Judgment of the Lords of the Judicial Committee of the Privy Council on the Consolidated Appeals of Baker Ali Khan v. *Anjuman Ara Begam and Wasi Ali Khan; and of Sadik Ali Khan* v. *Anjuman Ara Begam and Wasi Ali Khan, from the Court of the Judicial Commissioner of Oudh; delivered the 4th March* 1903.

Present at the Hearing:

LORD MACNAGHTEN.
LORD LINDLEY.
SIR ANDREW SCOBLE.
SIR ARTHUR WILSON.
SIR JOHN BONSER.

[*Delivered by Sir Arthur Wilson.*]

The suit out of which these consolidated Appeals arise relates to the devolution of a part of the property of Haji Begam, a Mahommedan lady who died at a very advanced age on the 19th January 1894. She was a daughter of a former King of Oudh, and the family to which she belonged are Shiahs and governed by the Shiah law.

Haji Begam was married to Ikhtidaruddaulah, who died in 1883, and the issue of that marriage was a son Zaka-uddaulah, who died about 40 years ago, leaving issue, by three different mothers, Farzana, Haidri, and Jafri. By Farzana he left a son Fazl Ali, who is dead without issue, and a daughter Najmunnissa, who died leaving a son Baker Ali, the first Appellant. By Haidri Zaka-uddaulah left a daughter, Shazada, since deceased, whose daughter is the first

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Respondent. By Jafri he had a daughter Wilayeti, who died leaving a son, the second Respondent.

On the 10th July 1890 Haji Begam executed a document, the legal effect of which is in controversy, under which it is contended by the Appellants that certain portions of Haji Begam's estate have become wakf devoted to religious purposes. Under this document Sadik Ali the second and Baker Ali the first Appellant were to be executors and mutawallis; and on the 21st January 1895 Sadik Ali alone obtained probate of the document as a will, Baker Ali being a minor.

On the 8th June 1895 the now Respondents filed the present suit against the Appellants in the Court of the Additional Civil Judge of Lucknow. They alleged that they were entitled as heirs of Haji Begam to two-thirds of the property which should pass to her heirs, while they admitted that the other third passed to the first Appellant, Baker Ali, as their co-heir. And they claimed to have it established that the alleged will of the 10th July 1890 was invalid as against them as heirs, and to recover two-thirds of the property affected by it.

The Additional Civil Judge who heard the case held that the Plaintiffs, the now Respondents, had failed to prove that they were heirs of Haji Begam. As to the second question, he held that the will was not valid against heirs; but as he had found that the Respondents were not heirs, he dismissed their suit with costs. Against this decision an Appeal was brought to the Court of the Judicial Commissioner of Oudh. The two Additional Judicial Commissioners who heard the Appeal differed from the First Court on the first question and held that the now Respondents were heirs of Haji Begam, while they agreed with the First Court as to the effect of the will; and

they accordingly reversed the Decree of the First Court and made a Decree in favour of the now Respondents on all points. Against that Decree the present Appeals have been brought.

With regard to the question whether the Respondents are heirs of Haji Begam, their case is that their mothers Shazada and Wilayeti were the legitimate children of Zaka-uddaulah, inasmuch as the respective mothers of those ladies, Haidri and Jafri, were his wives, married to him in the mutai or temporary form, which is accepted as valid by the Shiah law.

On the other side it was alleged that Haidri and Jafri were both sisters of Farzana, the first wife of Zaka-uddaulah, and that Farzana was living at the time of the supposed marriages with Haidri and Jafri, so that there could have been no lawful marriages with them. Both Courts in India have found that the facts necessary to support this contention are not proved; and their Lordships were not asked to review these findings.

It was also urged in India as matter of law that a child of a mutai marriage is not legitimate without proof of acknowledgment by the father; but this contention was abandoned before their Lordships.

The case that remains on behalf of the Appellants is that neither Haidri nor Jafri was married to Zaka-uddaulah, that they were mere slave girls, and that their children by Zaka-uddaulah were the fruit of illicit intercourse with him. The issue thus raised, which is one purely of fact, is the one upon which the Courts in India have differed.

There is no direct evidence of either marriage, a point upon which the Courts in India have not laid much stress, and under the circumstances their Lordships think rightly. There is no

evidence of acknowledgment of the children by their father; a point which is of less importance than it might otherwise have been by reason of the fact that, when he died, the two children whose status might have been affected were very young.

But marriage and legitimacy may of course be proved in such cases by other means. In the present case the most important evidence in favour of legitimacy consists of a series of statements made by Haji Begam herself which were admitted as evidence by the Courts in India, and their Lordships think rightly. It appears that Haji Begam was in receipt of a pension from Government known as a "wasika"; and according to the practice in force such pensioners were from time to time called upon to make statements to the wasika office, a department under Government, as to who were their heirs. A series of such statements by Haji Begam extending from 1860 to 1890 is in evidence. It also appears that from time to time Haji Begam was asked by the wasika officers to furnish explanations of the statements submitted by her, and several letters in reply to such inquiries have been produced. In these documents beginning with that of 1860 down to and including that of 1885, Haji Begam speaks of the line of Haidri and that of Jafri as heirs, in exactly the same terms as of the line of Farzana, whose legitimacy is not questioned; she speaks of Shazada and Wilayeti as her grand-daughters, and as daughters of Zaka-uddaulah; she speaks of Shazada, at a time before Wilayeti was born, as daughter of a mutai wife, coupling her as such with Najmunnissa; and she speaks of Jafri as a mutai wife still alive. In her statement of 1890 it is true she omitted the Respondents from her list of heirs. In her letter of explanation she gave her reasons for this, which do not seem to be inconsistent with

her previous statements of fact, but which were not accepted as satisfactory.

Their Lordships think that the Appellate Court was right in giving great weight to these documents. They come from a public office and bear indorsements which exclude all doubt of their genuineness; they contain the statements of one who had the best means of knowledge, made at times when no such controversy as the present can well have been in contemplation; and the statements are such that, if true, they seem to conclude this part of the case.

Ikhtidaruddaulah, Haji Begam's husband, who died in 1883, also appears to have been in receipt of a wasika, and when he died a question arose as to who should succeed to it. A petition was presented jointly by Fazl Ali, Shazada, and Wilayeti, describing the deceased as their grandfather, and asking that his pension should be allotted to them. This petition their Lordships think has been duly proved, and it seems to be by necessary inference a statement by Fazl Ali, and a statement against his own interest, that the title of his two cousins was as good as his own. And so far it confirms the far more important statements of their grandmother.

On the same occasion inquiry was made from the wasika office of a number of persons as to the heirs of the deceased man; and the answers then obtained from them with the evidence of the same persons at the trial have been received. This evidence, however, is of very inferior value to that previously referred to, for it consists at best of hearsay reports of statements said to have been made by members of the family. The learned Judges who heard the Appeal in India do not appear to have attributed much importance to it, and their Lordships do not rely upon it for the conclusions at which they have arrived.

In support of the Respondents' case reliance was further placed upon the treatment of Haidri, Jafri, and the descendants of each in Haji Begam's family, which, it was argued, was inconsistent with illegitimacy. In dealing with this branch of evidence their Lordships will only notice those matters as to which there is no controversy of fact.

Haidri and Jafri and their children and grandchildren were always treated as members of Haji Begam's family. Haji Begam made an allowance to each of those ladies for the maintenance of herself and her children. Haji Begam provided for the marriages of the children, and such marriages took place with members of the family; thus the second Respondent, Wasi Ali, is married to the daughter of the second Appellant Sadik Ali, who is himself a sister's son of Haji Begam. Lastly, in the will of Haji Begam, the effect of which will have to be considered in another connection, when making provision for the anniversary religious ceremonies in commemoration of the deaths of certain ladies, the testatrix places Shazada in the same list, not only with Najmunnissa, but with the testatrix herself and her mother, and provides alike for all.

To meet the case of the Respondents reliance has been placed upon two lines of defence. First, the learned Counsel for the Appellants has sought to impugn each piece of evidence in detail, and in particular has examined and criticised every document relied upon, with the object of shaking its credit and minimising its effect. Their Lordships have given full weight to these criticisms, but they have failed to create any doubt in their Lordships' minds as to the trustworthiness, or as to the meaning and effect of the documents to which, as already indicated, they attach importance.

The Appellants relied secondly upon evidence given at the trial, by witnesses of each side, the

effect of which is said to have been to show that in the family to which Haji Begam belonged very lax views as to sexual relations prevailed, and that, for social purposes at least, legitimate and illegitimate children were treated alike. This evidence seems to have had great weight with the Court of First Instance.

It is unnecessary to consider what effect ought to have been given to this evidence if the case of the Respondents had rested only on evidence of treatment in the family, for this is not the case. The statements and letters of Haji Begam and the petition to which Fazl Ali was a party related, not to social status or family recognition, but to rights of inheritance. And the evidence in question can have no bearing upon statements on that subject. Certainly too it can have no tendency to neutralize the express assertions of Haji Begam that Shazada was the daughter of, a mutai wife and that Jafri was a mutai wife.

For these reasons their Lordships are of opinion that the Additional Judicial Commissioners were right in holding that the Respondents are co-heirs with Baker Ali of Haji Begam, and are as such entitled to two-thirds of the property descending to her heirs.

The second inquiry involved in these Appeals is as to the validity and effect of the alleged Will of the 10th July 1890.

That document commences with the usual invocation and reference to the uncertainty of life, and proceeds :—

" I deem it proper to dispose of by will a third part of my
" movable and immovable property and that of cash in the way
" of God for ever, in order to improve my condition in the next
" world, and to make arrangements thereof in my life-time that
" there may arise no quarrel and dispute after my demise, I
" . . . do hereby set apart out of my entire property a
" third part as detailed below, valuing this date Rs. 54,100
" Queen's coin, for the expenses of Imambara, &c., and having
" appointed two executors and *mutawallis* (Superintendents)
" named Nawab Sadik Ali Khan, and Nawab Baker Ali Khan,
" make my Will with the following provisos :—

" (1.) That having placed one *pucca* Imambara owned and " possessed solely by me and free from all transfers with two " *pucca* Mahal Sarais, compound and *pucca* shops, situate in " Mohallah Pir Bokhara and Lohia Bazar in the Lucknow city, " and bounded as under, together with all furniture and articles " intended for mourning purposes in the month of Moharram " and belonging to the said Imambara, the detail whereof is " given below, under the charge of the aforesaid *mutawallis* " (Superintendents) I set apart for the perpetual expenses of " Imambara 4 Promissory Notes amounting to Rs. 54,100 " numbered as follows :—(The numbers are given, as are the " boundaries of the Imambara, and a list of furniture and other " articles)."

Para. 2. That the monthly and annual expenses of the Imambara mentioned above shall ordinarily be as detailed below, and the said executors shall have no power at any time to decrease or increase expenses. (The expenditure is here prescribed.)

Para. 3 provided for the minority of Baker Ali.

" (5.) That Nawab Sadik Ali Khan and Nawab Baker Ali " Khan will continue to act as Superintendents and Managers " during their life-time and after their demise, their descendants, " generation after generation will hold the same office. If (God " forbid) any of their descendants may turn out of bad conduct " and prove incompetent for the office, the British Government " and Mujtahid ul-asr (religious leader for the time) conjointly " shall appoint two fit persons to act as Superintendents for the " Imambara and they shall be invested with the afore-mentioned " powers. Any of the Superintendents desiring to renounce his " office can do so after appointing a new man of his own choice.

" (7.) The income arising from the shops and houses shall be " kept with the Superintendents and after defraying miscella- " neous expenses of the Imambara the surplus shall be distributed " among Saiyeds.

" (8.) If, perchance, both the executors or their descendants " commit embezzlement and misappropriation, subvert the " arrangements stated above, or raise any dispute or quarrel " about the same, the Magistrate of the District shall, in that " case, institute an enquiry and shall have power to appoint " other two persons in their place and act as directed above.

" (9.) The executors shall have no power to make any sort " of transfer by mortgage or sale, in respect of the above detailed " Promissory Notes, at any time.

" (10.) That the said executors shall have power to endorse " the Notes after my demise in execution of the will, and " during my life-time I shall receive the interest and de- " fray the expenses of the Imambara ; nay, so long as I live, " all sorts of property in respect whereof the will has been " made shall remain in my absolute proprietorship. The " expenses incurred after my death in obtaining a certi- " ficate, in conducting suits in the event of dispute arising " between heirs or in seeking any other relief, shall be met

" from the interest arising from the Promissory Notes, but in
" case of insufficiency the additional expenses shall be paid by
" the Superintendents by deducting from such items as they
" think proper, so that they may sustain no personal loss.
" The Superintendents are further empowered to make a pro-
" portionate deduction in all the items of annual expenses, if
" by chance any diminution be made by Government in the
" present rate of interest.

"(12.) In the said Imambara corpses will be interred with
" the consent of the above-named Superintendents.

' (13.) If after the execution of this will, which has taken
" place with my free will and consent, I execute another will
" or a codicil revoking this will and disposing of the property
" detailed above, the latter one should be regarded by the
" Court as null and void."

In paragraph (14) it is said, "I have written these few lines
" as a will and have got it registered."

Their Lordships think it clear that this document is a will, and that its expressed intention is to convey the property with which it deals, on the death of the testatrix, to the Mutawallis, the Appellants, as wakf for the purposes specified; and effect must of course be given to that intention if the law admits of it.

It was held, however, by both the Courts in India that under the Shiah law, unlike the Sunni law, a wakf cannot be created by will. And though it is not so stated, there can be little doubt that the Courts in so holding acted out of deference to the decision of a Full Bench of the High Court of the North-Western Provinces in 1892 in the case of *Agha Ali Khan* v. *Altaf Hasan Khan*, I.L.R. 14 Allahabad, 429, in which the law appears to have been so laid down. Their Lordships have therefore to consider whether the High Court, whose reasons were most fully expressed by Mahmood J., were right in deciding, as they seem to have done, in that case that under Shiah law a wakf cannot be created by will, though the result can be secured indirectly by making a gift of property with a direction to the donee to create the wakf desired.

In considering this question their Lordships must start with certain propositions as to which there is no doubt. A Shiah can make a gift. He can make a gift of the kind known as a wakf. He can make a will and can, speaking generally, give a gift by will. It would seem to follow as a logical inference that he can make a wakf by will, as can a Sunni. And in substance and effect it is admitted that he can indirectly do so. It is admitted that he can give a gift of property by will and require the donee to apply it as wakf; the contention is that the testator, though he can do this, cannot himself directly create the wakf by his will. The distinction which has been taken is thus one of form, not of substance; and it is one which has little to commend it unless their Lordships are constrained by authority to accept it.

The only judicial authority prior to 1894 on the present point cited in argument is the case, in 1836, of *Wasiq Ali Khan* v. *Government* 6 S. D. A. 110 mentioned by Mahmood J. at p. 449 of his judgment, in which effect was given to a testamentary wakf of a Shiah. Mahmood J. suggests that the Sudder Court wrongly applied Sunni law to the case, and it may be so; but it may equally well be that it was not then thought that there was any difference on this point between the two schools of Mahommedan law. The learned Judge suggests also that until the case before this Committee in 1841, *Rajah Deedar Hossein* v. *Ranee Zahoor-oon-Nissa* 2 Moo I. A., 441 Shiah law was not consistently applied to Shiah cases. And again he may be right, though the language used in the case just cited, at pp. 477, 478, hardly supports him in this view. The case before the Sudder Court is not a strong authority, but so far as it goes it lends support to the more liberal view upon the question under consideration. The case of

Prince Suleman Kadr v. *Darab Ali Khan*, 8 I. A. 117, decided in 1881, shows at least that in the same family to which Haji Begam belonged a testamentary wakf was created and apparently went unquestioned.

On the other hand the only support for the doctrine that a Shiah cannot directly make a wakf by will is to be found, not in any positive statement by any of the recognised authorities on Shiah law, but in the reasoning of Mahmood J. upon a number of more or less ambiguous texts, which their Lordships have considered with all the respect due both to the opinion of so eminent a Mahommedan lawyer, and to the concurrence of his colleagues in the Full Bench in his views.

In the earlier and more important part of his judgment, the learned Judge deals with texts, many of them of undoubted authority, which purport to lay down the essentials of a wakf under Shiah law, namely that a wakf is by definition a contract involving offer and acceptance, that as essential conditions there must be delivery of seisin, that the gift must be unconditional, and that nothing must be reserved for the settlor.

The last two conditions may, their Lordships think, be disregarded for the present purpose. If a wakf may be made by will speaking from the death, there is no condition and no reservation in such a case as the present. Mahmood J.'s reasoning turns on the definition and the first condition; he thinks his conclusion necessarily follows from them, and this is the really important part of his reasoning, on which the whole depends. The argument of the learned Counsel for the Respondents was the same; he contended that if you accept the texts, as you must do, you are bound to accept their logical consequences.

In *Abul Fata* v. *Russomoy Dhur Chowdhry* 22 I. A. pp. 86, 87, in the judgment of this Committee delivered by Lord Hobhouse, the danger was pointed out of relying upon ancient texts of the Mahommedan law and even precepts of the Prophet himself, of taking them literally, and deducing from them new rules of law, especially when such proposed rules do not conduce to substantial justice. That danger is equally great whether reliance be placed upon fresh texts newly brought to light, or upon fresh logical inferences newly drawn from old and undisputed texts. Their Lordships think it would be extremely dangerous to accept as a general principle that new rules of law are to be introduced because they seem to lawyers of the present day to follow logically from ancient texts however authoritative, when the ancient doctors of the law have not themselves drawn those conclusions.

There are, moreover, special difficulties in the way of accepting the inference drawn by Mahmood J. from the definition and conditions of a wakf as laid down in the ancient Shiah texts. The more important of those texts have long been accessible to all lawyers. In none of them does the author himself draw the conclusion that the creation of a wakf by will is excluded. Nor has that conclusion been drawn by any of modern writers who have collected and translated such texts, though in other respects the difference between the Shiah and the Sunni law of wakf has been pointed out.

And beyond these negative indications their Lordships find an important guide for determining the light in which the definition and condition in question should be regarded, as bearing upon the testamentary creation of a wakf, in the closely analogous case of a gift. A gift like a wakf is defined as a contract requiring offer and

acceptance, and delivery of seisin is a condition of the validity of a gift as of a wakf. Yet from the time of the earliest Shiah authorities until now it has always been clear that a Shiah can make a gift by will. The most authoritative work of that school (the one translated by Baillie) contains a chapter on Wills. This Committee in *Nawab Amin-ood-Dowlah* v. *Syud Roshun Ali Khan*, 5 Moo. I. A. 199, affirmed their validity. And the distinction drawn by Mahmood J. is itself based on the legal efficacy of a gift by will. Their Lordships think that, in applying the same definition and condition to the case of a wakf, it is safer to follow this analogy than to draw the logical conclusions which may seem to an acute modern dialectician to follow from the words of the old texts.

Another part of the judgment of Mahmood J. deals with texts which seem to have little bearing upon the present question. They discuss the consequences of the death of a settlor before delivery of seisin, and they relate apparently, not to wills, but to cases in which a man has made a deed of wakf intended to operate *inter vivos*, but has died before he could complete the transaction by delivery.

The last part of the judgment of the learned Judge cites texts bearing somewhat more closely upon the present question. But there is no unanimity among them ; the learned Judge has to choose between texts which he thinks are of various degrees of authority, and it is to reconcile those which he accepts that he adopts his distinction between the direct and indirect creation of a wakf by will. Their Lordships doubt whether the learned Judge would himself have relied upon such texts as sufficient to support his conclusion, had he not already been satisfied of its correctness by the reasoning of the earlier

part of his Judgment, in which their Lordships are unable to concur.

For the foregoing reasons their Lordships are of opinion that the rule of law laid down by the Allahabad High Court, and followed by both the Courts in India in the present case, to the effect that a Shiah cannot create a wakf by will, is unsound.

Their Lordships thus differ from the first Court upon both the broad issues raised in the case; while they agree with the Appellate Court upon the first and differ upon the second. But the result is that the suit of the Plaintiffs, the present Respondents, fails and was rightly dismissed by the first Court, though not upon the right grounds.

Their Lordships will humbly advise His Majesty that the Decree of the Judicial Commissioner's Court should be set aside with costs; and that of the Additional Civil Judge of Lucknow affirmed. The Respondents will pay the costs of these Appeals.