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victed under s. 165 of the Penal Code, and that he should suffer four months' simple imprisonment. I would also order him to pay a fine of one rupee, and in default to suffer one month's additional imprisonment, such additional imprisonment to cease when the fine is paid or is recovered by process of law.

SPANKIE, J.—I concur with the Hon'ble Chief Justice on the propriety of the conviction under s. 165, and in the sentence proposed. The conviction of accused and sentence passed by the Sessions Judge under s. 29 of Act V of 1861 is annulled, and the prisoner is convicted under s. 165 of the Indian Penal Code, and a warrant must issue accordingly.

APPELLATE CIVIL.

1877
December 18.

Before Mr. Justice Spankie and Mr. Justice Oldfield.

HASAN ALI AND ANOTHER (PLAINTIFFS) *v.* MEHDI HUSAIN AND OTHERS (DEFENDANTS).*

Muhammadan Law—Inheritance—Minor—Justice, Equity, and Good Conscience —Act VI of 1871 *(Bengal Civil Courts' Act), s.* 24.

H, being in possession of certain real property on her own account, and on account of her nephew and niece, minors, of whose persons and property she had assumed charge in the capacity of guardian, sold the property, in good faith, and for valuable consideration, in order to liquidate ancestral debts, and for other necessary purposes and wants of herself and the minors. *Held* that, under Muhammadan law and according to justice, equity, and good conscience, the sales were binding on the minors.

THIS was a suit for possession of certain shares in a dwelling-house and in certain villages, by cancelment of sales of the property. The plaintiffs were respectively the son and daughter of one Najib Husain, who died in 1857. At the time of his death the plaintiffs were minors, and, their mother being also dead, Husaini Bibi, their father's only sister, assumed charge of their persons and their property in the capacity of guardian. Najib Husain and Husaini Bibi had inherited from their father a dwelling-house and certain shares in six villages, which property was heavily mortgaged. On the 3rd January, 1862, the plaintiffs being minors at the time,

* Special Appeal, No 860 of 1877, from a decree of M. Brodhurst, Esq., Judge of Benares, dated the 1st May, 1877, affirming a decree of Pandit Jagat Narain, Subordinate Judge of Jaunpur, dated the 4th June, 1875.

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Husaini Bibi sold the dwelling-house to her paternal uncle, defendant in this suit, and the shares in the six villages to her cousins, also defendants in this suit. These sales were made by her in good faith, and for valuable consideration, in order to liquidate ancestral debts, and for the benefit of the plaintiffs. The plaintiffs sought in the present suit to set aside these sales. The Court of first instance dismissed the suit, holding that, under Muhammadan law and according to justice, equity, and good conscience, the sales were binding on the plaintiffs. On appeal by the plaintiffs the lower appellate Court concurred in the ruling of the Court of first instance.

On special appeal by the plaintiffs to the High Court it was contended by them that, inasmuch as Husaini Bibi was not their legal guardian, she had no power to make contracts on their behalf, and the sales were invalid.

Pandit *Bishambhar Nath*, for the appellants.

Mr. *Colvin* and Shah *Asad Ali*, for the respondents.

The judgment of the Court, so far as it is material for the purposes of this report, was as follows:

We may, however, observe that we should be disposed to accept the Judge's finding on the merits. Even if the plea that Musammat Husaini was not the legal guardian of the appellants when she made the sales was good, we think that the plea is not one to be taken in special appeal for the first time; no such objection was made below; and further it does not appear that the plaintiffs came into Court offering their shares of the ancestral debts on account of which the sales were effected (1). On the contrary, they denied any necessity for sale, and seek to repudiate the transactions. But we are not satisfied that we are not within Muhammadan law in this case (2). We must look to the position of the parties, the circumstances of the case, and the facts found by the Judge. Musammat Husaini was one of the heirs of the property, and was manager on behalf of the children—her nephew and niece. Their father and mother had died, and there was no one to take care of the orphans. The father had been in straitened circumstances before his death. The debts

(1) *Pana Ali* v. *Sadik Hossein*, H. C. R., N.-W.P., 1875, p. 201; *Sahee Ram* v. *Abdul Rahman*, H. C. R., N.-W. P., 1874, p. 268.

(2) *Hamir Singh* v. *Zakia*, I. L. R., 1 All., 57.

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of deceased had to be satisfied. Their discharge is a matter of necessity, and as observed in the Full Bench decision quoted above (1), the right of the heirs is connected with the estate on the sole condition of its being free from incumbrance. Musammat Husaini was in possession of the property, whatever it was, on her own account, and on behalf of the minors, and, in that character, it would seem that she could act for them. In about five years after his death she was compelled to sell the property covered by the deeds of sale, the landed portion of which was already mortgaged for more than Rs. 3,000, to satisfy the debts and for other necessary family purposes and wants. She thus was enabled to bring up the children and maintain and marry them. Whatever she did was done openly, and the Judge has found that the consideration was duly paid, that the sales were effected to pay the ancestral debts and that they were paid, and to meet pressing necessity for the benefit of the minors. Under these circumstances we agree with the lower appellate Court that the Muhammadan law and principles of equity and justice are binding on the plaintiffs, who have not in their petition of plaint assigned any reason or grounds for repudiating the act of Musammat Husaini.

With these observations, which go to all the pleas in appeal, we dismiss the appeal and affirm the judgment of the lower appellate Court with costs.

Appeal dismissed.

APPELLATE CIVIL.

1877
December 19

Before Mr. Justice Pearson and Mr. Justice Spankie.

WALI-UL-LA (PLAINTIFF) *v.* GHULAM ALI (DEFENDANT).*

Reference to Arbitration—Form of Oath—Power of Arbitrator to administer Oath other than in prescribed form—Validity of Award based upon evidence taken on Oath illegally administered—Act X of 1873 *(Indian Oaths Act) ss.* 8, 10, 13—*Act XLV of* 1860 *(Indian Penal Code), s.* 20—*Act I of* 1872 *(Indian Evidence Act), s.* 3—*Special appeal—Objection.*

The matters in dispute in a suit were, by the desire of the parties to the suit, referred to arbitration. During the investigation of these matters by the arbitra-

*Special Appeal, No. 878 of 1877, from a decree of Maulvi Abdul Majid Khan, Subordinate Judge of Shâhjahânpur, dated the 16th May, 1877, affirming a decree of Babu Brijpal Das, Munsif of Shâhjahânpur, dated the 26th March, 1877.

(1) *Hamir Singh* v. *Zakia*, I. L. R. 1 All., 57.