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not seem to affect, or even bear upon, the language or theory of the enactment.

Their Lordships will humbly advise His Majesty that the appeal ought to be dismissed, and the appellants will pay the costs of the appeal.

Appeal dismissed.

Solicitors for the appellants: Messrs. *Young, Jackson, Beard and King.*

Solicitors for the first respondent: Messrs. *Watkins and Lempriere.*

J. V. W.

SHAFIQ-UN-NISSA (PLAINTIFF) *v.* SHABAN ALI KHAN (DEFENDANT).

P. C. 1904 *July* 7, 8.

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Evidence Act (I of 1872) sections 4, 32, 90—*Practice of Privy Council with respect to decisions as to credibility of witnesses by lower Courts—Mode of dealing with hearsay evidence—Ancient document—Discretion of Court in calling for formal proof of—*

The Judicial Committee will not criticize with any strictness opinions as to the credibility of witnesses, which is eminently a question for the Courts in India.

Where the Courts below had rejected the evidence of certain witnesses on the ground that it was hearsay only and had not conformed with section 32 of the Evidence Act, and on the face of the evidence it was sometimes uncertain whether the witnesses were speaking from their own personal knowledge or from information derived from others, but the Courts had considered it from both points of view and held it inadmissible, the Judicial Committee saw no reason to differ from the estimate which the Courts had formed as to the credibility of the witnesses in the former case, nor, in the latter case, to question the manner in which the Courts had applied the provisions of section 32.

Notwithstanding a document was more than 30 years old and had been produced from proper custody, the Courts below, on the grounds that there were circumstances in the case and evidence as to the document itself which threw great doubt on its genuineness, exercised their discretion under section 90 of the Evidence Act by not admitting the document in evidence without formal proof, and rejected it when no such proof was given. The Judicial Committee considered that the discretion of the Court had been rightly exercised and declined to interfere with it.

APPEAL from a judgment and decree (April 6th 1899) of the Court of the Judicial Commissioner of Oudh, which

Present:—Lord DAVEY, Lord ROBERTSON, and SIR ARTHUR WILSON.

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affirmed a judgment and decree (July 12th, 1897) of the Additional Civil Judge of Lucknow by which the suit of the appellant was dismissed.

The property in dispute in the suit was the taluqdari estate of Salempur, the last male owner of which was Raja Nawab Ali Khan whose name was entered in the 1st and 2nd lists prepared under the provisions of Act I of 1869, section 8. He died on 24th February 1879, and was succeeded by his widow Sitar-un-nissa, who retained possession until her death on 5th November 1894. In substitution of her name the appellant and respondent both claimed mutation of names in their favour; the former claiming as niece, and the latter as son of Raja Nawab Ali Khan; and on 5th February 1895 an order was passed directing the entry in the Revenue Registers of the name of the respondent, who was in possession of the estate.

On the 4th October 1895 the appellant instituted the present suit against the respondent for the estate left by Raja Nawab Ali Khan. The plaintiff claimed as the nearest heir of the Raja, and asserted that the defendant was his illegitimate son, and therefore not entitled to succeed. The defendant denied both these statements, and the issues raised on them constituted the two main issues in the suit, and there were concurrent findings of the Civil Judge of Lucknow, and of the Court of the Judicial Commissioner of Oudh on both the issues against the plaintiff. On the issue as to the plaintiff's title the Judicial Commissioners said:—

"In our opinion the bulk of the plaintiff's oral evidence is inadmissible. The witnesses are not speaking from personal knowledge, but from hearsay, and the plaintiff is unable to distinguish hearsay that is admissible from hearsay that is not admissible in evidence. Under the conditions mentioned in section 32, clause 5, and section 50 of the Evidence Act hearsay is admissible, otherwise it is not. The plaintiff has failed to show that those conditions exist in the present case."

On the issue as to the legitimacy or otherwise of the defendant, the judgment of the Judicial Commissioners stated as follows:—

"On a review of the evidence we hold that the respondent has fully established the facts that Raja Nawab Ali Khan expressly acknowledged Shaban Ali Khan as his son to the Chief Commissioner, the British Indian

Association, the Officials of Government and his friends and social equals, and Shaban Ali Khan was recognized on all important occasions as the legitimate son of Nawab Ali Khan. The treatment of Kurban Ali Khan, in his life-time, his introduction to the *Darbar* in 1862, and his being entrusted with the management of the estate, establish acknowledgment of a similar character in his case. Shaban Ali Khan was treated by the members of his family and by the servants in marked distinction to the treatment accorded to Murtaza Husain and other illegitimate sons of Nawab Ali Khan. Rani Sitar-un-nissa also treated Shaban Ali Khan as the legitimate son of her husband, and as her own son. Nawab Ali Khan, as a member of the British Indian Association, was concerned in having clause 10, section 22 in Act I of 1869, entered in the Act for the express purpose of securing the succession of the defendant as his legitimate son. There is evidence that the defendant's mother was called, and treated, and recognized as, the junior wife of Nawab Ali Khan, that she paid visits to other families as such, and she lived in the same building with Rani Sitar-un-nissa, having a separate, but smaller allowance. Her funeral was attended as that of the wife of Nawab Ali Khan. Exhibit D12 is an express declaration by Nawab Ali Khan that Shaban Ali Khan is in the line of succession to him. In the face of this documentary and oral evidence, we cannot accept the evidence of Raja Amir Hasan Khan, which from defect of memory or other causes, cannot be held to be reliable or even consistent with his own statements on other occasions."

The Courts below rejected various documents produced by the plaintiff in support of her case, on the ground that they were inadmissible under the Evidence Act. The document P. 6 referred to in their Lordships' judgment was a letter dated 25th April 1865 written by Raja Nawab Ali Khan to a peshkar in the following terms:—

"I beg to inform you that I am in receipt of your favour dated 14th April 1865 with a statement to be filled up of such consanguineous relations, or (other sort of) relations who are granted, as gratuitous maintenance, an entire village or a piece of land by a lease, or without a lease, or are supported otherwise, whereas in this estate there is no consanguineous relation, or any other sort of relation deserving maintenance, and there are in my family only two of my real nieces (sister's daughters), Shafiq-un-nissa and Rafiq-un-nissa, the former being also my adopted daughter, brought up by me, who receive proper maintenance and support such as the income of the estate would allow, with a little distinction, and all the rights of my deceased sister and the profits of her villages being paid to them; and whereas, besides these, no one else is paid anything. I therefore beg to state in reply, for your information, that the statement be prepared in the tahsil, in accordance with my writing, to the effect that there is no consanguineous relation, so no one is supported."

The defendant denied the genuineness of this document, and both the Lower Courts rejected it because the plaintiff

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made no attempt to prove that it was genuine, after he had been called upon by the Court to do so.

From the decisions dismissing his suit the plaintiff appealed to His Majesty in Council.

Mr. *W. C. Bonnerjee* for the appellant contended that the courts below were wrong in law in presuming that there had been a marriage between the respondent's mother and Raja Nawab Ali Khan. The parties were governed by the Shia or Imamia school of Muhammadan law, by which (unlike the Sunni or Hanifia school) no such presumption was allowed to be drawn, but which required in such cases that a marriage should be proved by direct evidence. Under the circumstances no acknowledgment by the father would establish the respondent's consanguinity or give him the status of a legitimately born son. It was also contended that an error of law had been committed by the Lower Courts in wrongly rejecting as inadmissible evidence, oral and documentary, tendered by the appellant to prove her relationship to the late Raja. In particular the rejection of exhibit P. 6, which was most cogent evidence in favour of the appellant's claim, was wrong in law. That document was more than thirty years old and was produced from the proper custody: the Courts therefore should have presumed, under section 90 of the Evidence Act (I of 1872) that it was genuine, and should not have put the plaintiff to proof of its genuineness. Other instances were given of what, it was contended, was the erroneous rejection of documentary evidence produced by the appellant. As to the oral evidence a great deal of it had been wrongly rejected as hearsay evidence, which, it was submitted, was admissible under clause 5, section 32 of the Evidence Act.

Mr. *DeGruyther* for the respondent was not heard.

1904, *July 8th.*—The judgment of their Lordships was delivered by LORD DAVEY:—

In this case the appellant, who was the plaintiff in the suit, sued the respondent, who was the defendant, for recovery of possession of a taluq called Salempur, in Oudh. The respondent is in possession, and he claims to be entitled to the taluq as the son and next male heir of a former taluqdar,

Raja Nawab Ali Khan. The appellant, however, alleges that the respondent is not the legitimate son of Nawab Ali, and that she is the elder daughter of the sister (now deceased) of Nawab Ali, and is entitled, according to Muhammadan law, by the Oudh Estates Act, to succeed to the estate. The respondent denies the alleged relationship of the appellant to Nawab Ali, and as the appellant can only succeed on the strength of her own title, the first issue is, whether the appellant fills the position she alleges. The learned Judges of the Civil Court and of the Court of the Judicial Commissioner have given concurrent judgments against the appellant on this point. Under these circumstances it is not necessary for their Lordships to review all the evidence at length.

But the appellant suggests that the Civil Court and the Court of the Judicial Commissioner have given erroneous findings in matters of law. The only two points, however, to which Counsel for the appellant directed their Lordships' attention were these. In the first place he says that both Courts below have treated as inadmissible the evidence of certain witnesses on the ground that their evidence is hearsay only and has not conformed with the requirements of the Indian Evidence Act; and secondly, he says that a certain document, marked P. 6, was wrongly rejected in evidence.

As to the first objection, their Lordships are of opinion that no fault can be found with the mode in which the Courts in India have dealt with the evidence in question. On the face of the evidence it is sometimes a little uncertain whether the witnesses purport to be speaking from their own personal knowledge, or from information which they have derived as members of the family or otherwise. But the Courts appear to have considered the evidence of the witnesses from both points of view. They say, either these witnesses are speaking from personal knowledge, or they are speaking from information which they have derived from others, and if they are speaking from information which they have derived from others, they do not state the persons from whom they derived that information, nor—which is equally important—at what period of time they derived it; and,

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if they are speaking from personal knowledge, the learned Judges point out inaccuracies and contradictions in their evidence which, in their opinion, render the witnesses unworthy of credit.

Their Lordships do not conceive it to be any part of their duty to criticise with any strictness the opinion which has been expressed by the Courts as to the credibility of the witnesses. That, in their Lordships' opinion, is eminently a question for the Courts in India. But their Lordships see no reason to differ from the estimate which both Courts have formed as to the weight to be attached to the statements made by the witnesses, and so far as the witnesses are speaking from information and not from personal knowledge, their Lordships see no reason to question the manner in which the Courts below have applied the provisions of section 32 of the Indian Evidence Act.

The other question which has been put before their Lordships as a matter of law is the admissibility of the Exhibit P. 6. That document, if proved to be a genuine statement of Nawab Ali, would go a long way towards establishing the appellant's case. But both the Courts in India have rejected it. It is a document purporting to be dated on a Muhammadan date corresponding to the 25th April 1865. It purports to be a letter written by Nawab Ali in his own hand, and signed by himself, addressed to the peshkar or keeper of the public records of the Collector. It is produced out of the custody of the Deputy Collector. Under these circumstances, the document being more than thirty years old, the provisions of section 90 of the Indian Evidence Act are applicable, and the Court may presume the genuineness of it without proof. Section 90 says:—"The Court may presume that the signature and every other part of such document which purports to be in the handwriting of any particular person is in that person's handwriting." What is meant by "the Court may presume" a document to be genuine, is shown by section 4 of the Act, which is in these terms:—"Whenever it is provided by this Act that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it." The learned Judge

in the Civil Court called for proof of the document, but no proof was forthcoming. It is one of the remarkable things in this case that the plaintiff did not give any evidence of her own, and no witness was called on her part who was acquainted with Nawab Ali's handwriting to say whether the document was in his handwriting or not. Therefore it may be taken, that unless it can be admitted to evidence under section 90 of the Evidence Act, there is no proof of the genuineness of the document. On the other hand there are circumstances, both internal, and external, which throw great doubts upon the genuineness of the document. It is said that the plaintiff was Nawab Ali's adopted daughter, brought up by him, and that she was in receipt of proper maintenance and support out of the income of his estate. There is no evidence of those facts, and if evidence could have been given of those facts, one would have thought that the appellant would have given such evidence, as it might have a material bearing upon her case.

Under these circumstances, their Lordships are not surprised that the Judges, both in the Civil Court and in the Court of the Judicial Commissioner, exercised the discretion which is vested in them by section 90 by not admitting the document to evidence without formal proof, although it is more than thirty years old, and purports to come from the proper custody. It should be added that the Court considered that there was evidence in the case—which it is not necessary to go into, and to which, in fact, their Lordships' attention has not been pointedly drawn—which raised great suspicions as to the document itself. Their Lordships would always be extremely slow to overrule the discretion exercised by a learned Judge under section 90 of the Act, and certainly this is not a case in which they would be disposed to do so.

If these questions are disposed of there is really no question of law left as regards this part of the case, and their Lordships therefore can do nothing else but adopt the concurrent findings of both Courts below, and hold that the appellant has failed to prove her title.

It is not necessary, of course, and their Lordships are not asked to do so, to give any decision on the second issue of the

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case, whether the defendant is, or is not, the legitimate son of Nawab Ali. This being an ejectment action, the plaintiff must succeed on the strength of her own title, and as she has failed to prove her title the suit was properly dismissed.

Their Lordships will therefore humbly advise His Majesty that the appeal should be dismissed, and the appellant will pay the costs of it.

Appeal dismissed.

Solicitors for the appellant: Messrs. *T. L. Wilson and Co.*

Solicitors for the respondent: Messrs. *Watkins and Lempriere.*

J. V. W.

FULL BENCH.

1904
April 8.

Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Burkitt and Mr. Justice Banerji.

BHAIRON RAI AND OTHERS (DEFENDANTS) *v.* SARAN RAI (PLAINTIFF).*

Joint owners—Illegal ouster of joint owner—Suit for recovery of joint possession—Form of decree.

Held that if a plaintiff has been in joint possession of property and has been illegally ousted from joint possession of any portion of that property by a co-owner, he is entitled to be restored to such joint possession. *Rahman Chaudhri* v. *Salamat Chaudhri* (1) distinguished.

THE plaintiff in the suit out of which this appeal arose owned jointly with his brother Sangam Rai certain zamindari in mauza Mallap. Sangam Rai sold a portion of his share to Bhairon Rai and others. The purchasers, according to the plaintiff, took forcible possession of some 10 bighas odd of the joint sír land, and accordingly the plaintiff, after an unsuccessful application to the Revenue Court, filed his suit in the Civil Court asking for joint possession of the sír from which he had been ousted. He also claimed profits of the sír land for 1308 Fasli. The Court of first instance (Munsif of Rasra) decreed the plaintiff's suit, and that decision was upheld in appeal by the District Judge. The defendants purchasers appealed to the High Court. Their appeal came before Aikman, J., sitting in single bench, and was dismissed by the following order:—"In

*Appeal No. 59 of 1902 under section 10 of the Letters Patent.

(1) Weekly Notes, 1901, p. 48.