verbal evidence of those contents is not receivable, yet the *fact* of the marriage may be proved by the independent evidence of a person who was present at it." If, therefore, in this case this document was intended to embody the contract of the parties, I should hold that the evidence of its contents would not be admissible. But in my opinion there is nothing whatever to show this. The claim has been brought upon the promise by the plaintiff, and he states in his plaint that in execution of his decree he arrested the retainer of the Maharajah, upon which "the master of the judgment-debtor, having taken upon himself the responsibility of the decree-money, had the said Dumbar released from arrest, and made a promise to the plaintiff to pay the said sum of Rs. 986-15, with interest at 12 annas per mensem, within a period of six months; that by virtue of the said promise of the Maharajah the plaintiff had his decree against Dumbar Pandey struck off as wholly satisfied." The promissory note is merely used, and was taken, as has been observed by the learned Chief Justice, as collateral security for the debt. Under these circumstances I see no reason whatever why the claim cannot be proved *aliunde* by other evidence. I might also refer, as entirely in point, to an unreported case decided by this Court on the 15th March, 1882, from a reference from the Judge of the Small Cause Court at Benares. (1) I therefore concur in the order proposed. (2).

Cause remanded.

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January 28

Before Mr. Justice Straight and Mr. Justice Tyrrell.

WAZIR JAN (DEFENDANT) *v.* SAIYYID ALTAF ALI (PLAINTIFF)*.

Muhammadan Law—Gift in contemplation of death—Will—Disposition in favour of heir—Consent of other heirs.

A Muhammadan executed in favour of his wife an instrument which purported to be a deed of gift of all his property. At the time when he executed this instrument he was suffering from an illness likely to have caused him to apprehend an early death, and he did, in fact, die of such illness upon the same day. There was no evidence that any of his heirs had consented to the execution of the deed. After his death, his brother sued the widow to set aside the deed as invalid.

Held that the instrument, though purporting to be a deed of gift, constituted, by reason of the time and other circumstances in which it was made, a death-bed

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* First Appeal No. 194 of 1885 from a decree of Maulvi Muhammad Saiyyid Khan, Subordinate Judge of Agra, dated the 14th September, 1885.

(1) *Gopi Nath* v. *Hurrish Chandar*, Misc. No. 35 of 1882, Oldfield and Brodhurst, JJ.

(2) See *Pothi Reddi* v. *Velayudasivan*, I. L. R., 10 Mad. 94.—REP.

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gift or will, subject to the conditions prescribed by the Muhammadan law as of the consent of the other heirs, and, those conditions not having been satisfied, it not only fell to the ground, but the parties stood in the same position as if the document had never existed at all.

The facts of this case are stated in the judgment of Straight, J.

Mr. *C. H. Hill*, Munshi *Hunuman Prasad*, Shah *Asad Ali*, and Mir *Zahur Husain*, for the appellant.

Pandit *Nand Lal*, for the respondent.

STRAIGHT, J.—The suit to which this appeal relates was brought by the plaintiff-respondent to avoid an instrument, dated the 24th November, 1884, which purported to have been executed by his brother, one Saiyyid Imdad Ali, C. S. I., in favour of the defendant, Musammat Wazir Jan, his then wife and now widow.

By the plaint the plaintiff alleged that, with the view of depriving him of his right of inheritance under the Muhammadan law as residuary of the estate of his deceased brother, the defendant, Musammat Wazir Jan *alias* Mukhtar Begam, had caused this instrument "to be illegally executed by Saiyyid Imdad Ali, deceased, without his wish and consent, when the deceased was in agony and not in his senses, and suffering from a mortal disease."

The question in broad terms before the Subordinate Judge was whether the instrument, in fact and in law, was a good instrument so as to bind the heirs of Imdad Ali, and such as to obstruct the right which the plaintiff otherwise would have had to a portion of the property left by the deceased.

The Subordinate Judge, however, practically treated the case as set up by the plaintiff as one in which he alleged that the deed of the 24th November, 1884, was a forged deed, and that the signatures appearing thereon as professedly made by the deceased Imdad Ali, were not in his handwriting but were fraudulently put there for the purpose of fraud. In other words, the Subordinate Judge regarded it as one in which he charged the defendant and her witnesses with either causing the instrument to be forged, or using it knowing it to be forged, and with giving false testimony in support of it. He has, no doubt, after elaborately comparing and examining the signatures of the deceased on various admittedly genuine documents with those to be found on the deed of gift, and

stating his own views as to the manner of signing documents ordinarily adopted by native gentlemen in the position of the deceased, come to the conclusion that Imdad Ali did not write the three signatures to be found on the instrument of the 24th November, 1884.

As I said yesterday, so I say now, I do not think the reasons of the Subordinate Judge, however attractive they may appear on the surface, are sufficient to warrant the conclusion he came to. I do not think that because in one of the signatures to this instrument Saiyyid Imdad Ali describes himself as "Maulvi and C. S. I.," or in another as "Maulvi Imdad Ali Khan, Bahadur, C. S. I.," it necessarily follows that he could not have written it because such a mode of inserting titles and descriptions is not usual among native gentlemen, and is in bad taste. No doubt the remarks of the Subordinate Judge on this head are entitled to consideration; but I do not think it would be safe, on the grounds adopted by him, to arrive at a conclusion that the document was fabricated. Apart from a discussion of the point of good taste, which even the most discreet people sometimes forget, this document, if made by Imdad Ali, was one which he knew would most likely provoke discussion and litigation at the instance of his excluded brother, and probably attract public notice, and be questioned in a public Court. Consequently it is quite possible that, either of himself or at the suggestion of his friend, he signed the document, in the manner it purports to be signed, in order that those who might hereafter have to read it, should be duly impressed with the position and importance of the person whose act and deed it professed to be. I cannot adopt the judgment of the Subordinate Judge in this respect therefore, nor, in face of the evidence of the defendant's witnesses, can I say that it has been satisfactorily made out by the plaintiff, if such was the case in which he came into Court, which I doubt, that the signatures of Imdad Ali Khan to the deed of the 24th of November, 1884, are false or forged. Indeed, to my eye, from their form and character they look rather like the genuine signatures of a man who was in a reclining position, and enfeebled by sickness, at the time he wrote them, and whose hand was guided owing to weakness. I cannot bring myself to believe that if the supporters of the defendant had resolved to forge this document they would have gone to

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work in such a bungling fashion, or have caused the donor's handwriting to be imitated in such a way as to at once provoke suspicion. Having regard to all the evidence, I think the safest course to follow is to hold that the deed was signed by Saiyyid Imdad Ali Khan, and, such being my view, the question then arises what is the precise nature and effect of the instrument. Taking it as it stands, and giving its terms their ordinary meaning, it undoubtedly *primâ facie* constitutes a deed of gift, because, to quote them, Saiyyid Imdad Ali, "made a gift" to the defendant of all his property, as therein mentioned, "worth Rs. 25,000." "I have therefore executed this deed of gift, in order that it may serve as evidence and be of use when needed."

But though it thus on the face of it is a deed of gift, its effect and operation, according to Muhammadan law, are governed by the further consideration of the circumstances and time at which it was made, and if the donor was in his death-illness when he executed it, that fact has a direct bearing on its validity as a gift. The law bearing on this point is succinctly stated by Mr. Amir Ali in his *Tagore Law Lectures*, page 444, in the following terms:—

"Under the Muhammadan Law, the acts of disposition by a person suffering from an illness which induces the apprehension of death, and which eventually causes death, have only a qualified effect given to them. For example, when a person suffering from such an illness makes a gift or *waqf*, such disposition, though an act of immediate operation, takes effect like a will, and is valid only so far as a *wasiat* may be valid."

I have no doubt whatever—and my brother Tyrrell informs me he is of the same opinion—that from the evidence of Dr. Makand Lal, a gentlemen practising medicine, of high repute and long experience, in Agra, it is established as an unquestionable fact that the deceased Imdad Ali was, at the time he signed this paper, suffering from sickness likely to cause him to apprehend an early death, and that he did succumb to such sickness on the very day of its execution.

Dr. Makand Lal's evidence leaves no doubt in my mind—and he is corroborated by the Muhammadan physician Hakim Rajab Ali,

—that Imdad Ali Khan was, on the 24th November, 1884, a dying man, suffering from the fatal disease of a tumour in his stomach, and wasting away from inability to take any nourishment.

It seems to me that on the 24th of November, Imdad Ali Khan was well aware that his condition was so perilous that it was necessary for him to make a disposition of his property, and that this instrument was then made in apprehension of death. This being so, although on the face of it it is a deed of gift, by the operation of the Muhammadan law it falls into the category of wills, and the gift made by it must be regarded as a bequest, and must be treated in that light with all the legal incidents attaching thereto.

Now, there can be no doubt that the defendant, Musammat Wazir Jan, was an heiress of her deceased husband. This being so, no bequest made in her favour is binding, even to the extent of the one-third over which a Muhammadan ordinarily has disposing power, without the consent of all his other heirs.

There is no suggestion in this case that the document in question was made with the consent of such heirs. On the contrary, it appears that the plaintiff on the very day of its execution, and when it was about to be registered, himself filed in the office of the Registrar of Deeds a protest against the registration of it. As stating the rule of Muhammadan Law above referred to, I may quote again from Mr. Saiyyid Amir Ali's *Tagore Law Lectures*, pages 464, 465 and 466 :—

"All the schools agree in holding that a bequest in favour of of an heir is invalid.........A legacy, says the author of the *Multika*, in favour of one heir is valid if the other heirs consent thereto." "Under the Sunni Law, apparently, the assent must be a free and voluntary act on the part of the heirs, &c."

There is also a Calcutta ruling—*Mussumat Baroda Kooery* v. *Ashruffunnissa* (1) in support of this view, in which it was laid down that a *tamlaknama* could not, "in any event stand higher than a will, or be of operation except as to one-third of the estate of the deceased;" and having been executed while the deceased "was suffering from her last and fatal illness," and made "in favour of one who is an heir of the deceased," was inoperative

(1) 1 W. R. 17.

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"without the consent of the other heirs."—Macnaghten's *Muhammadan Law*, 2nd edition, pages 51, 198 and 245.

This being so, although I do not agree with the grounds upon which the Subordinate Judge refused to give effect to the instrument of the 24th November, 1884, and decreed the plaintiff's suit, I nevertheless come to the same conclusion as he did, namely, that the plaintiff must succeed in his claim, not because the instrument referred to was not signed by the deceased, but because by reason of the time and circumstances under which it was made it constituted a death-bed gift or will, subject to the conditions prescribed by Muhammadan Law as to the consent of the other heirs, and those conditions not being satisfied, it not only falls to the ground, but the parties stand in the same position as if the document in question had never existed at all. This appeal is therefore dismissed with costs.

TYRRELL, J.—I agree.

Appeal dismissed.

1887 *January* 12.

CRIMINAL REVISIONAL.

Before Mr. Justice Straight.

QUEEN-EMPRESS *v.* SHERE SINGH.

Practice—Revision—Criminal Procedure Code, ss. 438, 439—*Reference by District Magistrate of proceedings of Sessions Judge.*

A District Magistrate who considers that there has been a miscarriage of justice in the Court of Session, should not report the case to the High Court for orders under s. 438 of the Criminal Procedure Code, but should communicate with the Public Prosecutor as to the case in which he thinks such miscarriage has occurred, and invite his assistance to move the Court with regard to it.

IN this case the District Magistrate of Allahabad, being of opinion that an order passed by the Sessions Judge on appeal was erroneous in law, reported the case to the High Court for orders under s. 438 of the Criminal Procedure Code. The facts of the case need not be stated, as the judgment of the High Court relates only to the method adopted by the Magistrate of directing the Court's attention to the matter. The following passage occurred in the Magistrate's letter to the Court:—

"It may be urged that District Magistrates are not competent to invoke the High Court as a Court of revision because they