Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Faiz Muhammud Khan v. *Muhammud Saeed Khan, from the Court of the Judicial Commissioner of Oudh; delivered* 1*st April* 1898.

Present:

LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD MORRIS.
SIR RICHARD COUCH.

[*Delivered by Lord Hobhouse.*]

The sole question in this appeal is whether Sultan Khan, the grandson of Abdul Hakim Khan took under the will of his grandfather a heritable interest in his grandfather's Talookdari estate. Sultan is dead, and the Plaintiff, who is now Appellant, claims to represent him. The estate is one of those which were entered in List III of Act I of 1869; which means that, not being one in which the custom of primogeniture had previously prevailed, the Talookdar elected that it should so descend in future. The Defendant and Respondent Saeed is another grandson of the testator.

The Plaintiff claimed a further share in the estate, being that which was devised to Shabhan, a daughter of the testator who died in his lifetime. That claim has been decided against him and is not revived in this appeal. At the hearing the District Judge wholly dismissed the suit, holding that Sultan took no

more than a life interest under his grandfather's will. The Plaintiff appealed, when the Acting Judicial Commissioner Mr. Dyson held that Sultan took an absolute interest; and he remanded the suit for trial of the question (among others) to what share of profits is Plaintiff entitled in the 4-anna share of profits inherited by Sultan Khan.

On remand the District Judge found "that "two persons have equal rights to this item; "one of them is Mussammat Aziz-un-nissa, and "the other is Plaintiff as representative of Sultan "Khan." With that finding the appeal came again before the Judicial Commissioner's Court for final disposal. The Court then consisted of the Judicial Commissioner Mr. Burkitt and the Additional Judicial Commissioner Mr. Howell. Those learned Judges held that they were not bound by Mr. Dyson's decision; and, considering that Sultan took only a life interest, dismissed the appeal with costs. That had the effect of affirming the District Judge's original decree which dismissed the suit with costs.

The testator was a Mahomedan gentleman who married two wives and had children by both of them. His will which is now to be construed takes notice that a daughter has just been born to him by his second wife and then proceeds—

"I do execute this will, in modification of my will dated "19th September 1870, and got the same duly registered, so "that after my demise the engagement in respect of the Ilaka "(estate) in its entirety and without division may be made in "the name of Muhammad Saeed Khan, son of Mussammat "Shahzadi Bibi my eldest daughter by my first wife, and "that Muhammad Sultan Khan, son of Mussammat Umrao "Bibi my second daughter by my first wife, and Mussammat "Moti Bibi my third daughter by my first wife, and "Mussammat Shabhan Bibi my fourth daughter from my "second wife, may be as equal sharers (with him) entitled to "appropriate profits, and that the profits of the said estate "after deducting therefrom the Government revenue, "Talukdari, and Ahl-i-biradri (members of brotherhood) "expenses may be divided equally among all the four persons.

" Let no one act contrary to this. Should any one do so, his " act shall be null and void both before the authorities for the " time being and the members of the brotherhood. If in case " Muhammad Saeed Khan fail to distribute the profits, or " raise a dispute over the distribution, each sharer shall be " competent to have with the help of the Government set apart " for him lands yielding his share of profits; but the estate " shall continue in the name of Muhammad Saeed Khan entire " and undivided."

This will was made on the 1st February 1873, and it is not now disputed that all former wills were revoked by it, or that it is the only instrument now to be construed. But it is not unimportant, especially with reference to the arguments founded on the testator's preference of primogeniture for his Talook, to see how he had dealt with it by former wills, and what were his actual dispositions immediately before the will of 1873.

The Government of India thought it important for the quiet of titles in Oudh that Talookdars should be advised to make wills, and Abdul Hakim was so advised as early as October 1860. In January 1861 his only issue was three daughters by his first wife, and he provided that Shahzadi his eldest daughter should be Lumbardar in his place, and that his daughters Umrao and Moti should be subordinate co-sharers in equal shares. In the course of that year Umrao gave birth to Sultan; and on the 5th October 1861 the testator made a second will giving the estate to Sultan according to the custom of primogeniture. He directed that his two other daughters, then childless, should get maintenance from Sultan; but with a proviso that if they should not remain on terms of peace and concord, his three daughters should be proprietors in equal shares, Sultan being only Lumbardar. When the eldest daughter Shahzadi gave birth to Saeed, the testator made a third will dated 9th September 1870. By it he gave his estate to Sultan

and Saeed in equal shares and made them joint Lumbardars. Also he directed that his third daughter Moti should get maintenance. The 4th and last will was, as stated, made upon the birth of another daughter, Shabhan.

Their Lordships have heard no reason founded on the language of the will of 1873 for confining the interest of Sultan to a life estate except that the gift is only of profits. But in order to show that an unlimited gift of profits is less than a gift of the corpus some evidence should be found in the context or in the circumstances affecting the property. It appears to their Lordships that the context so far from favouring the restriction of the gift, bears the other way. The testator does not give the estate to Saeed, but directs that the engagement shall be made in his name. When he disposes of the surplus after deducting revenue and expenses, he puts all four takers on the same footing, equal shares of profits are given to each. Finally comes the provision that in case of dispute each sharer shall have land set apart for him, only the estate is to continue in the name of Saeed (clearly as Lumbardar) entire and undivided. It may be that such a setting apart would be difficult, as the Court below observes; but the testator clearly contemplated it, and it seems more consistent with a permanent than with a limited interest.

The will then read alone must be construed as giving a heritable interest to Sultan, and it is not shown from any of his former dispositions that the testator was in the habit of using any of its expressions in any but their ordinary sense, or that he looked upon the gift of the Lumbardari as carrying the whole beneficial interest, or that he leant in favour of the rule of primogeniture. On the contrary, in the will of

January 1861 he gives the Lumbardari according to primogeniture, and the surplus in equal shares; in the will of October 1861 he provides for equality of proprietorship in case of dispute; and in the will of 1870 he gives the proprietorship, Lumbardari and all, to his two grandsons equally.

Their Lordships' attention was called to the fact that the Plaintiff is not entitled to the whole of Sultan's share. The District Judge found that Aziz-un-nissa is equally entitled. She is not a party to the suit, and would not be bound by any decree made in it. But their Lordships prefer to confine themselves to a construction of the will on the points argued in this appeal. The plaint, which is rather confused both in its statement and in its prayer, sues for possession of 8-annas share in the Talook. A declaration of the nature of the devise to Sultan will enable the Courts to put him in enjoyment of so much of the share of Sultan as has devolved on him, in the mode appropriate to the circumstances of the Talook. Their Lordships think that the proper course will be to discharge the decrees of the Judicial Commissioner's Court and of the District Judge; to declare that according to the true construction of the will Sultan Khan took a heritable interest in 4-annas of the profits of the estate after deducting Government revenue, Talookdari and Ahl-i-biradri expenses; to dismiss the suit so far as it seeks relief in respect of the share devised to Shabhan; and to order that neither party shall pay or receive costs either in the District Judge's Court or in that of the Judicial Commissioner; in both of which Courts the Plaintiff was right as to one half of his claim, and wrong as to the other half. They will therefore humbly advise Her Majesty to this effect. On this appeal the

Appellant is wholly right and the Respondent wholly wrong. Therefore the Respondent must pay the costs.