*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Haji Mahommed Ismail Khan* v. *Haji Ghulam Ahmed Khan and another, from the High Court of Judicature for the North-western Provinces of India, at Allahabad; delivered Thursday, January 27th*, 1881.

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Present:

SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.
SIR RICHARD COUCH.

THIS Suit was brought by the two Respondents, Haji Ghulam Ahmed Khan and Haji Inayatullah Khan, claiming as heirs of their sister, Mussumat Wali-un-nissa, to recover two villages, mouzah Sahauli and mouzah Kamalabad, in zillah Aligarh. The original Defendant and Appellant here, was Faiz Hamed Khan. He has died since the Appeal to Her Majesty, and is now represented by his sons, who are his heirs. The question in the Appeal turns upon the construction of two instruments. A third was executed to carry the transaction into effect; but the case really turns upon the construction of two instruments, one a deed of gift, and the other an agreement in which the gift is accepted.

In order to understand the position of the parties, who are Mahommedans, it will be necessary to refer to a few facts. Murad Khan, who was the talukdar of Datauli and the owner of several villages, having died, his grandsons, Mohammed Hussain Khan and the Defendant Faiz Ahmed Khan, succeeded to his

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estates; their father, Abdulrahman Khan, having died in the grandfather's lifetime. Abdulrahman Khan left a widow, Mussumat Wazir-un-nissa, the mother of his two sons, who is still living. Hussain Khan, the elder grandson, died on the 31st of August 1838, leaving as his widow Mussumat Wali-un-nissa, the sister of the two Respondents, who now, as her heirs, claim the mouzahs in question.

On the death of Hussain Khan his share in the estates which descended from his grandfather would fall, according to Mahommedan law, to his brother, Faiz Ahmed Khan, his mother, Wazir-un-nissa, and his widow, Wali-un-nissa, as co-sharers; the latter, as widow, being entitled to a fourth. The estates had stood in the register in the name of Hussain Khan, his brother Faiz Ahmed Khan being a minor; but after Hussain's death they were placed in the names of his mother, his widow, and his brother, Faiz Ahmed Khan. Although the estates were so placed in the names of the mother and widow, the two ladies did not enter into possession or receipt of the profits of them, but received allowances of money and grain. Wali-un-nissa, the widow, received annually 500 rupees and 100 maunds of grain. In 1856 the two ladies executed a power of attorney authorising a mukhtar to expunge their names from the register; and in 1857 the power of attorney was acted upon, but partially only. Their names were expunged from the register with regard to the greater part of the estates, but two villages were left standing in their names, namely, Datauli Khas and Deosaini; and these villages remained in their names down to the time of the transaction which is in question.

On attaining his majority Faiz Ahmed made

a pilgrimage to Mecca. During his absence there appears to have been some dispute between the manager of the estates and the ladies or those acting for them, and some contest took place during the Government settlement which was then being prosecuted. It is not immaterial to refer to these proceedings, which show that, though the two ladies were receiving an allowance in money and grain, they had not given up their claim to a share of the estates. What took place is shortly stated, in the judgment of the Subordinate Judge, as follows:—"The revision of the settlement in "this district commenced in 1863: and Wali-"un-nissa then, probably with the advice of "Mohammed Inayat-ul-lah Khan, (the cause "of which, perhaps, might have been those "very disputes,) presented applications through "her agent for entry of her name in respect "of the villages of the estate. But those "applications were withdrawn about 10 or 20 "days after, on the 27th May 1863 (as proved "by the evidence of Farzand Ali, muchtar). "The disputes were prolonged regarding "Datauli Khas, in respect of which Wali-un-"nissa's name had continued to be entered. "The cause of this appears to have been that, "in the wajib-ul-urz, Faiz Ahmed Khan had "caused the name of Wali-un-nissa to be "entered in regard to a $1\frac{3}{4}$ biswa share with "receiving Rs. 500 cash and 100 maunds of "corn. The Mussummat applied for entry of "her name in respect of a 2-anna share, and "also stated that the agents of Faiz Ahmed "Khan had wrongly stated her right to $1\frac{3}{4}$ "biswas, and her receipt of Rs. 500 cash and "100 maunds of corn." It thus appears that, although an allowance in money and grain was made, Faiz Ahmed or his agents admitted that the widow was entitled to $1\frac{3}{4}$ biswas; and there

is no satisfactory evidence to show that by taking the allowance she had relinquished her right to a share if she chose to insist upon it. These proceedings occurred in the absence of Faiz Ahmed at Mecca. After the discussion before the Deputy Collector the case was brought before the Collector, who very properly said that the Collectorate had nothing to do with the rights of the parties, and that the whole matter had better stand over until Faiz Ahmed returned.

Faiz Ahmed returned from Mecca in the year 1866; and steps were then taken to come to an arrangement with his brother's widow, which was carried into effect by the documents which are now to be construed.

The instrument executed by Faiz Ahmed Khan bears date the 1st of January 1867. It states that he intended again to go to Mecca, and goes on thus:—"The karindas cannot properly "meet the requirements of the services due to "Bibi Wali-un-nissa, my sister-in-law (brother's "wife); and whereas from before Rs. 500 cash "and 100 maunds of grain were fixed on "my part for necessary purposes, by way "of rendering service to her, therefore I "have now, with great pleasure, willingly and "voluntarily made a gift of mouzah Sahauli, "assessed at Rs. 1,310-5-1, and of mouzah "Kamalabad, assessed at Rs. 281-11-3, villages "appertaining to pargana Atauli, in the zila of "Aligarh, valued altogether at Rs. 10,000, and "owned by me without the partnership of any "other person, for all the expenses of the said "sister-in-law, and put in her possession." If it had stopped here, there could be little doubt that the instrument would contain an absolute gift of the two mouzahs. It goes on:—"I do "declare and record that the aforesaid sister-in-"law may manage the said villages for herself,

" and apply their income to meet her necessary " expenses and to pay the Government revenue." Those words, it is contended, cut down the previous words of gift, not even to a gift for life, but to what in Mahommedan law is called an ariat or loan, which would seem to be no more than a licence to take the profits of the land, revocable by the donor. Undoubtedly, those words require consideration. They may have been inserted either to show that an ariat was intended, or merely to show the motive and consideration of the gift. In order to ascertain which of those two meanings the words properly bear, the rest of the document is material to be considered. It goes on:—" And that I " and my heirs shall make no objection or " opposition." These words seem to be entirely opposed to the view that an ariat in the sense of a resumable loan or licence was intended. It goes on: " I therefore have written these " few words as a deed of gift,"—the grantor here distinctly describes the deed or instrument he is signing as a deed or instrument of gift, —" that it may serve as evidence." Then, written by way of postscript, he says:—" I " declare that these villages have been given in " lieu of the former Rs. 500 cash and 100 " maunds of grain, and that henceforth the said " money and the grain shall not be given." This, taken in its plain sense, is a statement of one of the considerations for the gift; and it was necessary to be stated, otherwise a claim might have been made for a continuance of the allowance of the rupees and grain in addition to the benefit which the donee took under the deed.

The Mussumat executed an ikranamah, dated on the 3rd January 1867, but which was, in fact, executed on the same day as the deed of gift; and the two instruments evidently form but one transaction. It contains a recital of

her having received the money and grain, and of some of the facts relating to the register and to her name having been upon it and expunged; and then it proceeds thus: —"Mohammed Faiz Ahmed Khan has now " returned from Arabia, but notwithstanding " that I had caused my name to be expunged; " he gave me mouzahs Sahauli and Kamalabad, " in taluka Datauli, for my maintenance and " support. I am now satisfied and contented " with this property." The word "property" surely implies that she had the estates. The mere right to take the usufruct so long as the grantor pleased could hardly be described as property, nor would it be a provision with which she was likely to be satisfied and contented. Then there is this important relinquishment of claim on the part of the Mussumat: "I " do declare that neither I have nor shall have " any claim in future respecting the estate of " Datauli Khas, the villages of the taluka " Datauli, Burhansi, Deosaini, the villages in " taluka Malakpur and Rahwara, and other " detached villages, and also respecting the " movable and immovable property constituting " the ancestral estate of Mohammed Faiz Ahmed " Khan;" that is, she disclaims and relinquishes all her right as a co-sharer to the whole of the ancestral estate; and it is plain that not only had her name remained up to this time on the register in respect of the two villages, Datauli and Deosaini, but that she had done nothing which would have amounted to a release of her right as co-sharer in the ancestral property. It is evident that Faiz Ahmed, in obtaining from the widow this release of her right, considered that he was getting something valuable; and undoubtedly she was giving up a valuable right for that which, according to the Appellant's present contention, would not be a fair or reasonable equivalent for it.

The question upon these instruments, as already stated, is whether, read together, as their Lordships think they must be, they constitute a gift by Faiz Ahmed Khan to Wali-un-nissa, or amount only to an ariat or loan. The allegation in the Appellant's pleading below is that the latter is the true construction. Upon this question their Lordships have the benefit of an able and learned judgment from a Mahommedan Judge of whom the High Court says that he enjoys a high reputation as a Mohammedan lawyer. This learned Judge has referred to many books of authority on Mohammedan law, from which he has given extracts and also instances in his Judgment. He is clearly of opinion that this instrument contains words which in Mohammedan law have a technical signification as words of gift, and which, when used as they are in it, do by law constitute a gift. He also thinks that the words "that she might maintain herself out of the estates" describe one of the objects of the gift, and do not limit or cut down its operation.

Their Lordships do not think it necessary to discuss the authorities cited, but there are two short passages in the Judgment of the learned Subordinate Judge that may be usefully referred to. He says:—"There is no reason why the word "hibeh should be held to mean an ariat (loan), "and why, when it is clearly stated that the "mouzahs of Sahauli and Kamalabad are made a "gift of, the context should be construed to "mean that the profits of the mouzahs Kamalabad "and Sahauli were given as ariat." It may be observed that if it had been meant to give the profits only the deed might have been so expressed, but the mouzahs themselves are given. Then he concludes his judgment in this way:—"Considering all these circumstances, "the opinion of the Court is that both the

" villages were given to the Mussummat as " a gift, and not as an ariat (loan); that the " document is clearly a hibehnama (deed of gift), " and not an ariatnama (a deed of loan); that " both the villages were Mussummat Wali-un- " nissa's property by reason of the gift, and " heritable. According to the Mohammedan " law, in an unconditional (mahz) gift a donor is " no longer competent to recede from the gift on " death of the donee, or, in other words, to get " the property back, and in hibeh-bil-ewaz (gift " for a consideration) the doctrine is clearer." The gift in this case appears to their Lordships to be a hibeh-bil-ewaz.

Some difficulty was felt by the learned Counsel for the Appellant in condescending upon the definition of an ariat. It was pointed out to them that in the written statement of the Appellant the contention was this:—" This mode " of giving, where the word acceptance (ejab) " denotes the proprietorship of the profits, and " not the proprietorship of the area, is called " ariyat (*commodatum*) in the Mohammedan " law; that is to say, the proprietary right of " the person who gives is not extinguished, and " he can resume (the estate) at any time. It is " therefore not valid, according to the Moham- " medan law, to claim by inheritance to the " said Mussummat an estate which she herself " did not own." This statement is in accordance with what is said of ariat in the Hedaya, Book 29. The learned Counsel, Mr. Graham, at first adopted this statement; but feeling how difficult it was to support the instrument as an ariat having this effect, both the learned Counsel for the Appellant afterwards endeavoured to construe it as being something intermediate between an absolute gift and an ariat. This was obviously a departure from the view originally taken by those who advised the Appellant in the Courts

below, and no authority in Mahommedan law for holding that any such construction could be given to the document has been shown. Their Lordships are satisfied, as the High Court below was satisfied, that the Mahommedan Judge has come to a correct conclusion that the transaction was a gift for a consideration, and that the words relied on to cut it down to an ariat have not that effect. It is to be observed that the Subordinate Judge cites various instances from books on Mahommedan law in which very similar words, used after words of absolute gift, have been read as being descriptive of the motive or consideration of the gift, and ineffectual to control the operation of technical words of gift.

For these reasons their Lordships think that the judgments below are right; and they will humbly advise Her Majesty to affirm the decree of the High Court, and to dismiss this Appeal with costs.