Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Nawab Muhammad Azmat Ali Khan v. *Mussumat Lalli Begum and others, from the Chief Court of the Punjaub; delivered November 22nd*, 1881.

Present:

SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR RICHARD COUCH.
SIR ARTHUR HOBHOUSE.

THIS Appeal arises in an action brought by Mussumat Lalli Begum, claiming in her own right, as widow of the late Nawab of Kurnal, Ahmed Ali Khan, and as guardian on behalf of her minor sons, Rustam Ali Khan and Umar Daraz Ali Khan, to recover her own share as widow, and the shares of her minor sons, who are alleged to be sons of the late Nawab, in large landed estate and other property left by him. The Defendant in the action is Nawab Azmat Ali Khan, who is the undoubted son of the late Nawab and much older than the two minor Plaintiffs.

The late Nawab had four wives. A son, Rahmat Ali Khan, died in his lifetime. He left, surviving him, Azmat Ali Khan, the Defendant, the Mussumat Lalli, who asserts that she was his wife and is now his widow, and the two minor Plaintiffs.

In the Courts below several judgments, original and on remand, have been given, and the result of the litigation appears to be as follows: The Commissioner of Lahore found that neither Mussumat Lalli nor her sons were entitled to

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inherit, being of opinion that she was never married to the Nawab, that her sons were not originally legitimate, and further that the status of sons had not been conferred upon them by the late Nawab by any recognition of them as his sons. On remand the Commissioner found that by family custom widows did not inherit. The Chief Court of the Punjab agreed with the finding of the Commissioner as to this custom, and dismissed the Mussumat's appeal on the ground that she was disentitled by the custom. The Commissioner also, as already observed, dismissed the suit of the sons. The Chief Court of the Punjab reversed his decree so far as it dismissed the suit of the sons, and decreed in their favour, being of opinion that the minor Plaintiffs were entitled to inherit. No question now arises as to the widow, both Courts having found that she is excluded by the custom of the family; and she does not appeal from those decisions.

The issues raised as to the right of the minor Plaintiffs to inherit originally involved the following questions:—First, the alleged marriage of their mother, Mussumat Lalli, with the late Nawab; secondly, the alleged acknowledgment and recognition of them by the late Nawab as his sons, and the legal consequence of such recognition, if made; and thirdly, the existence of certain family customs.

It will be convenient, in the first place, to refer to the issues as to the customs of the Mandals, to which this family belonged, to see if any custom has been established varying the general rule of the Mahommedan law relating to inheritance, or the effect of the acknowledgment of a son. An attempt was made to show that by the custom of the Mandals the sons of ignoble wives did not inherit. It appears that in 1849 an inquiry was instituted by the

Government respecting the customs of the Mandals, and various Dustur-ul-amuls were drawn up by members of Mandal families respecting them. But, on consideration of these documents, it appears first, that they do not agree on important points; and, further, they do not profess to record existing customs, except possibly with regard to the exclusion of women from inheritancy, but contain endeavours to come to an agreement with respect to the rules which should bind the family in the future. This was the view taken by the Government at the time, and also by both the Courts in India in this suit, of these documents, so far as they related to the inheritance of sons. On a remand by the Chief Court oral evidence of the custom was taken by the Commissioner. The evidence satisfied the Commissioner, and the Chief Court agreed with him, that the custom to exclude widows from a share of the inheritance was proved. The claim of the widow was therefore rejected. With respect to the sons, the Commissioner's judgment is to this effect: he finds distinctly, upon the question which was referred to him by the judgment remanding the case, that legitimate ignoble sons would take a share with noble sons; that there is no distinction as to the right to inherit between the sons of noble and ignoble wives. But in the course of his judgment he finds an issue to be proved which does not appear to have been referred to him. He says this: "They agree"—that is, the Dustur-ul-amuls and the oral evidence agree —"that illegitimate sons of ignoble "mothers, though recognised as sons, get no "share." Their Lordships have been referred to the evidence on which this last finding rests; but the learned Counsel for the Appellant did not prosecute the consideration of it after a few witnesses had been referred to, because it soon

appeared that the evidence afforded no foundation upon which the learned Commissioner could properly base his finding, and the Judges of the Chief Court have distinctly come to a different conclusion upon it. His finding that legitimate ignoble sons get a share with noble sons was, however, affirmed by the two Judges of the Chief Court, who both came, after a very careful review of the evidence, to the conclusion that no custom prevails in this family which varies the ordinary rules of the Mahommedan law with regard to the rights of sons to inherit.

An attempt has been made to show that the family were originally Hindoos and converts to the Mahommedan faith, and upon this foundation a suggestion has been raised that Hindoo customs were preserved in the family; but the foundation for this suggestion entirely fails. Not only was the fact of the family having been at one time Hindoos not proved, but it was negatived by some of the witnesses. Even if the fact had been proved, it would only have lent probability to the suggestion that some Hindoo laws had been preserved in the family as customs. It must still have been proved that they were in fact so preserved and acted upon; and, as already stated, the proof of the existence of any customs, so far as the present suit is concerned, entirely failed, except as to the widow's right to share. It is to be observed also, that there is evidence that the late Nawab was himself a strict Mahommedan. The rights of the minor Plaintiffs have therefore to be determined by the rules of Mahommedan law as applicable to the facts of the case.

The undisputed facts of the case are, that Mussumat Lalli was originally a slave girl in the late Nawab's house, and at one time acted as a servant in it. She lived in the house up to the time of the Nawab's death,

and beyond question the Nawab cohabited with her, and the two minor Plaintiffs were born in his house, and remained in it up to the time of his death. Those facts are undisputed.

The questions which arise are, first, whether there was a marriage between the late Nawab and Mussumat Lalli before the births of the Plaintiffs, in which case, of course, both would be his legitimate sons; and, secondly, whether, if that be not established, there is proof of an acknowledgment and recognition by the Nawab of the two Plaintiffs as his sons, which would give them the status of sons and a title to inherit.

The direct evidence of the marriage is not very satisfactory, and is in some respects contradictory. Still there is positive evidence that a ceremony of marriage did take place before the births of the children. That direct evidence is met by the negative evidence of witnesses who say that if such a ceremony had taken place they must have known of it. From this state of the evidence, if it stood alone, it would be difficult to affirm that a marriage had been established; but the evidence exists, and a question certainly arises whether the treatment of the minor Plaintiffs by the Nawab as his sons, to be hereafter adverted to, and the acknowledgments he made respecting them, do not afford such a strong presumption of marriage as to entitle the testimony of the witnesses who speak to the marriage to credit which otherwise it would not have possessed. Their Lordships, however, do not think it necessary to decide the case upon the ground that an actual marriage is proved. The Commissioner of Lahore has found against the marriage. The two Judges of the High Court certainly do not find against it. The inclination of Mr. Justice Boulnois' opinion was that it

was not proved, whilst the inclination of Mr. Justice Lindsay's opinion was the other way; they therefore did not find against the marriage, though they have not affirmed it. Their Lordships also do not find it necessary to pronounce a distinct opinion upon the question whether the marriage, in fact, took place, as they think the Plaintiffs are entitled to succeed upon the ground that acknowledgments of them as his sons by the Nawab have been proved.

The evidence of the acknowledgment of the elder son, Rustam, is extremely strong. It rests not only on oral testimony, but on documents, one of which is almost conclusive of the question. It seems that Rustam was born six or seven years before his father's death. His brother Umar was born shortly before his death,—the precise time is not ascertained,—probably about a year, or a little more; but it is not possible to arrive at the time with any exactness.

With regard to Rustam, it is shown that he was treated by the Nawab as a legitimate son would be. He was often taken by his father on visits to the houses of Mr. Warburton, a native of India, but educated by an Englishman and a Government official, and of Major Parsons, another British officer, both living in the neighbourhood. The Nawab appears to have introduced Rustam as his son, and the evidence is that he treated him with greater affection than his eldest son Azmat. Not only in the Nawab's house was Rustam put forward as his son, but he was taken on the above-mentioned and other visits as if he were a legitimate son. He was always dressed as a legitimate son would be. Mr. Warburton proved that he "used frequently to see "Rustam going about well dressed, mounted on "an elephant, and attended by servants." He also says he was extremely like the Nawab. A

great deal of other evidence was given to this effect. Besides evidence of this kind, when Rustam's education was about to be commenced the Bismillah ceremony was performed. There is distinct evidence of the performance of that ceremony, not only by the native gentlemen who attended, but by Mr. Warburton and Major Parsons, who were also invited and attended. Mr. Warburton appears to have been an intimate friend of the late Nawab; he is a witness whose credit is entirely unshaken, and appears to be in every respect an unimpeachable witness. At this Bismillah ceremony Rustam was introduced and treated as the son of the Nawab. It is scarcely conceivable this ceremony would have been performed if he had been an illegitimate son. With regard to the evidence of the Defendant's witnesses as to the manner in which these children were treated, their Lordships think that it is entirely unworthy of credit. In opposition to the strong and credible evidence given by the witnesses for the Plaintiff, it is attempted to be shown that these children were, in fact, the children of a slave girl allowed to have promiscuous intercourse with men outside the Nawab's house, and whose fathers, some of the witnesses say, it was impossible to know. This evidence, and that which seeks to prove that the boys were treated as such children would probably be treated, seems utterly unworthy of credit.

In addition to the oral evidence which has been mentioned, a declaration, important in itself, and as affording confirmation of the oral testimony of the Plaintiffs, is found in the report which the Nawab made to the Government respecting the arms belonging to his family. In a letter to the Deputy Commissioner of Karnal, dated on the 7th March 1866, the year before he died, is a schedule in which the arms held by himself and the members of his family are

described. The letter is:—"After expressing "a desire for an interview which has abundant "advantages, and is the best of the objects, be "it known to your splendid and kind mind, on "the arrival of your kind note a list of my "personal arms is annexed to this friendly "letter, as required in Commissioner's circular "dated 8th January 1866." In that list there are columns with the names of the possessors and the descriptions of the arms. First there is "Personal," that is himself; and he returns 11 native swords, 1 shield, muskets, pistols, and other arms. Then follows:—"The Nawab's son, Azmat Ali Khan," (the Appellant,) 4 native swords, 1 shield, 2 double muskets, and so on. Then follows:—"The Nawab's son, Rustam Ali Khan," (the Respondent,) 4 native swords, 1 shield, 2 double muskets, and so on. In this document the Nawab describes Rustam as "the Nawab's son, Rustam Ali Khan," and returns exactly the same number of arms as belonging to him as belonged to his eldest son. He therefore not only calls him his son, but treats him as he treated Azmat, his undoubted legitimate son. Their Lordships think that this acknowledgment in a formal report to the Government is almost conclusive as regards Rustam.

Undoubtedly the evidence of acknowledgment and recognition of Umar the youngest son is, as may naturally be expected, much less than that in the case of the elder brother. Considering the short period that elapsed between his birth and the death of the Nawab, it is not surprising that a paucity of evidence appears; but their Lordships think that enough is shown in the case of Umar also to satisfy them, as it satisfied the Judges of the Chief Court of the Punjab, that he was acknowledged and treated as a son.

The first witness for the Plaintiffs, Nijabut

Ali Khan, who was a relation of the deceased Nawab, gives evidence of an acknowledgment which, if true, goes far to support the claim of the younger son: "I often used to go to "Nawab Ahmad Ali Khan, and he often acknow- "ledged to me that Rustam Ali Khan and Umar "Daraz Ali Khan were his sons." No doubt the Commissioner of Lahore has found that this witness and two other witnesses who speak of the marriage are not to be believed, because he considers that the marriage did not take place, and not believing them upon that point he did not give credit to them upon any other. Their Lordships are by no means sure that the Commissioner was not too sweeping in his condemnation of these witnesses, because even if some discrepancies appear in their evidence as to the facts of the marriage, it may still be that they were speaking the truth when they said they were present at the ceremony. It is too common for witnesses in India to become partisans of the party for whom they are called, exaggerating facts, and adding incidents to transactions which really took place. But it is not always safe to disregard their evidence altogether because in some respects they may have said that which is not believed. If the case, however, had rested on this man's evidence, their Lordships agree with the learned Counsel for the Appellant that it would have been, to say the least, unsafe to act upon it; but the evidence does not rest there. Mr. Warburton, the witness who has been already described and commented upon, gives evidence of what appears to be a distinct acknowledgment by the Nawab of Umar as his son. Mr. Warburton is examined at some length by both parties. He had excellent opportunities of knowing the state of the Nawab's family with accuracy. He visited the Nawab, was invited to the Bismillah ceremony

of Rustam, and was on intimate and confidential terms with the Nawab. He is asked: "Do you know anything about Murdaraz "Ali Khan?—another name for Umar. (Reply.) "Yes, I know Murdaraz Ali Khan; he is the "reputed son of the late Nawab Ahmad Ali "Khan.—(Question 2.) Whenever you had oc- "casion to see these two boys, or either of them, "in what dress did they generally appear? I "mean, were they dressed in such costumes as the "sons of Nawabs and native gentlemen were? "(Reply.) Yes, they always appeared in clothes "as usually worn by sons of Nawabs and native "gentlemen.—(Question 3.) Did you see father "and son in one place, and was then the treatment "like that of a father? (Reply.) I do not recol- "lect seeing Murduraz Khan with his father; "but I have frequently seen Rustam Ali Khan "and his father at the same time, and his treat- "ment of Rustam Ali Khan was that of a father." The more specific evidence is at the end of his examination, and is in these terms. It is given in reply to a question which was put to him in cross-examination. "To the best of your recol- "lection did Nawab Ahmad Ali Khan ever talk "to you about Rustam Ali's sonship; *i. e.*, did "he ever acknowledge in your hearing, in distinct "and solemn words, that Rustam or Umar-daraz "Ali was his son or legitimate son? (Reply.) I "do not recollect having any conversation with "the late Nawab as to the parentage of Rustam "Ali Khan; but with regard to Umar-daraz Ali "Khan I distinctly recollect that shortly after his "birth Nawab Ahmad Ali Khan came to my house "and said that Umar-daraz Ali Khan his son's "mother had no nourishment, and he was then "advised to procure a sucking bottle for the child. "I don't recollect having on any other occasion "heard the Nawab talk of Umar-daraz Ali Khan "as his son." If that statement be true, and

their Lordships are disposed to give credit to it, can there be any doubt that it was a distinct acknowledgment of this young boy by the Nawab as his son? It was made in the most natural way, and conveyed to Mr. Warburton's mind the clear impression that he referred to and acknowledged Umar as his son. It is also important to observe that Umar received the titular name of Khan, as his brother Rustam had, a name which it is not likely the father would have bestowed upon any but his acknowledged and legitimate sons. Those who advised the Appellant were apparently aware of the importance attached to this name, for they endeavoured to show that it had not been given to the boys until after the death of the Nawab; that is distinctly disproved by the evidence in the case, and it appears that they always bore that name.

The evidence of Major Parsons is not so distinct as that of Mr. Warburton. He says, to the best of his recollection, the Nawab spoke himself to him about the second boy. Besides this testimony, there is general evidence that both boys were treated by the Nawab as his sons.

Undoubtedly an acknowledgment of each son must be proved. In the actual circumstances of this case, it is highly probable that when the Nawab had recognised the elder son of Mussumat Lalli, he would also acknowledge the younger, and this probability gives support to the evidence in the case of the latter. There seems to be no reason for his making a distinction between them.

Their Lordships have already adverted to the unsatisfactory character of the evidence given on the part of the Defendant. The only piece of evidence entitled to weight is the genealogical tree which has been produced by him. That tree professes to be a pedigree of the

Nawab's family which was returned to the Government. The genealogy begins, at no distant period, with the father and uncles of the late Nawab. He was asked for a genealogy of his family. Undoubtedly in the paper which has been produced there is under his own name an entry of two sons only, Rahmat Ali Khan "deceased," and Azmat Ali Khan; there is no mention of Rustam, though Rustam must have been born at the time that this pedigree was drawn up. It is, however, to be observed that the document produced is a copy only, and that the original has not been produced or satisfactorily accounted for. There may be considerable question whether the copy was admissible in evidence; but whether admissible or not, it is a copy only, and there is an entry after the name of Rahmat Ali of his death—"Rahmat Ali Khan, *deceased*." Now at the time that this pedigree was prepared Rahmat Ali Khan was not dead; and therefore the document must have been altered, at least to that extent after it had been originally prepared. It is possible that when the Nawab was called upon for his genealogy he might have thought it sufficient to give the genealogy only down to himself. But the document itself, the original not being produced, containing an entry which could not have been in a genuine original, cannot be safely relied upon. Even if an original pedigree had been produced without the name of Rustam, though it would no doubt be a piece of evidence favourable to the view of the Appellant, and perhaps strongly favourable to that view, it would not be sufficient to outweigh the positive evidence of the acknowledgment of Rustam by the Nawab.

Their Lordships, therefore, have come to the conclusion that an acknowledgment by the Nawab of both the minor Plaintiffs as his sons has been proved.

The only question which remains on this part of the case is as to the effect of these acknowledgments. Both the Judges of the Chief Court, who have given learned and careful judgments, have gone very fully into the authorities upon this question. Their Lordships, however, are relieved from a discussion of those authorities, inasmuch as the rule of Mahommedan law has not been disputed at the bar; viz., that the acknowledgment and recognition of children by a Mahommedan as his sons gives them the status of sons, capable of inheriting as legitimate sons, unless certain conditions exist, which do not occur in this case. That rule of the Mahommedan law has not been questioned at the bar. In this case we have not only the treatment of the Plaintiffs by the Nawab as his sons, from which under certain circumstances an acknowledgment may be presumed, but we have actual acknowledgments of them. It has been decided in several cases that there need not be proof of an express acknowledgment, but that an acknowledgment of children by a Mahommedan as his sons may be inferred from his having openly treated them as such. The question whether the acknowledgment should be presumed or not must of course depend on the circumstances of each particular case in which it arises. The only authority, after the course which the argument has taken, to which their Lordships think it necessary to refer, is the case of *Ashrufood Dowlali Ahmed Hossein Khan* v. *Hyder Hossein Khan* (11 Moore, I.A., p. 113). In that case their Lordships say:—"The presumption of legitimacy from marriage follows the bed, and whilst the marriage lasts the child of the woman is taken to be the husband's child; but this presumption follows the bed, and is not antedated by relation. An antenuptial child is illegitimate. A child born out of wedlock is

" illegitimate; if acknowledged he acquires the " status of legitimacy." The rule of the Mahommedan law as to acknowledgment is so affirmed in this judgment. " When there- " fore a child really illegitimate by birth " becomes legitimated, it is, by force of an " acknowledgment express or implied, directly " proved or presumed. These presumptions are " inferences of fact." This last passage appears to refer to cases where an express acknowledgment is not proved, and has to be presumed from other facts. They are built on the " foundations of the law, and do not widen the " grounds of legitimacy by confounding concu- " binage and marriage." These observations must be taken with reference to the facts of that case; and in that case it appeared that there was a *Moottah* marriage after the birth of the child. There was no acknowledgment, and the treatment of the child was equivocal. Sometimes he was treated as a son and at others not; and indeed, by a deed executed by the father for that purpose, he was distinctly repudiated by him as his son. In that case it was decided that, in the absence of express acknowledgment, the evidence was insufficient either to raise the presumption of a marriage which in point of time would cover the birth of the child, or of an acknowledgment. The facts and questions in that case were very complicated, and some of the passages in the judgment referred to by the Judges below can only be understood by referring to the questions to which they were addressed. However, there really is no dispute about the law; and their Lordships in this case have not to lay down any new principles of law, but only to apply a well-established principle to the facts.

The remaining point relates to a part of the property which is sought to be recovered. It

appears that some part of the property in suit consisted of land which was assumed in the Courts below to be held under a grant from the Crown on terms which brought it within the Pensions Act (Act XXIII. of 1871). Their Lordships have not been referred very specially to the facts, nor was that necessary in the view taken by them of the construction of this Act; they are therefore not to be understood to affirm the assumption upon which the Courts below acted, that the grant in question is a grant within the Pensions Act. They give no opinion upon that point; but assuming that the Court was right in considering the grant as one within the Pensions Act, their Lordships think it came to a correct decision in holding that, when the certificate mentioned in the Act was obtained, the suit might proceed. It seems that after the judgment which disposed of the principal questions in the case had been delivered, final judgment was suspended upon an objection that no certificate had been obtained. Before the case was finally disposed of and the final decree passed, the certificate was obtained and delivered to the Court. The Pensions Act, by section 4, provides that: "Except as herein-after provided, no Civil "Court shall entertain any suit relating to any "pension or grant of money or land revenue "conferred or made by the British or any former "Government." Then the sixth section is, "A "Civil Court, otherwise competent to try the "same, shall take cognisance of any such claim "upon receiving a certificate from such Col-"lector." It is contended that the suit ought to have been dismissed altogether as regards the property held under the grant, because no certificate was obtained before the commencement of the suit; but their Lordships think that the Court, although up to a certain time they had proceeded, apparently without objection,

with the suit without a certificate, was justified in going on with the suit when it was received. The statute says that: "A Civil Court otherwise competent to try it"—this Court was competent to try it—"shall take cognisance of any such claim upon receiving a certificate from such Collector." When the Court received the certificate it was bound to take cognisance of the claim; and it seems to their Lordships that, finding an existing suit when it received the certificate, it might take cognisance of the claim in that suit. The decision on that point, therefore, seems to their Lordships to be correct.

The result is that the decree of the Chief Court of the Punjab should be affirmed; and their Lordships will humbly advise Her Majesty to that effect. The Appellant will pay the costs of the Appeal.