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days after time, unless the plaintiff can show that the excess period should be excluded in computing the period of limitation under the provisions of s. 14 of the Law of Limitation. But looking to the proceedings taken it is clear that at most the only time which plaintiff might claim to exclude under the provisions of s. 14 would be from the 23rd September, 1878, to the 10th April, 1879, when he was prosecuting the suit in the Court of the Judge and in the High Court. But assuming that he could satisfy us that the whole of that period should be excluded, the present suit instituted on the 10th April, 1879, will still be beyond time. The plaintiff cannot claim to exclude from the computation any other period, for from the 26th August, 1878, to the 16th September, 1878, he was prosecuting his suit in a Court which had jurisdiction, and the inability of the Court to entertain it did not arise from defect of jurisdiction or other cause of a like nature, but from misjoinder of plaintiffs, a defect for which plaintiff must be held responsible, and from the 16th to the 23rd September he was not prosecuting his suit in any Court, and cannot claim to have that period excluded. The appeal fails, as there is no reason to interfere with the order as to costs, and we dismiss it with costs.

Appeal dismissed.

Before Sir Robert Stuart, Kt., Chief Justice, Mr Justice Pearson, and Mr. Justice Spankie.

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HASAN ALI AND OTHERS (PLAINTIFFS) *v.* MAHRBAN (DEFENDANT).*

Muhammadan Law—Missing person—Act I of 1872 *(Evidence Act), s* 108—*Act VI of* 1871 *(Bengal Civil Courts Act), s.* 24.

F, one of the heirs to the property of his parents (the family being Muhammadans), was "missing" when they died, and subsequently when the other heirs to such property sued his daughter *M* for the possession of a portion of such property. *M* set up as a defence to the suit that her father was alive, and that during his lifetime the plaintiffs could not claim his share in such portion. *Held* by STUART, C. J., and SPANKIE, J., that the suit, being one to enforce a right of inheritance, must be governed by the Muhammadan law relating to a "missing" person. *Parmeshar Rai* v. *Bisheshar Singh* (1) distinguished.

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* Second Appeal, No. 179 of 1879, from a decree of Babu Kashi Nath Biswas, Subordinate Judge of Meerut, dated the 14th November, 1878, modifying a decree of Muhammad Mir Badshah, Munsif of Bulandshahr, dated the 24th December, 1877.

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Held by STUART, C. J., that, according to Muhammadan law, ninety years not having elapsed from *F's* birth, his share could not be claimed by the plaintiffs, but must remain in abeyance until the expiry of that period, or his death was proved.

Held by PEARSON, J., and SPANKIE, J., that *F* being a "missing" person when his parents died, his daughter, according to that law, was not entitled to hold his share either as heir or trustee.

ONE Kamar Ali died leaving two sons, Kurban Ali and Nisar Ali. Kurban Ali died leaving a son, Hasan Ali. Nisar Ali died in June, 1868, leaving his wife, Faiz-un-nisa, a son, Niaz Ali, two daughters Niaz-un-nisa and Imtiaz-un-nisa, and a grand-daughter, Mahrban, the daughter of his son Farzand, who at the time of his father's death had not been heard of by his family since 1857. On the death of Nisar Ali, his son Niaz Ali was recorded in the revenue registers as the proprietor of his landed estate. Faiz-un-nisa, Niaz-un-nisa, Imtiaz-un-nisa, Sahib-un-nisa, the wife of Farzand, and Mahrban, all resided together in a house belonging to Faiz-un-nisa, and were supported out of that estate. Faiz-un-nisa died in 1873, Farzand being still missing, and Niaz Ali died subsequently in the same or the following year. On the death of Niaz Ali, by the consent of all the parties interested, Sahib-un-nisa was recorded in the revenue registers as the proprietor of 16 bighas, 18 biswas of the land owned by Nisar Ali, and on her death her daughter, Mahrban, was recorded as the proprietor of the same. In June, 1877, Farzand being still missing, Hasan Ali and the daughters of Nisar Ali instituted the present suit in which they claimed to recover possession from Mahrban of the 16 bighas, 18 biswas of land and of the house belonging to Faiz-un-nisa. The plaintiffs alleged that, inasmuch as Niaz Ali died without leaving issue and Farzand was missing at the death of his father and his mother, the property of Nisar Ali and Faiz-un-nisa descended to them, and the defendant had no right therein. The defendant set up as a defence to the suit that Farzand was alive, and that during his lifetime the plaintiff Hasan Ali had no right in the property of Nisar Ali or Faiz-un-nisa. She admitted the right of the other plaintiffs, the daughters of Nisar Ali and Faiz-un-nisa, to a moiety of the property in suit. The Court of first instance, expressing its opinion that Farzand was in all probability dead, held that, inasmuch as he was missing at the death of his parents, he had forfeited his right to succeed to a share in their

estates, and the defendant could claim no right through him, and it gave the plaintiffs a decree. On appeal by the defendant, the lower appellate Court held, on the question whether in this case the Muhammadan law relating to a missing person should be applied, or whether it should be presumed with reference to s. 108 of Act I of 1872 that Farzand had pre-deceased his parents, that, under the provisions of s. 24 of Act VI of 1871, Muhammadan law was applicable, distinguishing the present case from the case of *Parmeshar Rai* v. *Bisheshar Singh* (1). Applying Muhammadan law, the Court held that, inasmuch as a period of ninety years had not elapsed from the date of Farzand's birth, it could not be presumed that he was dead, and that until that period had elapsed, or his death was proved, the daughters of Nisar Ali and Faiz-un-nisa were only entitled to a moiety of the estates of their parents, and Hasan Ali was not entitled to share in the estate of Nisar Ali.

The plaintiffs appealed to the High Court, contending that the lower appellate Court should, with reference to s. 108, Act I of 1872, have presumed that Farzand had pre-deceased his parents, and that if this were the case the defendant could claim nothing through him.

Pandit *Nand Lal*, for the appellants.

Mir *Akbar Husain*, for the respondent.

The following judgments were delivered by the Court:

STUART, C. J.—I generally concur in the view taken in this case by the Subordinate Judge, who, however, appears to have very unnecessarily occupied himself with the consideration of the Evidence Act, and with the remarks of the select committee of the Legislative Council thereon. The suit is brought by the plaintiffs for the establishment of their rights to property on the allegation that the inheritance to them has opened by the disappearance and death, during his father's lifetime, of one Farzand Ali. With respect to this Farzand Ali the facts appear to be these:—He left his home and his family in 1857, the year of the mutiny, at which

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time he would appear to have been about 30 years old, and therefore, if alive when this suit was instituted, his age would then have been about 51 years. He has not since been heard of, but there is nothing on the record to prove his death. Under these circumstances the first question is what is the law to be applied to the case? The parties are Muhammadans, and the question raised in the suit being one regarding succession and inheritance, the 24th section of the Bengal Civil Courts Act VI of 1871 immediately applies, and the Muhammadan law must, in the words of s. 24, form "the rule of decision," and the Evidence Act has no application whatever. The only question therefore is, what, on the facts stated, is the Muhammadan law on the subject? This question may be answered without doubt or difficulty, and it is simply this, that for ninety years from the date of his birth the property of a missing person is kept in abeyance, the principle of Muhammadan law appearing to be that, in the absence of proof to the contrary, the missing person is presumed to be alive. This rule of the Muhammadan law appears to be the result of all that is to be found in the leading authorities on that law,—Macnaghten, Baillie, and others. Now, applying this rule of Muhammadan law so stated, it is clear that the property of Farzand Ali cannot be claimed by the plaintiffs, but must be in abeyance until the expiry of ninety years from his birth, that is, for about forty years yet to come, unless in the meantime evidence is obtained proving his death. The Subordinate Judge appears to have correctly applied this rule of Muhammadan law to the facts of the case, and I would therefore affirm his order and dismiss the present appeal with costs.

I should add that the Full Bench case of *Parmeshar Rai* v. *Bisheshar Singh* (1) is quite consistent with the view I have taken of the facts in the present case. There the suit was brought for the avoidance of a deed of mortgage executed to the detriment of the plaintiff's reversionary rights, and it was therefore held that the provisions of s. 108 of the Evidence Act should be applicable. I was absent from the Court when this judgment was given and I express no opinion as to whether I consider it right or wrong. But the opening sentences of the judgments of Turner, J., who was acting

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for me, and of Pearson, J., clearly support the view I have taken in the present case. This portion of the judgment of the Full Bench is as follows:—"The plaintiffs in this suit are not claiming the estate of Janki Rai, the missing person, by right of inheritance; were they claiming it, inasmuch as Janki Rai has been missing for only eight or nine years, their claim might be inadmissible under Hindu law. But they are claiming nothing belonging to him." And the judgments of Spankie, J., and Oldfield, J., are to the same effect.

SPANKIE, J.—This being a suit for inheritance under the Muhammadan law, that law will apply to it, in regard to the missing person, Farzand Ali. The Full Bench ruling in *Parmeshar Rai* v. *Bisheshar Singh* (1) of this Court is not in conflict with this opinion. The lower appellate Court therefore was not wrong in holding that the case must be governed by Muhammadan law. These remarks dispose of the first plea.

On the second plea it appears to me that the judgment of the lower appellate Court is wrong and that the Munsif was right.

According to the Muhammadan law of inheritance, a missing person is considered as living in regard to his own estate, so that no one can inherit from him, and dead in regard to the estate of another, so that he does not inherit from any one, and his estate is reserved until his death can be ascertained, or the term for a presumption of it has passed over. I find a summary of the law quoted from well-known authorities and cited in the Madras edition of Macnaghten's Muhammadan law, referred to by Babu Shama Charan Sirkar in his printed Tagore Lectures.—"Thus, if he (the missing person) had an estate when he disappeared, or if at that time he was entitled to a share in a joint property, such property cannot be inherited before his death be proved, or until he would have been ninety years of age, but must remain in trust until that time, when it will devolve upon those of his heirs who are in existence at that time. On the death of any of the relatives of a missing person, to whom he is an heir, he is so far considered to be alive, that his share is set aside, but such share is not reserved

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in trust for him and his heirs, but delivered to the other heirs, who would have taken it if he had been dead; if he returns after this, he will be entitled to his share, but if he does not return, it devolves on the heirs who came into possession at the former distribution, but not to the heirs of the missing person." Again: "If a missing person be a co-heir with others, the estate will be distributed as far as the others are concerned, provided they would take at all events, whether the missing person were living or dead. Thus, in the case of a person dying, leaving two daughters, a missing son, and a son and daughter of such missing son. In this case, the daughters will take half the estate immediately, as that must be their share at all events, but the grand-children will not take anything, as they are precluded on the supposition of their father being alive."

Farzand Ali became lost during the lifetime of his parents, and his daughter, the defendant, according to the view of the law expressed above, could not, under the circumstances, inherit.

For these reasons I would decree the appeal and reverse the judgment of the lower appellate Court and restore that of the Munsif with costs.

Stuart, C. J., and Spankie, J., differing on a point of law, the appeal was referred, under s. 575 of Act X of 1877, to Pearson, J., by whom the following judgment was delivered:

PEARSON, J.—The property in suit did not belong to Farzand Ali, the missing man, but would have been more or less inherited by him, had he survived his parents. The plaintiffs are his sisters and a cousin, who married one of them; the defendant is his daughter, and, if she be not entitled to the property, they are. Her contention is that her father is still alive, and, if the contention be true, it is apparent from the rules of Muhammadan law cited by my learned colleague Spankie, J., that she is not entitled to hold the property either as heir or trustee, although Farzand Ali may be entitled to it should he return. The plaintiffs do not assert that he is dead, but nothing has been heard of him since he disappeared in 1857, and the strong probability is that he died in the lifetime of his parents, in which case his daughter could not inherit, through him, any portion of their estate. This being so, in concurrence with

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Spankie, J., I decree the appeal with costs, reversing the lower appellate Court's decree and restoring that of the Court of first instance.

Appeal allowed.

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Before Mr. Justice Spankie and Mr. Justice Oldfield.

MAYA RAM AND OTHERS (DEFENDANTS) *v.* LACHHO (PLAINTIFF).*

Pre-emption -Wajib-ul-arz

The greater portion of the lands of a certain village were divided into "thokes," each thoke comprising a certain amount of land, and the rest of the lands were held in common according to the interests of the co-sharers in the village. The *wajib ul-arz* contained the following provision regarding the right of pre-emption: "Each sharer is by all means at liberty to transfer his right and share, but first of all the transfer should be effected by him in favour of his own brothers and nephews who may be sharers, and, in case of their refusal, in favour of the other owners of the thoke." *Held*, in a suit by a sharer in one thoke to enforce a right of pre-emption, under the *wajib-ul-arz*, in respect of a share in another thoke, that the fact that the plaintiff in common with all the sharers of the different thokes was a sharer in the common lands did not make her a sharer in the vendor's thoke, and she had therefore no right of pre-emption under the *wajib ul-arz*.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Pandit *Bishambhar Nath* and Munshi *Sukh Ram*, for the appellants.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*) and Babu *Oprokash Chandar Mukarji*, for the respondent.

The judgment of the High Court (SPANKIE, J. and OLDFIELD, J.) was delivered by

OLDFIELD, J.—The property in this suit, comprising the share in mauza Tholai belonging to Mahummad Ibrahim Khan, was sold by him to the defendants under a deed of sale dated 1st March, 1878, and the plaintiff claims the same by right of pre-emption under the *wajib-ul-arz* The lower Court decreed the claim, and one of the objections taken in appeal is that, under the pre-emption clause in the administration-paper on which the plaintiff relies as her ground of action, she is not entitled to recover the property. The clause is as follows :—"Each sharer is by all means at liberty to transfer his right and share, but first of all the transfer

* First Appeal, No. 25 of 1879, from a decree of Maulvi Farid-ud-din Ahmad, Subordinate Judge of Aligarh, dated the 11th December, 1878.