PRIVY COUNCIL.

AHMAD HOSSEIN KHAN (DEFENDANT) *v.* NIHAL-UD-DIN KHAN (PLAINTIFF).

P. C.* 1888 *March* 16.

[On appeal from the Court of the Commissioner of the Faizabad Division of Oudh.]

Res judicata—Suit for Maintenance—Limitation Act (XV of 1877,) Sch. 2, Art. 132.

An allowance for the maintenance of a younger member of a family, was charged upon the inheritance to which the eldest male member alone succeeded. In a suit for such an allowance brought by a younger brother against the elder, who had succeeded their deceased father in the possession of the estate, *held* that an order made dismissing a claim for maintenance preferred by such younger brother against their father in his life-time, founded on an ekrarnama, did not afford a defence under s. 3 of the Code of Civil Procedure.

Held, also, that the brothers having made an agreement, fixing the allowance for maintenance at a certain sum, the younger brother agreeing to receive a less sum for a defined period, he could only obtain a decree for the allowance so reduced.

An objection taken on this appeal, that this suit should have been brought on that agreement, *held* taken too late; the defendant having been made aware of the agreement at the hearing, and not having objected on this ground in the first Appellate Court. A suit for arrears of such maintenance, within twelve years, is within time under Act XV of 1877.

APPEAL from a decree (30th January 1879) of the Commissioner of the Faizabad division, confirming a decree (1st June 1878) of the Deputy Commissioner of the Lucknow district.

The question raised on this appeal related to a charge for maintenance on the village Khalispur in the Lucknow district, and others in Pertabghar in Oudh, which were granted maafi, in the time of the Nawabi, to one of the ancestors of the late Mahomed Hossein, the father of the parties to this suit, who were brothers by different mothers.

These maafi estates had been charged, at the time of the grant, with the payment of sums for the maintenance of the younger members of the family in the hands of the maafidar.

* *Present:* LORD BLACKBURN, SIR B. PEACOCK, SIR R. P. COLLIER, SIR R. COUCH, and SIR A. HOBHOUSE.

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Mahomed Hossein in 1861 received from the British Government a sanad confirming the rent-free holdings, as they had existed under the Mahomedans; and, he being in bad health, his mother Fatima Bibi acted as manager of the estates for him.

On the 10th July 1862, a claim for Rs. 1,128 brought by Nihal-ud-din against his father for a monthly allowance due on an ekrarnama purporting to be signed by Fatima Bibi, was dismissed by an Assistant Commissioner in the Lucknow district.

Upon the death of Mahomed Hossein in 1863, Nihal-ud-din disputed his elder brother's right to the inheritance, and in proceedings, taken both before and after the passing of Act I of 1869, unsuccessfully claimed to exclude his brother.

On the 5th March 1878, he brought this suit for a declaration of his right to maintenance, claiming arrears for eleven years and eight months, at Rs. 140 per mensem. At the hearing in the Court of first instance an agreement, dated 11th December 1869, was produced, whereby Nibal-ud-din, giving up his claim to the estates, accepted an allowance of Rs. 75 per mensem for one year, with Rs. 100 per mensem for the next six years, and after that Rs. 140 per mensem.

The Court held that neither with reference to the Assistant Commissioner's order of 1862, nor on the ground of limitation, was the suit barred; and that there was no doubt that the Government grant contemplated the maintenance of this rent-free holding, as it had existed under the Nawabi, subject to the charge for the benefit of the younger members of the family. The suit was decreed in favor of the plaintiff, and an appeal was dismissed by the Commissioner, who, as the Court exercising the final appellate jurisdiction, gave to the defendant, on his application, a certificate for appeal to Her Majesty in Council under Chapter XLV of the Code of Civil Procedure, Act X of 1877.

On this appeal,—

Mr. *J. H. W. Arathoon* appeared for the appellant.

Mr. *C. W. Arathoon* for the respondent.

For the appellant it was argued that this claim, regarded as

of doubtful validity in regard to the altered circumstances of the maafi estate after 1858, and again after 1869, had been concluded by the proceedings in 1862. Again, the production of the agreement of 1869 showed that the alleged charge on the maafi estates was not the ground on which the respondent relied. If maintainable at all, this claim could only be based on that agreement.

For the respondent it was argued that the judgments of the lower Courts were correct. Any objection to the suit not having been framed upon the agreement of 1869 should have been taken in the lower Court. But it was not a tenable objection; the undertaking to pay the allowance confirming the right of the plaintiff rested on the original charge on the estate.

Their Lordships' judgment was delivered by

SIR R. COUCH.—This is a suit between two brothers, the sons of Mahomed Hossein Khan, who died in November 1863. The plaintiff in the suit, the respondent before their Lordships, was the second son of Mahomed Hossein Khan, and the defendant, the appellant, was the elder son. It appears that upon the death of their father there was considerable litigation between the brothers with regard to the right to the estate of the father. That litigation began in 1863, and the result of it was that th[illegible]dant, the appellant, was declared to be entitled to the [illegible] that the respondent brought a suit against his [illegible]h he claimed to recover Rs. 19,600 for arrears of [illegible]r 11 years and 8 months, *viz.*, from the 1st July [illegible]e end of February 1878, at Rs. 140 a month, a[illegible]n of his right to maintenance in perpetuity, and to have it [illegible]li-cially declared that the maintenance was a debt due from the estate of Khalispur, situated in the Lucknow district, as also from Mamni and Motka, being the estates which the defendant had recovered by means of the litigation. He appears to have fixed the 1st July 1866 for the beginning of this claim for maintenance, and claimed arrears from that date, as being the day on which he was himself dispossessed of the estate and the defendant got possession of it. His case was that he was legally entitled to maintenance at the rate of Rs. 140 a month from the estate of his deceased father; and in his plaint he founded his claim

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upon an order of the Deputy Commissioner of Lucknow in a suit between the father and Mussamut Bibi Fatima his grandmother and the present defendant, who was the plaintiff in that suit. He also said that he was dispossessed of the property under an order dated 29th June 1865, which was upheld by Her Majesty in Council. The defendant, by his written statement, set up various answers to the claim. The material defences were that the plaintiff was not entitled to any maintenance as the son of Mahomed Hossein; that the claim was barred by limitation, as the plaintiff himself said that he had not received maintenance since September 1863; and that the defendant was not bound by the document which was filed by Bibi Fatima, being a document alluded to in the plaint, nor by any document filed by Mahomed Hossein; and, lastly, in the 11th paragraph of his written statement, he alleged that the claim was barred by the fact of its being *res judicata*. Issues were settled which raised what are the substantial questions between the parties, and they were: (1), is the suit barred by *res judicata*; (2), is the suit barred by limitation; and, (3) and (4), which may be taken together, was the plaintiff entitled to the maintenance, and if so at what rate, and from whom? Both the lower Courts have made decrees in favor of the plaintiff, and the defendant has appealed to Her Majesty in Council from the decree of the Commissioner which affirms the decree of the first Court.

As to the first question, whether the suit was barred by *res judicata*, the document which is relied upon by the defendant appears to be an order made in a suit brought by the plaintiff against Mahomed Hossein the father, in which he claimed to be entitled to a monthly allowance for maintenance founded on some ekrarnama, which would appear to have been executed by the grandmother, who had the management of the property in consequence of Mahomed Hossein being incapable of taking care of his affairs. That is clearly not an order which would be *res judicata* in the present suit. It was not an adjudication between these parties but between the plaintiff and his father, and it was altogether upon a different sort of claim. There is no ground for saying that the lower Courts were wrong in deciding against the defendant upon that issue.

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Another question was raised which perhaps it may be well for their Lordships to notice. It was said that, there being an agreement, which will be presently mentioned, and which was put in as evidence on behalf of the plaintiff, a suit should have been brought upon that and not in the present form. If there had been ground for this objection, it might and should have been taken when the defendant appealed to the Commissioner. It was said that he could not know of the objection when the written statement was filed, because the agreement was produced for the first time at the hearing of the cause when evidence was given, and it had not been filed; but after the hearing, and after the production of the agreement, the defendant knew perfectly well that it was being used against him, and when he made his appeal to the Commissioner he could have taken this objection. If there is any ground for the objection it cannot be taken in the present stage of the proceedings.

The next question, in the order in which the issues were framed, is the law of limitation; but perhaps it will be better first to consider the other, which is the main question in the case, and which arises upon the third and fourth issues, namely, whether the plaintiff is entitled to receive the maintenance.

The lower Courts have come to this conclusion upon that question: As to his being entitled to receive the maintenance. The Officiating Deputy Commissioner says: "Moreover it appears to me that the defendant, as maafidar, merely takes that estate trust, subject to the rent-charges, and that he is bound to p stipends with which the estate is charged. Sanad or act of ment does not absolve him from this charge. As rega tiff's right to the allowance claimed, there is, in my doubt; the documentary evidence referred to and establishes this fact, that the cadets of the family certain specified allowances payable to them from the eldest male member managing the estate." The says: "Regarding the payment of the allowance, evidence on the file of the lower Court ampl clearly establishes that the cadets of the famil certain allowances payable to them from t eldest uncle in possession." There is this fin

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Courts to the effect that the allowance for maintenance was charged upon the estate; and there is evidence in the case upon which they might well come to that conclusion.

It appears that in December 1869 the parties came to an agreement. The defendant's part of agreement states "that Mahomed Nihal-ud-din Khan"—that is the plaintiff—"has waived his claim to succession of the estate, and, having filed a registered deed of compromise (razinama) in Court, has caused the suit to be withdrawn. That for his personal expenses I have fixed an allowance of Rs. 75 per mensem for a term of one year, and then for the next six years Rs. 100 a month; and as at present I am very much in debt, owing to the law expenses incurred, so much so that many of my maafi (revenue-free) villages are mortgaged and hypothecated and the estate yields very little profits, I cannot afford at present to pay the old allowance of Rs. 140 per mensem to Mahomed Nihal-ud-din Khan. But after the expiration of the aforesaid term of seven years I shall continue to disburse the old pay of Rs. 140 a month in perpetuity. If at any time I may offer any objection or hesitate in paying up each of the three descriptions of monthly allowances, Mahomed Nihal-ud-din Khan will be at liberty to realise the same by a suit in Court. If for my own necessity I may mortgage or hypothecate the maafi villages, so that the property left may be insufficient to meet the monthly allowance fixed, I will in that case pay the said allowance out of the estate Khalispur a." And there is a corresponding agreement, of the same he plaintiff, which recognises this agreement. This do- s put in by the plaintiff, and formed a very important evidence in support of his case. Besides that, there of some previous proceedings with reference to this allowances for maintenance, in which there was a Extra Assistant Commissioner of Lucknow, made of the Deputy Commissioner, stating that, in the xtra Assistant Commissioner, it was proved that ned received the allowances shown opposite to re is mentioned the name of "Nihal-ud-din which would seem to be the allowance that was Their Lordships think that the lower Courts,

with this evidence before them, were quite justified in finding that the plaintiff was entitled to an allowance for his maintenance as a charge upon the property which had come from the father, Mahomed Hossein Khan. If that is the case, the plea of the law of limitation is answered, because it is shown that the maintenance was a charge upon the property, and 12 years is the term which is applicable to the suit. The plaintiff only seeks to recover arrears from the 1st of July 1866, which is within the 12 years. Therefore the issue raised as to the law of limitation was properly found against the defendant.

But there remains this question: Although it would appear that at one time Rs. 140 had been paid monthly for the maintenance, when the parties came to the agreement which has been read in consequence apparently of the state of the property, the plaintiff was willing to receive less than the Rs. 140 for a part of the time. It was then arranged that Rs. 75 should be paid from the date of that agreement for the year 1870; that Rs. 100 should be paid up to the 14th December 1876, and after that time that the Rs. 140 should be paid. Now the plaintiff's case was mainly supported by this agreement, Exhibit A: it was put forward at the outset of the case as his evidence by the pleader who appeared for him; and it does seem right that he ought not to be allowed to recover more than he agreed by that document to receive. If he had had to sue upon the agreement he could only have recovered that. He has sued in a different way; but their Lordships are of opinion that this is all that he ought to recover in the present suit.

The consequence will be that their Lordships will humbly advise Her Majesty that the decree which has been made in the plaintiff's favour by the lower Courts should be altered by giving to the plaintiff the arrears, calculated in the manner provided for in the agreement, with interest upon those arrears from the date of the decree at the same rate as has been given by the lower Courts upon the sum which they awarded. The decrees of the lower Courts as to the costs will stand, and with regard to the costs of this appeal, the respondent has really substantially succeeded in it. The objections of law which were taken by the appellant,

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and without which he would have had no right of appeal, have entirely failed, and their Lordships therefore think that the appellant ought to pay the costs of the appeal.

Decree modified.

Solicitor for the appellant: Mr. *T. L. Wilson.*

Solicitor for the respondent: Mr. *Horace Earle.*

TAROKESSUR ROY (PLAINTIFF) *v.* SOSHI SHIKHURESSUR ROY (DEFENDANT).

SOSHI SHIKHURESSUR ROY (DEFENDANT) *v.* TAROKESSUR ROY (PLAINTIFF).

P. C.* 1883 *February* 28, *March* 2 *and* 17.

[On appeal from the High Court at Fort William in Bengal.]

Hindu law—Will, Construction of—Gift ineffectual so far as it departs from the law of inheritance—Gift over of accrued share.

A gift by will, attempting to exclude the legal course of inheritance, is only effectual, in favor of such person as can take, to the extent to which the will is consistent with the Hindu law. And it is a distinct departure from that law to restrict the order of succession to males excluding females.

A testator gave by his will to three sons of his brother certain estates "for payment of the expenses of their pious acts." He also directed as follows: "The said three nephews shall hold possession of the above in equal shares, and shall pay the Government revenue of the same into the Collectorate. They shall have no right to alienate the same by gift or sale, but they, their sons, grandsons, and their descendants in the male line shall enjoy the same, and shall perform acts of piety as they respectively shall think fit for the spiritual welfare of our ancestors. If any die without leaving a male child, which God forbid, then his share shall devolve on the surviving nephews, and their male descendants, and not on their other heirs."

In a suit between the survivor of the three nephews and the testator's heir, *held*, that the attempt to alter the legal course of inheritance failed, and that the estate taken under the above clause was only for life.

The gift over of a life estate was competent; it being to persons alive, and capable of taking on the death of the testator, and to take effect on the death of a person or persons then alive.

On the death of one brother his share went to the two other brothers, and on the death of one of the latter his augmented share, made up of his original and accrued share, went to the survivor.

* *Present:* LORD BLACKBURN, SIR B. PEACOCK, SIR R. P. COLLIER, and SIR A. HOBHOUSE.