Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Chowdhri Murtaza Hossein v. *Mussumat Bibi Bechunnissa, from the Court of the Commissioner of the Lucknow Division; delivered Thursday, 13th July* 1876.

Present:

SIR J. W. COLVILE.
SIR BARNES PEACOCK.
SIR MONTAGUE SMITH.
SIR ROBERT P. COLLIER.

THIS is an application under the 327th section of Act VIII. of 1859 to have an award filed in Court, with the usual consequence of having its provisions enforced as a decree of Court. Some discussion was raised in the course of the argument touching the meaning of the word "award" as used in the plaint. Their Lordships have no difficulty in ruling that it must be taken to include the whole of the document which is scheduled to the plaint, and headed "Copy of the Award;" that it comprehends both that which in some of the proceedings has been called the "formal judgment," and that portion of the document scheduled which is headed at page 10 with the word "Decree." If it were taken to be confined to the latter, the award would be obviously incomplete, since it would contain no finding upon many of the questions raised. The only reason for so confining it seems to have been a loose statement made by a pleader in one of the Courts.

The arbitration which resulted in this award came about in this way: The Plaintiff, who seeks to have the award filed, was the widow of one

Chowdhry Sarfaraz Ahmud; the Defendant, who resists the filing of the award, is Chowdhry Murtaza Hossein, who was the brother of Sarfaraz Ahmud. It appears that Sarfaraz Ahmud left not only a widow, but a daughter and daughter's children, of whom one was a son; that a considerable part of his property consisted of talooks, and that he was registered as talookdar under the schedules of Act I. of 1869, so as to make his talooks descendible in the case of intestacy to a single heir according to the rules laid down in the 22nd section of that Statute. The effect of these was to make the talookdary property of Sarfaraz Ahmud descendible to his daughter's son, if he had been recognised and treated by the deceased as his own son, but in default of such recognition, to his brother, in preference of his widow. The Act gives the talookdars the power of altering this law of succession by any will, made more than three months before the death of the testator, or by one of later date if made with a particular form of attestation. It is, however, an admitted fact in this case, that the will of Sarfaraz Ahmud was made within a month of his death, and was not attested in the manner prescribed by the Statute. The question raised and considered in these proceedings was in terms whether the will was valid or invalid; but the proper issue was whether such a will was sufficient to pass talookdary property, since it might be a good will according to Mohammedan law as to one third of the testator's other property, although it was not executed according to the provisions of the Act.

In this state of things the brother, whose claim to inherit the talooks was liable to be defeated only by proof of the recognition of the grandson as a son, of which there is no question

in these proceedings, was induced to enter into a submission to arbitration, the effect of which was to make his rights and the rights of the widow determinable according to the terms of the will of the testator, and therefore, for the purposes at all events of that arbitration, to recognise the sufficiency of the will. The submission to arbitration was in this form: We agree that "whereas Mr. W. Glynn, the Deputy "Commissioner of Barabunki, has with our "consent appointed Chowdree Ghullam Furreed, "talookdar of Barraiee, pergunnah Rodowlee, "and Rughunath Singh, talookdar of Palee, "arbitrators, to determine according to the "terms of the will of the deceased talookdar "the dispute between Chowdree Murtaza "Hossein and Chowdrain, widow of Sarfaraz "Ahmud, deceased, relating both to the pro-"perty specified in the will, and to that not "mentioned therein, we do hereby declare and "duly execute this document." The arbitrators made their award on the 16th March 1871. The suit to have it filed in Court was commenced on the 21st August 1871. Both parties seem to have made references to the Deputy Commissioner complaining of portions of the award, but the result was that the widow, at least, adopted it, and took these proceedings in order to enforce it.

In the Courts below an objection was originally taken to the form of the suit on the ground that the award was not an award within the meaning of the 327th section, but a judicial award which could only be dealt with under the earlier sections of the Act. That point has been given up, and the propriety of the suit must now be taken to be admitted.

A question, however, has been raised whether the earlier sections of the Act are incorporated into the 327th section, so as to give the Court

proceeding under the latter section the power of remitting an award which is insufficient upon the face of it back to the arbitrators for amendment; and also how far the power of such a Court to refuse to file an award is limited by the 324th section, which says that no award shall be set aside except on the ground of misconduct or corruption of the arbitrators or umpire. Their Lordships are of opinion that, upon the construction of the Act, the earlier sections are not incorporated into the 327th section as they are expressly incorporated into the 326th; and that the words "sufficient cause" should be taken to comprehend any substantial objection which appears upon the face of the award; or is founded on the misconduct of the arbitrators, or on any miscarriage in the course of the proceedings, or upon any other ground which would be considered fatal to an award on an application to the Courts in this country.

The objections which were formally taken to the admission of this award were embodied in the nine issues settled by the Deputy Commissioner of Lucknow, to whom the cause was transferred from the Deputy Commissioner of Barabunki, and are set out at page 42 of the Record. Those which are involved in the first, second, third, fifth, eighth, and ninth issues have here been given up by the learned counsel for the Appellant as untenable. That raised by the fourth issue was relied upon; it is in substance, that the arbitrators before making their award had consulted one Mahommed Ali, a vakeel or native lawyer. The sixth was in these terms, "Is the "award, being based on an invalid will, itself "invalid?" It will hereafter be considered what is embraced in that issue. The objection which it patently raises, viz.: that founded on the date and execution of the will, is now no longer relied upon. The seventh was that the arbi-

trators were bribed. The result is that the only objections raised by the issues which are now relied upon are, the consultation of the pleader, the corruption of the arbitrators, and whatever is included in the sixth issue.

It will be convenient at once to dispose of the seventh issue by saying that the Deputy Commissioner, after hearing the evidence that was adduced before him, came to the conclusion that there was no ground for imputing corruption to the arbitrators; that the story told by the witnesses as to the bribes that were given was false; and that their Lordships see no ground whatever for dissenting from that finding. This was not the finding of two Indian Courts, because the Commissioner to whom there was an appeal thought that he was incompetent to entertain that question. Their Lordships upon the evidence unhesitatingly acquit the arbitrators of corruption in this matter.

Some objections have indeed been raised at the bar which seem hardly to be included in the issues settled in the Indian Courts. Mr. Leith contended that the award was bad on the face of it, inasmuch as it failed to deal with some of the subjects referred to the arbitrators, and in particular with the two estates Behlal and Hosseinpur. But this contention can only be supported if the award is taken to be merely that portion of the document scheduled to the plaint which is headed "decree," a point upon which their Lordships' opinion has been already expressed. If the whole document be treated as the award the arbitrators have expressly dealt with the subjects in question.

The point as to the consultation of the pleader was disposed of in the course of the argument by their Lordships, who intimated a clear opinion that the case implicating the pleader in the

alleged corruption having failed, the mere fact that the arbitrators consulted a person supposed to be learned in the law was not a valid objection to their award. An objection was also founded on a passage in the Record wherein it appeared that on one occasion one arbitrator sat alone; but upon the whole their Lordships are of opinion that the final award was made by the two arbitrators, and that there is nothing in this objection which seems never to have been raised in the Courts below.

The case of the Appellant is then reduced to the objection which he contends is involved, though not explicitly stated, in the sixth issue. It is in effect that, by reason of the reference in the ninth paragraph of the will which was before the arbitrators to another document described as "a will bearing the testimony of "Rajah Farzand Ali Khan and Rajah Jugmohun "Singh in the possession of my wife," which was not produced before the arbitrators, they cannot be said to have had the whole will of the testator before them; and ought not to have made an award without having that document produced before them; and that by reason of this miscarriage the Court ought to refuse to direct the award to be filed.

The award contains the following statement regarding the missing document: "It is worthy "of observation that the Chowdrain has ren- "dered her conduct suspicious by concealing "the second will. But if it had been pro- "duced in compliance with our directions, it "would not have prejudiced the Chowdrain, "because we are not disposed to tolerate injury "or harm being done to either party. It "is regretted that the Chowdrain has, by "concealing the second will, created suspicion "in our minds as to the said will, and we have "no reason whatever to believe that the will

" under consideration was in no respect similar " in terms to that now before us." The arbitrators then suggest certain hypotheses as to what the will might contain, and add, "In the " absence of sufficient cause being shown to the " contrary, it may be suspected that it was " destroyed through the foolishness or careless- " ness of the woman. Be this as it may, we are " not disposed to be led by suspicions in deter- " mining the case, but at any rate it shall be our " duty not to lose sight of our inclination thus " caused to favour Chowdhri Murtaza Hossein." From the proceedings before the arbitrators it would appear that both parties agreed that the missing document had existed. The Chowdrain alleged that the original had been taken away by the Appellant, but admitted that she had a copy of it signed by the testator; the other party imputed to her that she kept back the original.

A question strongly contested before their Lordships was whether this objection to the filing of the award was sufficiently raised upon the Record. It does not appear to have been distinctly raised on the proceeding at page 41 of the Record, when the issues were settled. The sixth issue seems to have been framed upon the objection stated orally by Mr. Arathoon which, as taken down by the Judge, is in these words: "The will was invalid, being made " within a month of the talookdar's death, and " the arbitrators were wrong in attaching any " importance to it." The objection, however, had substantially been put forward in the petition impugning the award which the Appellant presented to Mr. Glynn on the 31st of March 1871; and also in a written statement tendered in this suit but rejected by the Court for want of sufficient verification, which therefore cannot be treated as part of the record.

Again, it appears that when the case came before the Deputy Commissioner the point was in a manner raised before him, and treated as included in the sixth issue. The Judge's note at page 57 of the Record after stating the sixth issue, and that the Plaintiff does not care so far as this case is concerned to dispute the invalidity of the will, proceeds thus, "Mr. Arathoon argues "that the award partly follows the will, in "other parts the will is disregarded; that "this is sufficient cause to refuse to file the "award; but besides this there is a codicil "which the arbitrators do not appear to have "looked at." The Judge says, "There is "nothing on the Record to show that any codicil "was executed, and that point need not be "considered. Had any codicil been in existence "it should have been brought forward in evi-"dence."

Now, if by the word "codicil" was meant the missing will referred to in paragraph 9 of the will produced, this mode of disposing of the objection was unsatisfactory, because in the statement of the arbitrators upon the face of the award which has been already read there is a clear *constat* that the document said to have been attested by Rajah Fayaud Ali Khan and Rajah Jugmohun Singh existed. The Judge, however, went on to dispose of the question as to the effect of the invalidity of the will under the statute, but took no further notice of the question raised by Mr. Arathoon as to "the codicil."

The general principle of their Lordships is that of not dealing very strictly with the form of the pleadings if they find that a material point was substantially raised. They are disposed, though not without some little doubt and hesitation, to treat this particular point as sufficiently raised in the Courts below, and therefore to be

one with which they are bound to deal upon appeal. The question which it involves appears to their Lordships to constitute the only formidable objection which can be taken to the filing of this award.

The contention is that it was miscarriage on the part of the arbitrators to make the award unless they had the whole of the will before them, which they cannot be said to have had in the absence of the document in question. Their Lordships have felt considerable difficulty upon this point. They are sensible, on the one hand, of the extreme impolicy of allowing parties to get out of awards upon objections which really do not affect the substantial justice of the case; and, on the other hand, they feel the necessity of not allowing arbitrators to act without jurisdiction by doing that which the terms of the submission to arbitration do not entitle them to do. Upon the whole, however, their Lordships have come to the conclusion that the objection is not fatal to the filing of this award. They may observe that, looking at the whole will, they are disposed to believe that this missing document was really confined to some question relating to the marriage of the eldest granddaughter, which is the substance of the ninth paragraph, if that be treated as ending with the word "followed." On the true construction of the whole document the words "detail of expenses," and all that follows, seem to be no part of the ninth paragraph, although treated by the arbitrators, when they settled their issues, as within it.

It is, however, possible that the missing document may be something more than their Lordships suppose; and if there had been a clear *constat* that the Defendant objected on this ground to the arbitrators proceeding to make an award, and that they had nevertheless gone

on to make their award upon the terms of the will before them, their Lordships might have thought the objection sufficient. Looking, however, to the proceedings before the arbitrators, and particularly to the document at page 146 which is called the rejoinder, they think that, notwithstanding the knowledge that this document was withheld, the Defendant did submit to take his chances of the arbitration, and that he cannot now, on the general rule upon which all Courts act with respect to awards, be allowed, having taken his chances of the arbitration, to set aside the award upon the ground of the objection taken. In the very first paragraph of this rejoinder he no doubt says: "But the arguments of the Plaintiff carry "no weight with them unless the other will "which forms an essential part be produced, "because in the will produced it is enjoined "that a regard should be paid to the will "therein referred to, which signifies that "the provisions of the latter will are to "be carried out and not of the former." But what is the conclusion that he draws from that? Not that the arbitrators are to abstain from making an award, for he says: "Wherefore, in the event of the other will "not forthcoming, the arbitrators are, under "the law, competent in every respect to "determine the dispute, according to the "British law, according to the custom or "according to Mohammedan law, and to render "justice to me. But notwithstanding all the "objections taken to the powers of the arbi-"trators, and to myself, the Plaintiff has "exceeded all proper bounds, and instead of "giving fit answers to my objections has "made frivolous statements. Although silence "is preferable to the refutation of such state-"ments, I apprehend that if I keep quiet my

" silence may be construed in a manner which " might show that I have been unable to refute " the Plaintiff's statements, or that I have " admitted them. I am also of opinion that, " in order to obtain justice at the hands of the " arbitrators, it is better for me to bring to " their notice the true facts; I therefore beg " to submit a rejoinder to the Plaintiff's reply, " in the following paragraphs." Therefore, as far as that first paragraph goes, it is not an objection to their proceeding to make an award at all because they have not the whole will before them, but it is a suggestion that they should make an award in a particular manner, namely, by declaring that, the whole will not having been produced, it is not to be operative, but that the dispute is to be determined according to the British law, which their Lordships take to be the course of succession prescribed by Act I. of 1869, as to the talookdary estate, according to the custom, which is probably some supposed family custom applying to the personal estate other than the talookdary estate, or according to the general Mohammedan law. That is one alternative which is put forward by this document. The other is at page 152, where he says, "As for that part of the will " which relates to Khanpur, I beg to urge " that inferential, optional, and adverse con- " structions have been put on it suited to " the interests of the Plaintiff. Such con- " structions have not been put by any one of the " community who has had occasion to read the " will, except by the agents of the Plaintiff, " nor does that part of the will anyhow convey " the meaning attached to it by the Plaintiff." Then he says, "I believe the other will, which " the Plaintiff assiduously tries to conceal, " supports this assertion of mine. Every " letter and every word of a will signifies

" nothing less than the declaration of the " intentions of the testator. This is supported " by law. No one is competent to put thereon " an optional or implied construction. I, " however, expect that the learned (meaning, apparently, the arbitrators) will clear up the " meaning of the will, and will, in con- " sequence of concealment of the other will, " interpret the will" (that must mean the will before them) "favourably to myself and detri- " mentally to the Plaintiff. The will pro- " duced allows maintenance only to the Plaintiff " and her descendants which may be born after " the time the will was drawn up, out of " mouzahs Shareefabad and Alapur. This does " not give her any right as against myself." Therefore he goes on to treat as still open to the decision of the arbitrators the question of the construction of that will, and only claims a right to have presumptions drawn in favour of himself.

There was some dispute as to this rejoinder and the time when it came before the arbitrators. That it came before the arbitrators seems to be pretty clear, by the translation of the petition at page 146, but there is some confusion occasioned as to the time by the supposed date of that petition. It is clear that the petition covered the rejoinder, and it is quite clear, from the internal evidence in the rejoinder itself, that it was addressed to the arbitrators, and proceeded upon the assumption on the part of the writer, that the arbitration was still open. Their Lordships conceive that that document must have been before the arbitrators, and can hardly suppose, in the absence of clear proof, that it was before them after the arbitration was closed. At all events it shows what was in the mind of the party and what were the points which

he intended to raise upon the omission to produce the missing will. Again, it appears from the proceeding of the 19th February 1871 that the parties had then also, with full knowledge of the absence of the missing will, expressed their willingness to allow the case to be dealt with by the arbitrators in its absence. The statement at page 136 of the Record is :—" The parties after some discussion " have expressed their willingness to give up the " different footings on which they grounded " their claims, *i.e.*, they have withdrawn their " claim to partition under the Mahommedan " law of succession, according to custom or " English law, and have agreed that those points " of the will in respect of which they are at " issue should be cleared up and the rest eft " untouched." The proceeding then goes on to frame certain issues, of which the first is one as to the real and true interpretation of that which is called the ninth paragraph, but which obviously means the detail which follows the ninth paragraph, and which deals with the different talooks, Khanpur, Shareefabad, and Alapur, which were some of the subjects of the award. This issue contains these words: " What is the real and true interpretation " of the ninth paragraph of the will, and what " was the real intention and object of the " testator? In other words, whether the entire " taluka Khanpur should be divided in equal " moieties between the parties, or exclusively of " Shareefabad and Alapur." Again, there is a passage in the award which reads as if the arbitrators had then before them the document called a rejoinder, and were accepting the proposition put to them by the Defendant in the latter part of it. The following is the passage in question: " Be this as it may, we are not disposed " to be led by suspicions in determining the case,

" but at any rate it shall be our duty not to lose " sight of our inclination thus caused to favour " Chowdhri Murtaza Hossein." On the whole, therefore, their Lordships think that the Appellant having a clear knowledge of the circumstances on which he might have founded an objection to the arbitrators proceeding to make their award, did submit to the arbitration going on; that he allowed the arbitrators to deal with the case as it stood before them, taking his chance of the decision being more or less favourable to himself, and that it is too late for him, after the award has been made, and on the application to file the award, to insist on this objection to the filing of the award.

Their Lordships, therefore, will humbly advise Her Majesty to dismiss the present Appeal; and to affirm the order of the Deputy Commissioner, which is the operative order; but, having regard to the confusion which has been caused in a great measure by the absence or withholding of this document, for which the arbitrators, on plausible grounds, treat the Plaintiff as responsible, their Lordships are of opinion that there should be no costs of this Appeal. But the Appeal having been decided in favour of the Respondent, the Appellant must pay the costs of the Respondent upon the application for leave to appeal made on the 9th March, as those costs were ordered to abide the result of this Appeal.