Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Nawab Umjad Ally Khan v. *Mohumdee Begum and Nawab Begum, from Oude; to be delivered the 20th December*, 1867.

Present:

Sir James W. Colvile.
Sir Edward Vaughan Williams.
Lord Justice Rolt.

Sir Lawrence Peel.

THIS is an Appeal, under an Order made on a special application to Her Majesty, for leave to appeal against so much of the Decree of Mr. George Campbell, made by him when Judicial Commissioner of Oude, as reverses or varies a Decree of Mr. Fraser, the Civil Judge of Lucknow, in favour of this Appellant. The suit in which Mr. Fraser's Decree was made was brought by the Respondents, Mohumdee Begum and Nawab Begum, as daughters and co-heirs of the deceased Nawab, against the Appellant as the son, and the Administrator of his father's estate, under Act 27 of 1860, against the widow of their father, and two sisters of the Plaintiff's, also co-heirs; and, lastly, against certain other persons described as nominal Defendants whom it is unnecessary here to name, or further to describe.

The suit was in the nature of an administration suit; it sought a discovery of a portion of the assets alleged to be withheld, and an account, and a division of the assets amongst the heirs according to the Mahometan law. The deceased and his family were Mahometans, and followers of the "Shiah" school. The widow of the deceased instituted also a distinct and separate suit against the heirs, claiming her dower according to a settlement of it upon her by

her husband, and claiming, in addition to it, a large sum of money by gift from her husband during his lifetime. Her share to one-eighth of the clear assets seems not to have been disputed. The Appellant claimed a large portion of the property, consisting of promissory notes of the Government, commonly called Company's Paper, amounting to 735,300 rupees, as his property by gift from his father in the lifetime of the latter, the validity of which gift was disputed by the Respondents, the Plaintiffs in the suit, as well as by the widow, a co-Defendant.

Mr. Fraser's Decree established this gift in favour of the Appellant. The Decree of Mr. Campbell reversed that portion of Mr. Fraser's Decree, and declared the gift invalid according to Mahometan law. The Appellant claimed also against the co-heirs, the immoveable property described in the suit. Of this a large portion was situate in Oude, and was claimed by him under a Firman from the Government of India granting it to him exclusively as property which had been declared forfeited, and to be the property of the State, by Lord Canning's proclamation on the suppression of the rebellion in Oude; and a smaller portion, being land situate in Furruckabad, was claimed by him under a certain instrument of conveyance from his father, termed a solahnameh. This property was adjudged to him by Mr. Fraser's Decree. Mr. Campbell did not adjudicate upon that part of Mr. Fraser's Decree relating to the above-mentioned immoveable property, otherwise than by declaring his intention to reserve the consideration of those issues to a further time, for the reason assigned in the concluding paragraph of his Judgment. The Appellant treats this reservation of Judgment as a variation by Mr. Campbell of Mr. Fraser's Decree, and makes the propriety of it a ground of appeal. The Respondents, on the other hand, contend that, as a mere reservation of a Judgment, on appeal, by the Appellate Court, is neither a reversal nor a variation of a Decree appealed against, the Appellant is not entitled to insist on this part of Mr. Campbell's Judgment as a grievance against which he has been permitted to appeal. The Appeal is brought not as of right but by special leave, and in the petition on which leave to appeal was granted, the Appellant named only the two Respondents who

ment by the Mahometan law, or to consider in any way the validity or effect of those documents.

The effect of the non-assent of co-heirs to a bequest to an heir by a Mahometan of the Shiah sect becomes also immaterial as a subject of inquiry here, if the gift be valid as a gift *inter vivos*.

Before the validity of this gift, as one *inter vivos*, is determined, it must first be considered by their Lordships what the real nature of the transfer was. The legal title in the promissory notes was undoubtedly in the Appellant, in his father's life-time, by virtue of an act of the father.

But though the transfer of a legal title will satisfy that provision of the Mahometan law which relates to the point of seisin, in its legal and technical sense, yet that alone will not suffice where no intention exists to transfer the beneficial ownership, either present or future. The facts relating to the gift have been most carefully investigated by Mr. Fraser, the Civil Judge. The Judicial Commissioner, paying a just tribute of commendation to Mr. Fraser on his accurate investigation of the facts, expresses no dissent from his conclusion as to them, but reverses his decision as to this gift as erroneous in point of law. Mr. Fraser's observations (at page 117 of the printed Record) as to the mode of dealing amongst natives living amongst themselves as a family in a state of family union, and dealing in this state with the proceeds of property standing in the names of separate members of the family, to whom it has been transferred by the parent and head of the family, and on the deference to his wishes and arrangements, and acquiescence in them commonly exhibited, are forcible as arguments to exclude the notion of fraudulent concealment or design in a transfer circumstanced as the present. They strengthen the probability of an intended transfer of property in the life-time of the donor, with a reservation of the use or proceeds of the the money transferred during the life-time of the donor only.

In consequence of the tendency amongst natives to disguise their ownership under Benamee transfers of property, a natural suspicion arises often that such is the design when the transaction is really fair and open, and the apparent and real title are entirely consistent. The transaction questioned

were Plaintiffs in the suit; but the Appellant has nevertheless now named all the parties interested in the general estate, including the widow, as Respondents.

Application was made on the part of the widow to their Lordships, on the first day of their sittings, to dismiss or suspend the hearing of the Appeal on the ground of irregularity: her Counsel stated that the widow had not appealed against the Decrees affecting her claims to the sum disallowed as a gift, being, on the whole, content to take her portion of the seven lacs which, by Mr. Campbell's Decree, fell into the residuary estate; but that, if this Appeal succeeded, she would be prejudiced thereby to so large an extent that she should then desire to appeal against the disallowance of a part of her claim by the Decrees of the two Courts. Leave was given to her to appeal against that portion of the Decrees, and she has been heard by her Counsel as a party Respondent on the present Appeal. The decision of their Lordships' on the present Appeal will be without prejudice to her rights in her own Appeal if preferred, as respects the claims disallowed her by those Decrees: in other respects it will conclude her rights, in the ordinary way, as a party Respondent to this Appeal.

The matters to be determined on this Appeal are three in number, and are:—First, the validity of the gift to him of the Company's Paper amounting to 735,300 rupees; secondly, the appointment of a stranger to be and act as co-trustee with the Appellant in the trust as to the family religions or charitable fund called Ruddi Muzalim, and the direction to settle a scheme for the administration of that fund; and, thirdly, the reservation of his Judgment, indefinitely, by the Judicial Commissioner on the right of the Appellant, as declared by Mr. Fraser in his Decree, in respect of the landed property adjudged to the Appellant by that last-mentioned decision.

The first in order of these matters involves an important point of Mahometan law relating to gifts *inter vivos*.

If the gift be sustained as a valid gift *inter vivos*, it will be unnecessary to review the evidence as to the genuineness of certain documents propounded by the Appellant, and said to constitute a valid testa-

in this case, though between natives, differs in no respect as to the manner of dealing with the property in question (Company's paper in the hands of the Government Agent at Calcutta at the time of and after the gift), from the mode in which an European father and son, designing to make between themselves a similar disposition of the like property, giving the paper to the son with a reservation of the interest to the father for life, might have dealt with it so as completely to effectuate their intention. There is no evidence of any attempt or design te conceal from the Government Agent, or from others, the origin of the property, its source, transfer, or continuing state of enjoyment. Mr. Fraser accordingly, and very reasonably, negatives any fraud in the transaction as to these notes, and Mr. Campbell, though he treats the case as one undeserving of support in a Court of Justice, proceeds not on actual fraud, but on his views of the policy of the law, and treats the transaction as fraudulent in contemplation of law, and done in evasion of its provisions, which limit the testamentary power of a Mahometan, and aim in some degree at equality of division amongst the descendants *ab intestato*.

Everything which took place in respect of these notes at the Government Agent's Office was perfectly consistent with the Appellant's real title in them. It is true his case is stated higher in his pleadings than the real title warrants; but the case as stated includes the real title, and is only the common error which is so frequently observed in the cases of natives in India, where their legal advisers, from ignorance or foolish craft, misstate a a good case, and place it on false grounds. This was not an absolute personal transfer of the whole property including all future interest, beneficial as well as legal; nor was it a benamee transaction. A mere benamee or ism furzee title is simply a nominal title without interest. It may, or may not, be fraudulent in design. Such a disposition by a donor, where the transfer of the property, from its very nature, effected a legal transfer of it, would be simply the creation of a trust in his favour, and would, of course, leave the disposition *ab intestato* undisturbed. But such was not the intention here, and such is not the nature of the disposition. The object of the disposition is

correctly stated by Mr. Fraser to have been to give the son a larger share of the father's property than would come to him by succession *ab intestato*. Mr. Campbell, the Judicial Commissioner, treats that intention and act as evasive of the testamentary law of Mahometans, and as inconsistent with their law of gifts. Upon the first ground of decision it is to be observed that in the absence of immoral or illegal purposes accompanying and prompting an act of disposition of property, a disposition which the law admits cannot be evasive of the law. The law of succession *ab intestato* applies only to the assets which constitute the succession. If the law allow alienation so as to defeat a succession, the question whether a subject of property is an asset or not raises simply the question whether the transfer of it is legally complete. The design to alter, and so in one sense to defeat, the disposition of property, is simply a design to conform to the law, whilst working out an unforbidden design. The other view of the subject, that this is an incomplete gift by the Mahometan law, is one which presents more difficulty, and will be presently considered. On moral grounds the transaction cannot be impeached. It seems to have proceeded simply from the cause assigned for it in Mr. Fraser's Judgment, viz., a desire to maintain the dignity of the eldest branch of the family; neither can the policy of the law be invoked, for the reasons above assigned, that the policy of the law is to be collected from its whole body, and not from a detached portion of it; so that if the law suffers a father by an act *inter vivos* to alter his succession, his exercise of that power cannot be deemed a fraud upon the law.

It remains to be considered whether a real transfer of property by a donor in his lifetime under the Mahometan law, reserving not the dominion over the corpus of the property, nor any share of dominion over the corpus, but simply stipulating for and obtaining a right to the recurring produce during his lifetime is an incomplete gift by the Mahometan law. The text of the Hedaya seems to include the very proposition and to negative it. The thing to be returned is not identical; but something different. See "Hedaya," tit. "Gifts," vol. iii, book 30, page 294, where the objection being raised that a participation of property in the

thing given invalidates a gift, the answer is, "The donor is subjected to a participation in a thing which is not the subject of his grant, namely, the use (of the whole indivisible article); for his gift related to the substance of the article, not to the use of it." Again, if the agreement for the reservation of the interest to the father for his life be treated as a repugnant condition, repugnant to the whole enjoyment by the donee, here the Mahometan law defeats not the grant, but the condition. (See "Hedaya," vol. iii, p. 307.) But as this arrangement between the father and the son is founded on a valid consideration, the son's undertaking is valid, and could be enforced against him in the Courts of India as an agreement raising a trust, and constituting a valid obligation to make a return of the proceeds during the time stipulated. The intention of the parties, therefore, is not found to violate any provision of the Hedaya, and the transfer is complete. The Mahometan law authority whom Mr. Campbell consulted, supported it. His opinion is treated somewhat lightly as a nude opinion unsupported by authority; but it is to be observed that unless some authority had been cited to show the transaction invalid, effect should have been given to the manifest intention of the parties.

The second matter of complaint is the appointment of a co-trustee. The ground taken on the argument of the incompatibility of such an application with the status and dignity of the Appellant, and with family usage, seems to their Lordships to be displaced by one of the documents which the Appellant propounded and used before the Court, which does associate a co-trustee with him. As against the Appellant the appointment of a co-trustee will justly give effect to what he alleges to have been the intention of the founder of the trust. The discretion of the Judicial Commissioner as to the person appointed is a matter with which their Lordships are indisposed to interfere, and no sufficient reasons are advanced to control it in this instance. His direction as to a scheme for the administration of this trust seems to their Lordships reasonable.

The third point requires a more detailed statement of the grounds on which their Lordships think

that the decision of Mr. Fraser may be affirmed here, rather than by the Judicial Commissioner acting under their Lordships' expression of opinion. As it is clear that the Appellant meant to include this part of the Judgment in his Appeal, any merely verbal insufficiency in his grounds of complaint, or of the Order made thereon, might be removed by leave given to renew and extend the application to Appeal, so as to cover and remove a mere technical defect. But as the intention is manifest, and the Decree of Mr. Fraser, though untouched in terms, is in effect suspended by Mr. Campbell's Judgment; upon a liberal construction of the language of the Petition to Appeal this part of the Judgment of Mr. Campbell may be considered as included within the term "varied." When the Appellate Court in India on Appeal has omitted to decide a question raised by the Appeal, their Lordships have remitted the case for decision to that Tribunal, in all cases where they did not find clearly on the Record before them materials for a final Judgment doing complete justice between the parties. This case is not of that nature. Mr. Fraser forbore to question the Appellant's title under the firman, because that firman could not be questioned in that Court. That Court itself existed under an exercise of powers of a similar character, and it did not think itself invested with a jurisdiction to question an Act of State, under which the firman had its origin. The Proclamation was necessarily impeached by impeaching the firman, and it was undoubtedly an Act of State. Even if this Act could be directly or indirectly questioned in a Municipal Court (on which we express no opinion), the contention must be raised on a suit duly constituted, to which the Government must be made a party. The forfeited estates were not an asset at the time of the Nawab's death, and could only be treated as such when the Government title was displaced. To remand the case for hearing to the Judicial Commissioner would be simply to involve the suitors in unnecessary expense, and subject them to unnecessary delay, since it must be accompanied with a declaration that in that suit, between those parties, and on those pleadings, the legality of the title of the granters of the firman could not be questioned.

The objection raised to the Solehnameh by

Mr. Bell (which it is necessary to notice only as respects the lands in Furruckabad) does not arise on the facts. The consideration, two rings, may be small and inadequate in the sense of purchase money; but it cannot be treated as of no pecuniary value: and the record furnishes no grounds to justify a remand to the Judicial Commissioner on this comparatively trifling point.

Their Lordships think that a valid gift, *inter vivos*, as to the Company's paper, was effected by the Nawab in his lifetime in favour of his son, the Appellant, and therefore they deem it unnecessary to consider the question as to the genuineness of the documents set forth as constituting his will, or to consider whether the non-assent of the heirs does or does not vitiate the will of a Mahometan of the Shiah school in favour of an heir.

On the whole case, they will humbly advise Her Majesty to reverse the decision of the Judicial Commissioner of Oude, except as to the appointment of a co-trustee, and to affirm the decision of the Civil Judge, Mr. Fraser, with that variation.

As the contention in this Appeal arises from the acts of the last owner, who has subjected his property, by his mode of dealing with it, to questions fairly raised, their Lordships think that the costs of the Appeal of both parties should come out of the residuary estate. Their Lordships therefore direct that the costs of the Appellant and the Respondents be taxed by the Registrar as between Solicitor and Client, and likewise the costs of Iftakaroonissa Begum Afzal Muhul, with reference to this Appeal.