Privy Council Appeals Nos. 131 *and* 132 *of* 1929.
Oudh Appeals Nos. 10, 11, 12, 20 *and* 24 *of* 1928.

Nawab Mirza Mohammad Sadiq Ali Khan - - - - *Appellant*

v.

Nawab Fakr Jahan Begam and others - - - - *Respondents*

Same - - - - - - - - - *Appellants*

v.

Nawab Fakr Jahan Begam and another - - - - *Respondents*

Nawab Fakr Jahan Begam and another - - - - *Appellants*

v.

Nawab Sharaf Jahan Begam and others - - - - *Respondents*

Nawab Sharaf Jahan Begam and another - - - - *Appellants*

v.

Nawab Mirza Mohammad Sadiq Ali Khan and others - - *Respondents*

Nawab Mirza Mohammad Sadiq Ali Khan - - - - *Appellant*

v.

Nawab Fakr Jahan Begam - - - - - - *Respondent*

(*Consolidated Appeals*)

FROM

THE CHIEF COURT OF OUDH AT LUCKNOW.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 19TH OCTOBER, 1931.

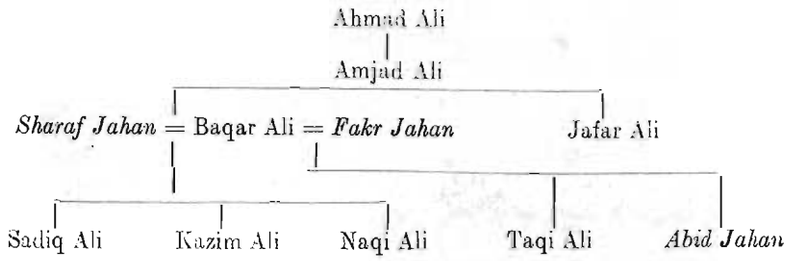
Present at the Hearing:

LORD THANKERTON.
SIR JOHN WALLIS.
SIR GEORGE LOWNDES.

[*Delivered by* SIR GEORGE LOWNDES.]

The principal question of the many, involved in these appeals is as to the right of succession to an important *taluqdari* estate in Oudh, known as Kunwa Khera. The last holder was Nawab Baqar Ali Khan, who died intestate on the 17th January, 1921. He left him surviving two widows, four sons, of whom Nawab Mirza Mohammad Sadiq Ali Khan was the eldest, and one

daughter. The pedigree of the family, so far as it is necessary for the determination of the appeals, is as below, the names of females being printed in italics :—



The appeals arise out of two separate suits, the first of which was instituted by the junior widow, Fakr Jahan Begum, and her two children, Taqi Ali and Abid Jahan, who will be referred to in this judgment as the plaintiffs. They claimed their shares according to the Shiah Mahomedan law, to which the parties are subject, in the whole estate of Baqar Ali, including the Kunwa Khera property. To this suit the other widow and her three sons, and also Jafar Ali, the brother of Baqar Ali, were joined as defendants. Jafar Ali died pending the suit, and his heirs were brought on the record in his place, but took no part in the proceedings. Naqi Ali also died, *pendente lite*, and is now represented by his widow, Jaddo Begum. Neither she nor her assignee, Dilawar Ali, have appeared before the Board.

The second suit was brought by Fakr Jahan alone, claiming the sum of Rs. 50,000 as due to her for dower out of the property left by Baqar Ali. To this suit all the other parties, with the exception of Jafar Ali, were defendants.

The first suit involved various questions as to Baqar Ali's estate, including the validity of a number of dispositions of property made by him during his lifetime, as to most of which there were concurrent findings of the Courts in India. There are now five appeals before the Board, which have been consolidated ; four of them arise out of the first and principal suit and the remaining one out of the dower suit. The parties are ranged on different sides on the various questions involved, according to their individual interests. On the question as to the succession to the Kunwa Khera estate, with which their Lordships will first deal, Sadiq Ali, claiming as the eldest son by the right of primogeniture, is opposed by all the other parties. His claim succeeded in both the Indian Courts, but is disputed before the Board.

The estate was the subject of two *sanads*, dated respectively in 1858 and 1861, by each of which it was granted to Amjad Ali, the father of Baqar Ali, subject to descent by the rule of primogeniture. The reason for the two *sanads* is unexplained. They are to all intents in the same terms.

Upon the passing of the Oudh Estates Act, I of 1869, Amjad Ali's name was included in the first and second of the lists prepared under Section 8 of the Act. Against his name in the first list was entered the estate of Kunwa Khera. By Section 10 the entry of

his name in the lists is conclusive evidence that he was a *taluqdar* to whom the provisions of the Act applied; the effect of the inclusion of his name in the second list was a statutory declaration that the Kunwa Khera estate by family custom ordinarily devolved upon a single heir: *Murtaza Husain Khan* v. *Mahomed Yasin Ali Khan*, 43 I.A. 269, at p. 280. By Section 22 of the Act, upon the death of Amjad Ali intestate the estate would descend upon his eldest son, Baqar Ali, and from Baqar Ali to Sadiq Ali, and, if the section applied, the claim of the plaintiffs, so far as the estate was concerned, would necessarily fail. Amjad Ali in fact left a will, dated the 16th March, 1874. By it he purported to provide for the division of his Sitapur property, which included at all events the greater part of Kunwa Khera, among his heirs according to Mahomedan law. The will, however, did not comply with the requirements of the Act. It has been held by both Courts in India to be invalid on this account, and their finding is not disputed before the Board. It would seem to follow that the title of Sadiq Ali to the estate was *prima facie* unassailable, but it is attacked by the plaintiffs and the defendants who side with them on three grounds.

In the first place, it is contended that though Kunwa Khera appears in list No. 1 as the *taluqdari* estate of Amjad Ali, the Act did not in fact apply to it. It was said that the definition of estate in the Act applies only to villages and lands named in the list attached to the *kabuliyat* executed by the *taluqdar*, and that the list in the case of Kunwa Khera was not executed by Amjad Ali, but by his slave Abdul, with whom the settlement was made on his behalf. Their Lordships think that there is no substance in this contention.

In the next place, it is contended that Baqar Ali did not take the estate under the Act, but by an independent title, and that therefore it devolved on his death by the ordinary Shiah Mahomedan law. In support of their contention reliance is placed upon certain transactions which took place after Amjad Ali's death and were, no doubt, inspired by the provisions of his will, to which reference has been made above. Amjad Ali died on the 7th March, 1875, and on different dates in April and June of the same year three deeds of compromise were executed between Baqar Ali, his brother Jafar Ali, and the other heirs of Amjad Ali, under which Baqar Ali's title to the Kunwa Khera estate was recognised, and that of Jafar Ali to another estate not concerned in these appeals, and provision was made for the other heirs. It is contended for the plaintiffs and their supporters that the effect of these compromises was that Baqar Ali took the estate by transfer from his brother and the other heirs and not by succession under the Act or under the *sanads*, and that it so became in his hands property which would be divisible on his death according to the ordinary rules of Mahomedan law. This contention has been rejected by both Courts in India, and their Lordships have no hesitation in affirming their

conclusion. They think that it is impossible to regard the compromises as being in any way the root of Baqar Ali's title, which, even if the original *sanad* could be disregarded, was clearly established by the Act. The compromises were, in their Lordships' opinion, only a recognition of his right to succeed to the estate.

The only remaining contention to which reference need be made on this part of the case is based upon a supposed deed of gift of the 1st June, 1857, by which Ahmad Ali, the father of Amjad Ali, is alleged to have transferred the estate to Baqar Ali, and it is said, therefore, that when the *sanads* were subsequently granted to Amjad Ali, and his name was entered in the lists provided for by the Act, he must be taken to have held the estate merely as a trustee, and that nothing in the Act applied to it in Baqar Ali's hands. Their Lordships think it sufficient to say, in answer to this contention, that the deed of gift has not been proved. Both the lower Courts have so held, and their Lordships see no reason to differ from the conclusion to which they have come.

In the result their Lordships are satisfied that the title of Sadiq Ali to the Kunwa Khera estate has been established; that it was not divisible according to the ordinary rules of Mahomedan law among the heirs of Baqar Ali, and that the plaintiffs' suit so far as it sought to effectuate this claim has failed.

Their Lordships now turn to the subsidiary questions raised by the various contending parties, which are many and diverse. It will be convenient to take up first the questions upon which Sadiq Ali is the appellant.

His main contention is that he is entitled to succeed not only to Kunwa Khera, as a *taluqdari* estate, but to all the property left by Baqar Ali to the exclusion of the other parties to these appeals. The ground of this claim is that the family custom of primogenitary succession being established in respect of the *taluqdari* property, it must be held to govern also what is *non-taluqdari*. The contention is based upon the decision of this Board in *Murtaza Husain Khan* v. *Mahomed Yasin Ali Khan* (*supra*). In that case Mr. Ameer Ali, in delivering the judgment of the Board, draws a distinction between the position of a Hindu family governed by the law of the Mitakshara and a Mahomedan family. In the former case, he points out, self-acquired property may go in a different line of succession to ancestral property, but the Mahomedan law allows of no such differentiation. In the case of a Mahomedan family, therefore, "if a custom governs the succession to the ancestral estate, the presumption is that it attaches also to the personal acquisitions of the last owner left by him on his death; and it is for the person who asserts that these properties follow a line of devolution different from that of the *taluqa* to establish it."

In the present case the Subordinate Judge by whom the suit was tried recognised the importance of this presumption, and held that

it was for the plaintiffs to prove that in their family the succession to *non-taluqdari* property followed the ordinary Mahomedan law by which the family was governed. This he held that they had satisfactorily established, and the Appellate Court accepted his finding. There being thus concurrent findings on what is obviously a question of fact, the matter could not, according to the ordinary practice of the Board, be reopened here. But it was contended by Mr. Upjohn, who appeared for Sadiq Ali, that there was no evidence to support this finding. Their Lordships are unable to accept this contention. Without going into the evidence at length it is sufficient to state that in at least two cases of succession in the family *non-taluqdari* property has been divided according to Mahomedan law, there being no trace of any claim in either case that it was not so divisible by reason of a family custom.

It is admitted that Kwaja Safi, the paternal grandfather of Ahmad Ali, migrated from Persia to India. There is no suggestion of a custom so directly at variance with the Mahomedan law having been introduced from Persia, and their Lordships think that it can only have originated in India, and therefore at a comparatively recent date. It may well, they think, have been a special custom attached only to a special grant from the ruling authority in Oudh. That there may be such a custom affecting only the principal estate of a family is recognised by the judgment of Lord Phillimore in *Zarif-un-Nisa* v. *Shafiq-uz-zaman Khan*, 55 I.A. 303, at p. 316, also a Mahomedan case. This view receives further confirmation from the terms of the *sanads* of 1858 and 1861. In any case, however, their Lordships think that where a family custom is, as here, of comparatively recent origin, two well-established instances of division according to the Mahomedan law are not only material upon which the Courts in India might hold in favour of the plaintiffs upon this question, but are in themselves sufficient to rebut the presumption upon which Counsel for Sadiq Ali relies. In the opinion of their Lordships, therefore, it has been rightly held that the property left by Baqar Ali other than the Kunwa Khera estate is divisible among his heirs according to Shiah Mahomedan law.

The next question to be considered is the claim by Sadiq Ali to a number of items as accretions to the *taluqdari* estate. They consist largely of subordinate interests in the estate which were owned by outsiders and had been bought up by Baqar Ali. Both Courts in India have rejected his claim to the alleged accretions. Sadiq Ali appeals against their decision and is opposed before the Board by all the other parties. Their Lordships think that the claim is clearly not maintainable. Both Courts have found that there was no intention on the part of Baqar Ali to incorporate any of these acquisitions in the *taluqdari* estate, and their Lordships would not be disposed to disagree with this finding. But the matter does not rest merely on the proof or disproof of such intention. Apart from the provisions of Section 32A of

the Act of 1869 as amended in 1910, which, it is admitted, do not apply in the present case, no incorporation of other property would be possible. This is clear on the judgment of the Board in *Rajindra Bahadur Singh* v. *Rani Raghabans Kunwar*, 45 I.A. 134, which has been rightly interpreted by the Chief Court.

Another item of immovable property which is affected by similar considerations is what is called the Kairabad House, but is really the estate office of the *taluqa*. It was not part of the Kunwa Khera estate at the dates either of the *sanads* or the statutory lists, but was purchased by Baqar Ali. Sadiq Ali claimed it as an "appurtenance" to the estate, and his claim was allowed both by the trial Judge and the Chief Court on appeal, who found that it had been so used for many years. In their Lordships' opinion, the principle affirmed in *Rajindra Bahadur's* case cited above applies with as much force to this property as to the alleged accretions, and Baqar Ali, not having availed himself of the provisions of Section 32A, could not by any form of user incorporate it in the *taluqdari* estate, or subject it to a rule of descent at variance with the Mahomedan law. Mr. Upjohn for Sadiq Ali does not deny that the property was purchased by Baqar Ali, but, founding upon a passage in the judgment in *Rajindra Bahadur's* case (at pp. 146–7), contends that a *sanad* from the Government should be presumed granting the house to the *taluqdar*. Their Lordships can see no possible foundation for this contention. The house was the property of Baqar Ali, and if he had desired to incorporate it in the *taluqa* he could have done so by the special procedure introduced in 1910. There was no necessity and no occasion for a *sanad*. The question of the Kaiser Bagh House in *Rajindra Bahadur's* case was on a different footing altogether. It was the property of Government and had been allotted to the *taluqdar*.

Their Lordships therefore think that the Courts in India were wrong in allowing Sadiq Ali's claim to this property, and that it forms part of the divisible assets of Baqar Ali in which all the heirs are entitled to share.

It will be convenient here to take up another and possibly more difficult question affecting a portion of the Kairabad property known as the Mahal Serai. By a duly registered deed of gift dated the 28th February, 1916, Baqar Ali purported to make over this serai to his wife, Fakr Jahan. The deed recites the donor's desire to arrange for her residence at Kairabad when she wishes to live there; sets out in detail the particular portions of the property which she is to have, and continues :—

> . . . "and I deliver possession over the gifted property to the aforesaid second wife of mine from this date, like myself. Now, the said wife has power to keep the gifted property in her proprietary possession, in whatsoever manner she desires and I or any heir of mine shall never have any occasion for raising any kind of objection. Now with effect from this date the gifted property has, with all the external and internal rights been transferred to the aforesaid Nawab Fakhr Jahan Begam in the capacity of an absolute proprietor like myself."

The gift is attacked by Sadiq Ali and his branch of the family upon two grounds, viz. (1) that the deed was merely colourable, there being no intention on the part of Baqar Ali to transfer the property to the lady, and (2) that the gift was not completed by such a change of possession as is requisite under the Mahomedan law to validate a gift of immovable property.

These two objections must be considered separately. The first is purely a question of fact; the second has been argued mainly as a question of law.

The trial Judge thought that the gift was fictitious, and held that nothing passed by it. The Chief Court disagreed with him, finding nothing suspicious in the transaction. It was not disputed, the learned Judges say, that after the deed was executed the lady frequently visited Kairabad and resided on the premises. They therefore held that she had taken possession, and that the gift was effective.

The first objection being against the tenor of the deed, the burden of proof is clearly upon those who dispute the gift. No possible reason is suggested why Baqar Ali should have desired to put a portion of this property in anyone else's name except, possibly, an inherent propensity for *benami* or *ism farzi* transactions. On the other hand, the reason recited in the deed that he desired to provide his favourite wife with an alternative residence at Kairabad is, to say the least of it, understandable. The portion assigned to her contained the *zenana* quarters, where she ordinarily put up when accompanying her husband on his apparently not infrequent visits to the *kothi*, and it is clear from the evidence of his other gifts to her which are now established that he had a great desire to provide for her future comfort on a generous scale. Against this all that can be said is that during his lifetime she exercised no individual acts of proprietorship over any portion of the Kairabad establishment; that in her and her husband's absence the serai was occupied by the servants of the estate; that such repairs as were necessary were done at Baqar Ali's expense, and that no mutation of names was made in the Government records. In their Lordships' opinion, these facts are not sufficient to establish that the transaction was merely colourable. The deed was handed over to the donee and remained in her possession, and their Lordships have no doubt that Baqar Ali intended to make a genuine gift of the property to her.

The second objection involves some consideration of the Mahomedan law. It is not disputed that a gift of immovable property must ordinarily be completed by a transfer of possession, and there seems to be no difference on this point between Hanafi and Shiah law. The Chief Court thought it was clear that Fakr Jahan had taken actual possession, but it is pointed out that this was only after her husband's death. So long as Baqar Ali was alive she merely resided there with him, and no change seems to have been made in the method of their joint occupation. But in the first place the deed contains the statement " I deliver

possession of the gifted property to my said wife," and this as a declaration of fact must be regarded as binding on the heirs of the donor: see *Sheikh Muhummad Mumtazahmad* v. *Zubaida Jan*, 16 I.A. 205. In the second place, the deed of gift was handed over to the donee as soon as it was registered. In the case of a gift by a husband to his wife, their Lordships do not think that Mahomedan law requires actual vacation by the husband and an actual taking of separate possession by the wife. In their opinion, the declaration made by the husband, followed by the handing over of the deed, are amply sufficient to establish a transfer of possession. In *Shaik Ibhram* v. *Sheik Suleman*, I.L.R. 9 Bombay 146, West J. laid it down as a principle for the determination of questions of this nature that " when a person is present on the premises proposed to be delivered to him a declaration of the person previously possessed puts him into possession." This statement of the law was cited and followed by Sir Lawrence Jenkins in 1905 (*Bibi Khaver Sultan* v. *Bibi Rukhia Sultan*, I.L.R. 29, Bomb. 468, a case between Shiahs), and also independently in the same year by the Allahabad Appellate Court (*Humera Bibi* v. *Najm-un-nissa Bibi*, I.L.R. 28 All. 147). It has also been followed in two Madras cases, and is cited with approval in the late Mr. Ameer Ali's work on the Mahomedan Law, 3rd Ed., p. 71. It is not necessary for their Lordships to decide in the present case whether this principle is of universal application between Mahomedan donors and donees, but they think that as between a husband and his wife who are living together it is undoubtedly a reasonable interpretation of the requirements of the law, and they adopt it as applicable to the case before them. In their opinion, therefore, the gift of this portion of the Kairabad property by Baqar Ali to Fakr Jahan was effective, and the conclusion come to by the Chief Court was correct.

Their Lordships must now turn to the long series of cases where purchases in the names of one or other of the plaintiffs are charged as *benami*. These have been examined with great care by the trial Judge, and in nearly every case where they were disputed on appeal his findings were confirmed by the Chief Court. No adequate reasons have been suggested why these concurrent findings of fact should not be accepted by the Board in accordance with the ordinary rule, and it is therefore unnecessary to burden this judgment with their details. Mr. Dubé, for the second plaintiff, Taqi Ali, disputes concurrent findings in 25 different instances, but his contentions amount to no more than that upon the evidence the Courts should have come to the opposite conclusion. In many cases the material documents have not been printed, and he is unable to give even the dates of the transactions which he is instructed to support.

There are, however, two cases in which the Courts in India have come to different conclusions, in addition to the case of the

Mahal Serai at Khairabad, which has already been dealt with, and these require consideration.

The first concerns the village of Jiamau, which was conveyed to Fakr Jahan by a deed dated the 12th January, 1920. The purchase price of the property was Rs. 51,000. Out of this two sums of Rs. 1,000 and Rs. 600 for earnest money, and a small additional sum for stamp duty were admittedly advanced by Baqar Ali. Fakhr Jahan has sworn that these sums were repaid by her and that the balance came from her own funds. The trial Judge was not prepared to accept her statement without further corroboration. The Appellate Court thought that there was no reason to disbelieve it. As the lady's evidence was taken on commission, the Judges of the Chief Court were in at least as good a position to appreciate its credibility as the trial Judge, and their Lordships must naturally attach the greater weight to their estimate. They have perused the evidence in question, and see no reason to disagree with the conclusion to which the learned Chief Judge and his Indian colleague have come. It is not denied that Fakhr Jahan was in possession of sufficient means to pay for the property; the purchase deed appears to have been all along in her possession and mutation was effected in her name. There is no affirmative proof that the balance of the purchase money was paid by Baqar Ali, nor does the admission as to the earnest money, even if it was not repaid, necessarily lead to this conclusion.

In their Lordships' opinion, the *prima facie* title of Fakhr Jahan has not been displaced by the oral evidence, and they think that the finding of the Chief Court with respect to this property should be affirmed.

The other case is that of a property known by the picturesque name of "Sher Darwaza." It was purchased on the 12th November, 1910, by Baqar Ali, but the conveyance was taken in the name of his daughter, Abid Jahan, the third plaintiff, then an infant of about five years old. The property was during her minority managed by Baqar Ali in her name, and though the income was apparently credited to a special account, and certain sums were paid out if it to her husband, it seems clear that it was in part appropriated to purposes with which Abid Jahan had no concern.

In the case of a gift by a Mahomedan father to his infant child, no transfer of possession is required, it is only necessary to establish a *bona fide* intention to give: see *Ameeroonissa, Khatoon* v. *Abedoonissa Khatoon,* 2 I.A., at p. 104.

There is no doubt that Baqar Ali did in many instances, which have been fully discussed by the trial Judge, purchase immovable properties in the names of various members of his family without any intention, so far as the evidence adduced discloses, of benefiting the particular nominee, and the only question is whether there is sufficient in the case of the Sher Darwaza property to take it out of this category of *benami*

purchases. The trial Judge thought there was not. The Chief Court came to the opposite conclusion. The deed, which was produced at the hearing by Fakhr Jahan, was on the occasion of Abid's marriage in 1914 placed upon a tray and sent for the inspection of her father-in-law, and this was in the view of the learned Judges conclusive of Baqar Ali's intention.

The purchase of this property was a very natural provision by Baqar Ali for the daughter of his favourite wife, and though there may be no presumption of advancement in such cases in India, very little evidence of intention would be sufficient to turn the scale. The sending of the deed for the inspection of the lady's father-in-law, which the Chief Court held to be established, was clearly a representation that the property was hers, and their Lordships agree with the learned Judges in the conclusion to which they came. They think, therefore, that the Sher Darwaza property should be excluded from the divisible estate of Baqar Ali.

An attempt has been made to press the same argument in the case of a mortgage upon certain property in Husain Ganj and Baragaon, which was taken in the name of Abid Jahan, but both the trial Judge and the Chief Court have held against the third plaintiff as to this, and their Lordships see no reason to re-examine the evidence upon which they have come to this conclusion.

The next matter over which the parties are at variance concerns a sum of about five and a-half lakhs of rupees in Government Promissory Notes. This has been held by both Courts in India to belong to a charitable fund known as the Radd-i-Mazalim, which is said to mean "Atonement for Crimes of Violence." It has accordingly been treated as outside the estate. Sadiq Ali apparently claimed to be the trustee of it, and the trial Judge acceded to his claim. The Chief Court, while affirming the trust, held that the question of the trusteeship was not before them. Sadiq Ali does not contest this before the Board, but supports the trust; the other parties contend that the trust is bad under Mahomedan law, and that the notes form part of the divisible estate.

The ground of this contention is that Government Promissory Notes, being interest-bearing securities, cannot be the subject of a dedication to God, which is an essential feature of every Mahomedan *Wakf*. On this question there has been a conflict of opinion in India. The authorities were discussed in the Chief Court, and the learned Judges came to the conclusion that, taking modern ideas into account, the objection was unsustainable. They therefore agreed with the trial Judge that the notes did not form part of Baqar Ali's estate.

The origin of the fund is uncertain. The earliest reference to it to which their Lordships' attention has been drawn is in the will of Ahmad Ali, the grandfather of Baqar Ali, dated the 2nd September, 1857. The notes in question were directed by his

will to be applied as part of the Radd-i-Mazalim fund. It is clear on the terms of the will that the trust had been created in the previous generation. There is nothing to show of what it originally consisted, but the fund was evidently in the keeping of Ahmad Ali, and he seems to have allocated the notes in question to it either as representing its investment in his hands, or possibly only as the equivalent of a sum for which he regarded himself as accountable.

After Ahmad Ali's death a suit was instituted for the administration of his estate, to which Amjad Ali was a party. The suit eventually came up to this Board in 1867 (*Nawab Umjad Ally Khan* v. *Mussumat Mohundee Begum*, 11 Moo., I.A. 517). The Radd-i-Mazalim fund figured in the proceedings as a " family religious and charitable fund." Trustees were appointed of it by the Court, and a scheme of management was directed, and these provisions were affirmed by the Order in Council.

Upon these facts, which have not been disputed on the present appeals, it seems difficult to see how the validity of the trust can now be questioned. It is not denied that the *Wakf* has been recognised by the members of the family for three-quarters of a century or more, and that the income of the fund has been applied, at all events in the main, consistently to charitable purposes. The notes clearly came into Baqar Ali's possession as representing the *corpus* of the fund, and even if they were an improper investment of it, as to which their Lordships express no opinion, this could not make them his property.

If the trust could be regarded as having been created by Ahmad Ali, and as originally invalid for the reason now suggested, the fund might have been divisible among his heirs, but that is not a question which arises in the present proceedings. So far as Baqar Ali was concerned, he was bound by the result of the suit above referred to, and in his hands the notes were clearly trust property.

Under the circumstances, their Lordships find it unnecessary to attempt a solution of the interesting problem of Mahomedan law which was propounded to the Chief Court. The only material question in these appeals is whether the fund formed part of Baqar Ali's divisible estate, and for the reasons given their Lordships have no doubt that it did not.

A small question has been raised by Mr. Wallach, who appears for the first and third defendants, Sharaf Jahan and Kazim Ali, as to the order for costs made by the Chief Court. In their appeal, No. 24 of 1926, which failed, they were directed to pay the costs of " the other side," separate sets of costs being allowed to each party or group, with the result that they have had to pay the costs of Jaddo Begum, the widow of Naqi Ali, and her assignee, Dilawar Ali, who were, apparently, separately represented in the Chief Court, but have not appeared before the Board. This, it is contended, is manifestly unjust, as Naqi Ali had made a joint defence to the suit with Mr. Wallach's clients.

Their Lordships think that if this was a slip, the attention of the Judges should have been called to it in India. If it was not, as appears more likely, it is manifest that this Board is not in a position to review the discretion of the Appellate Court in such a matter. It is very rarely that the Board interferes in a matter merely of costs, and there is no reason why an exception should be made in the present case.

Their Lordships have now dealt with all the matters which have been submitted for their consideration in the first suit, and it only remains for them to deal with the question of dower, which was the subject of the second suit in which Fakhr Jahan is the sole plaintiff.

It is not disputed that the dower fixed on Fakhr Jahan's marriage was the sum of Rs. 50,000, which she claimed from her husband's estate. The defence set up by Sadiq Ali and the other members of his branch of the family is that the debt was satisfied by payments made to her by Baqar Ali in his lifetime. It is admitted that she received sums of money from her husband which in the aggregate exceeded the Rs. 50,000, but these payments were made from time to time in varying amounts, the largest of which was only Rs. 3,000. There is no evidence that Baqar Ali allocated any of these payments to the dower debt, nor was there any attempt at the trial to show that the lady accepted them as such. She referred in her deposition to "presents" received from her husband in addition to a liberal allowance, but it does not seem to have been suggested to her in cross-examination that any of these moneys were payments on account of dower. The dower deed was produced by her at the trial, and no payments are endorsed or noted upon it. There is in reality nothing in the evidence to rebut her claim. Reliance is placed upon the maxim, "*Debitor non præsumitur donare*," but their Lordships doubt if it has any application as between husband and wife—at all events when the relations between them are such as are established in the present case. It is certain that in many cases Baqar Ali did make presents to his wife quite irrespective of her dower, and it can hardly be presumed that a man in his position would desire to discharge such an obligation by driblets.

A previous dower case in the same family is also cited in favour of the defence: *Iftikar-un-nissa Begum* v. *Nawab Amjad Ali Khan*, 7 Beng. L.R. 643. Here the dower debt was held to have been discharged after the husband's death by the transfer of Government Paper of substantially the equivalent in value of the debt, but their Lordships are unable to see any resemblance between the facts of the two cases.

The trial Judge held that the debt was satisfied by the aggregate of the payments and dismissed the suit. The Chief Court took the opposite view and allowed the claim of the plaintiff. Their Lordships think that the decision of the Chief Court was clearly right.

Before closing their judgment their Lordships would desire to express their appreciation of the great care with which these cases have been tried by both Courts in India. They are also indebted to the learned Counsel who have appeared before them for their assistance in extracting the necessary material from a heavy record.

On the whole case, in their Lordships' opinion, the conclusion come to by the Chief Court were right and should be upheld, except in the matter of the Khairabad House, which was one of the subjects of Oudh appeal, No. 20 of 1928, in the Chief Court. Their Lordships think that this question should have been decided in favour of the plaintiffs, and that the decree of the Chief Court on this appeal should be varied by declaring that the so-called Khairabad House, as apart from the Mahal serai, is not appurtenant to the *taluqa* of Kunwa Khera, but forms part of the divisible estate of Baqar Ali. They think that in all other respects the decrees of the Chief Court in both the suits should be affirmed, and they will humbly advise His Majesty accordingly. There will be no order as to the costs of these appeals.

In the Privy Council.

NAWAB MIRZA MOHAMMAD SADIQ ALI KHAN

v.

NAWAB FAKR JAHAN BEGAM AND OTHERS.

SAME

v.

NAWAB FAKR JAHAN BEGAM AND ANOTHER.

NAWAB FAKR JAHAN BEGAM AND ANOTHER

v.

NAWAB SHARAF JAHAN BEGAM AND OTHERS.

NAWAB SHARAF JAHAN BEGAM AND ANOTHER

v.

NAWAB MIRZA MOHAMMAD SADIQ ALI KHAN AND OTHERS.

NAWAB MIRZA MOHAMMAD SADIQ ALI KHAN

v.

NAWAB FAKR JAHAN BEGAM.

(*Consolidated Appeals.*)

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