides, the Sharia law required as a primary obligation that the decisions of the Court on the issues between the parties must be just and reasonable in all circumstances, and in accordance with natural justice, equity and morality. It is respectfully submitted that whatever might be the result in law if the principles of English law were applied it is in any event in all the circumstances of the present case just and reasonable and in accordance with the principles of natural justice, equity and morality that the Fund should be returned to the Defendants. It is submitted that the relevant circumstances which give rise to the result for which the Defendants contend are that:-

p.152, l.18.
p.193, l.46.
p.198, l.51.
p.152, l.30.
p.201, l.17.

(a) In 1903 the parties finding themselves in dispute formally agreed that the award of the Mansab should resolve the issues in dispute between them.

(b) The Mansab, a person highly respected, after full and careful enquiry as the Court of Appeal found, made an award apparently fair and regular in every way to both sides, with a view to putting an end to the dispute and urged as appears from his award that the dispute should in fact be brought to an end between the parties.

p.180, l.23.
p.221.

(c) Without any justification whatever and solely because they were dis-satisfied with the result of the award, the heirs of Abdullah wrongfully, and without any moral ground to support them, repudiated

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the obligations which they had formally undertaken to be bound by the Mansab's award.

(d) In spite of this wrongful act on the part of the heirs of Abdullah, Awadh nevertheless made tender of the full amount of Rs. 2,14,500/- representing the share of Hussein and Munasser and Hussein's mother under the award.

(e) The heirs of Abdullah nevertheless refused to accept the amount tendered and although Awadh would in those circumstances have been entitled to call for the return to him of this money, he and subsequently his heirs refrained from doing so and it was left with the Political Resident of Aden and thereafter the Government of Bombay for some 21 years until, in 1924 as above set out, the heirs of Awadh called for its return to them.

(f) Not only had the heirs of Abdullah committed the wrongful acts above referred to, but having failed to obtain under the arbitrator's award all that they had hoped, they made every possible endeavour to obtain by proceedings in the Court of the Nizam in Hyderabad a Judgment in their favour upon matters on which the arbitrator had already pronounced. These endeavours ultimately failed but although the Nizam's advisers dismissed the claims of the heirs of Abdullah, they nevertheless declared that there should be paid the allowances referred to by the Court of Appeal out of the revenues due under the terms of the Mansab's award to Awadh and his heirs from the Jaghirs and Mukhtars in Hyderabad.

(g) The heirs of Abdullah continued to receive these allowances and in fact availed themselves and took advantage of the directions of the Nizam's advisers that they should be supported by these allowances at the expense of revenues which, according to the Mansab's award, rightly belonged to the heirs of Awadh.

(h) By their repeated efforts to bring proceedings in the Nizam's Courts, the heirs of Abdullah caused the heirs of Awadh to incur very considerable costs

p.155, l.34. which the Supreme Court assessed at Rs.30,000 (Shs. 45,000).

It is in these circumstances respectfully submitted that it would be wholly contrary to the principles

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of equity and natural justice if the heirs of Abdullah were now allowed, having formally repudiated it, to revert to the Mansab's award and seek nearly 50 years after it was pronounced, to claim the monies awarded under this award.

15. The next issue which it is respectfully submitted requires determination, is whether the Court of Appeal were right in the view that they took, that the heirs of Awadh ought not to be allowed to resile from their obligation under the Mansab's award by reason of the fact that they had and still do, take a benefit under the terms of the award in that they remain in possession of the Hadhramaut territories and their other possession in south Southern Arabia under the terms of the award. In reply to this contention it is respectfully submitted that the true view of facts as it appeared in the evidence was that the heirs of Awadh in no sense relied upon the award in maintaining their possession of these territories. As appears from the Judgment of the Court of Appeal Awadh was in fact put in possession and established as the ruler of these territories by the British authorities. Awadh, and subsequently his heirs, have, at all times thereafter, up to the present day done no more than continue in this possession and continue to exercise the administration so vested in Awadh without altering its legal character in any way. The making of the award had no effect upon the said possession or administration and had no more than regularised an administration which already existed and had been established. Further, and in the alternative, it is respectfully submitted that Awadh and his heirs could in no sense be held by reason of the above matters to be bound by the award under English law unless the English doctrine of approbation and reprobation is applicable in consequence of their maintaining the possession and administration aforesaid. It was however clearly laid down in the case of Banque des Marchands de Moscou (Koupetscherky) v. Kindersley & Anr. (1951) 1 Cha. 112, at pp.119-120, that the doctrine is not applicable except in circumstances in which the party against whom it is invoked can be shown to have obtained and enjoyed an actual benefit under the decree, judgment or other instrument which it is contended that he has approbated. For the reasons above given it is respectfully submitted that in as much as Awadh already enjoyed in the fullest sense possession and administra-

pp.197-198.

p.198, 1.26.

p.179.

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tion over the territories in question he did not derive any additional benefit by reason of the fact that the award recognised what was an existing state of fact in recognising him as having jurisdiction in these territories.

16. If the contention of the Defendants, that they are entitled to be paid the full amount above referred to, is not well founded, the Defendants will seek to uphold the conclusion of the Courts below that in any event it should be judged that there should be paid out of the said sum to the Defendants such sum as is appropriate to represent the amount of the allowances received by the heirs of Abdullah together with the costs occasioned by the heirs of Awadh owing to the proceedings in Hyderabad. The learned Judge so held upon the basis that these sums should be paid out as damages for breach of contract, and the Court of Appeal in forming its decision on this point held that it could be sustained upon general principles of justice, equity and good conscience. The Defendants will seek to uphold these conclusions and will respectfully add that independently the conclusions can be justified upon the basis that if the Sharia Law is applied it is in any event just and equitable that such a sum should be ordered to be paid out to the Defendants. A further issue upon which it is respectfully submitted that the learned trial Judge and the Court of Appeal rightly decided is that under the terms of the said Ordinance, in the Interpleader proceedings for which the Ordinance provides, the Courts below had jurisdiction to make the aforesaid order for payment out to the Defendants.

pp.154-155.
pp.200-202.
p.201, l.19.
pp.154-155.
p.201.

The Defendants respectfully accept in principle that the basis on which the sum was ordered to be paid out to them was the appropriate basis.

17. A further issue which affects the question of the interest which has accrued upon the sum originally deposited arises as follows:- If the Defendants' contention that the whole Fund should be paid to them is not sustainable then it is submitted that subject to such sum as may be ordered to be paid out to the Defendants as indicated in paragraph 16, the Plaintiffs would be entitled, in addition to the original sum of Rs.2,14,500/-, to interest which has accrued upon that sum as from the date on which the heirs of Abdullah demanded that it should be paid to

them. It is respectfully submitted that they would not be entitled to interest in respect of any period up to that time, and the Court of Appeal, rightly it is submitted, so held. The Court of Appeal however held that the date on which the heirs of Abdullah demanded the payment to them of the said sum was April 7th, 1942 and was made in a letter of that date. It is respectfully submitted that the heirs of Abdullah did not at that time make any demand or unqualified demand for such repayment and that this appears when the terms of the said letter are considered. It is further submitted that the earliest date on which it could be rightly held that the heirs of Abdullah did make a final request for payment to them of the aforesaid sum was when the Plaintiffs lodged their claim in the present proceedings which was on the 15th August, 1954. If this contention is well founded it is submitted that it results that the Plaintiffs would be entitled, on the assumptions above made, to payment out of the original sum of Rs.2,14,500/-, together with the interest accruing thereon as from 15th August 1954 and less such sums as should be paid out to the Defendants as submitted in paragraph 16. Furthermore, that the Defendants should be paid out the whole of the interest accruing on the said sum of Rs.2,14,500/- as from the date it was lodged in the National Bank of India up to the 15th August 1954. It is respectfully submitted that it also logically follows that the Defendants are entitled to interest upon the sums mentioned in paragraph 16, that is, upon all the constituent elements making up the said sums, in each case as from the date when the heirs of Awadh had to make payment of such constituent element, whether in the form of allowance payable to the heirs of Abdullah or in the form of expenditure by way of costs incurred by them.

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p.202, l.7.
p.202, l.18.
p.234.

18. On the 30th July, 1958, the Plaintiffs were granted Special Leave to Appeal from the said Judgment of the Court of Appeal, and on the 24th March, 1959, the Defendants were granted Special Leave to Cross-Appeal.

p.209.
p.212.

19. It is respectfully submitted in the above circumstances that it should be decreed that the whole of the Fund should be paid out to the Defendants. Alternatively, that if any portion of the Fund is held to be payable to the Plaintiffs, such sum should not include any interest on the original sum of

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Rs.2,14,500/- which accrued from the date when it was originally lodged up to 15th August, 1954, and that it should be further in any event abated by (1) the sum referred to in paragraph 16 hereof, and (2) interest on that sum computed as stated in paragraph 17 hereof. With regard to the costs, it is respectfully submitted that there are no reasonable grounds for ordering that the Fund should bear the costs, and that the appropriate order would be either that the Plaintiffs bear all the costs of these proceedings including the Defendants' costs or in the alternative that each party should pay their own costs and the Privy Council will be respectfully asked so to decree. It is therefore submitted that the Appeal should be dismissed and the Cross-Appeal allowed for the following, amongst other,

R E A S O N S

(1) BECAUSE the heirs of Abdullah having refused to be bound by the Mansab's award must be taken to have repudiated the said award and because such repudiation was accepted by Awadh and his heirs.

(2) BECAUSE in any event if the Sharia law is applied it would be inequitable that the Plaintiffs should now be allowed to rely upon the said award.

(3) BECAUSE the Awadh and his heirs in no sense approbated the award and the Defendants ought not now to be held and bound by its terms.

(4) BECAUSE in any event interest on the original amount of Rs.2,14,500/- should not be allowed in respect of any period before the heirs of Abdullah made demand for its payment out to them, which they did not do until the 15th August, 1954.

(5) BECAUSE in any event the Courts below had jurisdiction to award and rightly awarded that the Defendants should be paid out of the Fund a sum representing the allowances paid in respect of the Crown Grants and the costs incurred in resisting the proceedings in Hyderabad.

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(6) BECAUSE the reason for so holding given by the learned trial Judge was well founded.

(7) BECAUSE the reason given by the Court of Appeal for so holding was well founded.

(8) BECAUSE in any event under Sharia law it would have been just and equitable so to hold.

(9) BECAUSE the Defendants are rightly entitled to interest upon the said sum of Rs. 2,14,500/- computed as stated in paragraph 17 hereof.

10 (10) BECAUSE the property, or in the alternative, the equitable ownership in the said sum of Rs.2,14,500/- never became divested by the heirs of Awadh and at all times remained with them.

FRANK SOSKICE

RALPH MILLNER

A N N E X U R E

THE SULTAN OF SHIHR AND MUKALLA'S FUND ORDINANCE, 1945.

Section 4:

When the Fund shall have been transferred from the Government of Bombay to the Financial Secretary, he shall, by a pleader appointed by him in that behalf, institute an interpleader suit in the Supreme Court in respect of the fund.....

Section 5, (1)

The Judge of the Supreme Court shall, with such assistance as he may require from the pleader referred to in Section 4, and after such examination as he may deem necessary of all the documents relating to the case in the possession of the Government, order such notice in writing to be given to each and every person, Government or body corporate who or which may, in his opinion have a claim to any part of the Fund, or any interest in the disposition thereof.

(2)

The Judge of the Supreme Court shall cause such notice to be advertised and served in such manner as he deems necessary and the law of service of process allows to each and every such person, Government and body corporate and in particular he shall cause notice of the interpleader suit to be published in three successive issues of The Colony and Aden Protectorate Gazettes as soon as practicable after the institution of such interpleader suit.

Section 6:

The Supreme Court shall, not earlier than six months after service or publication of all the notices referred to in Section 5, proceed to hear and determine all claims to the Fund made by persons before the expiration of such period of six months, and the findings and orders of the Supreme Court in respect of the claims shall, subject to the law governing appeals to the High Court of Judicature

at Bombay and to His Majesty in Council, be final.

Section 7:

If no claim is made within the period of six months referred to in Section 6, or if, after the determination of any claim or claims under the provisions of Section 6, the Fund or any part of the Fund, is undisposed of by any order of the Supreme Court or any Appellate Court and further appeal against every such order is barred, the Judge of the Supreme Court shall, as early as practicable report in writing to the Governor that no claim has been made to the Fund or to a specified part of the Fund, or that the Fund or a specified part of the Fund is undisposed of by any order of such Court, as the case may be.

Section 8:

It shall be in the discretion of the Judge of the Supreme Court to order that the costs or any of the costs incidental to the proceedings in the Supreme Court under this Ordinance shall be paid out of the Fund.

. . . . . .

Section 10:

The Governor, on receiving the report of the Judge of the Supreme Court under Section 7 that no claim has been made to all or some part of the Fund or that all or some part of the Fund remains undisposed of by any Court order, shall by writing under his hand direct the payment of the Fund, or unclaimed or undisposed part of the Fund, as the case may be, to any persons, Governments or bodies corporate to whom notice has been issued under Section 5, whether such notice has been served on them or not, and on such conditions as he, after perusal of the documents in the case thinks fair and reasonable on the merits, and such direction of the Governor shall be final and shall not be subject to appeal or liable to be restrained by, or inquired into, in any Court in the Colony.

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