1906
June 7.

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

AULIA BIBI AND OTHERS (DEFENDANTS) *v.* ALA-UD-DIN AND OTHERS (PLAINTIFFS) and SHARF-UD-DIN AND OTHERS (DEFENDANTS).*

Muhammadan Law—Will—Signature—Intention.

Where it was found that a document purporting to be the will of a Muhammadan lady was in fact drawn up in accordance with instructions given by the testatrix to a vakil at a time when the testatrix was competent to make a will, *held* that such document was a valid will notwithstanding the absence of the signature of the testatrix. *Parker* v. *Filgate* (1), *Perera* v. *Perera* (2), *Allen* v. *Manning* (3) and *Re Taylor* (4) referred to.

THIS was a suit by certain legatees claiming property under the will of a deceased Muhammadan lady, Musammat Badr-un-nissa. The defendants disputed the validity of the will. They stated that at the date of its alleged execution Badr-un-nissa was not competent mentally or physically to make a will, and that in fact the alleged will was never executed or explained to Badr-un-nissa, not did she understand its meaning. The Court of first instance (Subordinate Judge of Allahabad) came to the conclusion that "Musammat Badr-un-nissa did neither get this will, dated the 23rd November, 1902, written, nor had she any personal knowledge of the contents thereof, nor did the said Musammat in her senses instruct any person as to the formal execution and completion of this will, nor did the Musammat affix her mark to it," and accordingly dismissed the suit. The plaintiffs appealed to the District Judge. The learned District Judge found that the will was the genuine expression of the last wishes of the testatrix drawn-up in accordance with instructions given by her to a vakil shortly before her death, and that at the time the testatrix was competent to make a will. It was not signed by the testatrix; but that, the Judge held, was immaterial. The lower appellate Court therefore set aside the decree of the first Court and remanded the suit under section 562 of the Cade of Civil Procedure. Against this order the defendants appealed to the High Court.

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* First Appeal No. 117 of 1905, from an order of W. J. D. Burkitt, Esq., Officiating District Judge of Allahabad, dated the 3rd of August, 1905.

(1) (1883) L. R., 8 P. D., 171.
(2) L. R., 1901, A. C., 354.
(3) 2 Add., 490.
(4) 1 Hagg. 641.

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AULIA BIBI v. ALA-UD-DIN.

Dr. *Satish Chandra Banerji*, for the appellants.

The Hon'ble Pandit *Sundar Lal* and Dr. *Tej Bahadur Sapru*, for the respondents.

STANLEY, C.J. and BANERJI, J.—This is an appeal from an order of the District Judge of Allahabad reversing a finding of the Subordinate Judge that an alleged will of a Muhammadan lady, one Musammat Badr-un-nisa, was not executed by her or any one on her behalf, nor had she any knowledge of the will or of its contents. The plaintiffs are sons of the daughters of Musammat Badr-un-nissa and claimed her property as legatees under her will. The defendants are the widow and daughters of a predeceased son and they deny the validity of the will.

In their plaint the plaintiffs alleged that on the 23rd of November, 1902, Musammat Badr-un-nissa disposed of by will to the plaintiffs one-third of her property and died on the succeeding day. The defendants in their written statement set up the case that Musammat Badr-un-nissa was at the time of her death an old lady of about 70 years and very weak and infirm, and that on the date the alleged will was executed was not competent to make a will. They also denied that she ever executed the alleged will or that it was read out or explained to her or that she understood its meaning.

The following issues, amongst others, were framed upon the pleadings, namely, whether or not Musammat Badr-un-nissa executed the will in dispute, and, if so, whether or not she knew its contents and executed it whilst in possession of her senses. The learned Subordinate Judge reviewed the evidence at considerable length and came to the conclusion that "Musammat Badr-un-nissa did neither get this will, dated the 23rd of November, 1902, written, nor had she any personal knowledge of the contents thereof, nor did the said Musammat in her senses instruct any person as to the formal execution and completion of this will, nor did the Musammat affix her mark to it."

On appeal the learned District Judge reversed this decision, but he held that it "was not proved that the testatrix signed the will herself and it is not alleged that anybody else signed for her." In the course of his judgment he observed that evidence had been produced to prove that the will was actually signed; but that, in

view of the class of witnesses produced to prove this and the serious conflict in their evidence, and also of the mark which Badr-un-nissa is alleged to have made, which is strong and clear and firm and not at all such as an old woman who was suffering from fever and was practically at the point of death could possibly make, the plaintiffs had entirely failed to prove that Badr-un-nissa herself signed the will. He held, however, that Badr-un-nissa had a disposing mind when she gave final instructions to Mr. Rahmat-ullah, a vakil, for the preparation of her will, and that these instructions were embodied in the will and that this will was accepted by Badr-un-nissa relying on Rahmat-ullah's having faithfully carried out her instructions, and that the will was therefore legally valid.

The learned District Judge relied upon the authority of the decisions in the case of *Parker* v. *Filgate* (1) and *Perera* v. *Perera* (2). In the first mentioned case it was held that if a testatrix has given instructions for her will and it is prepared in accordance with them, the will will be valid, though at the time of execution the testatrix merely recollected that she had given those instructions, but believed that the will which she was executing was in accordance with them. This decision was approved of in the case of *Perera* v. *Perera* (2). In both these cases the wills were duly executed, in the first by a party on behalf of the testator by her direction and in the other by the testator himself. In neither case would the will have been valid if it had not been signed. In England since the Wills Act no will is valid unless it is signed by the testator or by some person in his presence and by his direction. In the case of *Perera* v. *Perera* the law of Ceylon was applicable, and there also the law requires that a testator's signature shall be made or acknowledged in the presence of witnesses. Before the Wills Act in England a will reduced into writing during the life-time and by the direction of a testator was sufficient for the disposition of personal estate though it had not been signed and was never actually seen by the testator. *Allen* v. *Manning* (3), *Re Taylor* (4), and the cases to which we have referred are useful as showing that a will,

(1) (1883) L. R., 8 P. D., 171.
(2) L. R., 1901, A. C., 354.
(3) 2 Add., 490.
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prepared in accordance with the instructions of a testator and to which he expressed approval believing that his instructions were carried out, would be valid if the will did embody the instructions. Now, according to the Muhammmadan Law, a will may be made either verbally or in writing, and no special form or solemnity for making or attesting a will is prescribed. It is sufficient if a will can be proved to have been really and truly the will of the testator. The learned District Judge has found that although the will in this case is not proved to have been signed by the testatrix or any one on her behalf, yet the document does represent her real will and he has found that she was competent at the time to make a will. It has been argued before us that this being the case the finding that the will was not signed is immaterial. We think that in view of the Muhammadan Law there is force in this contention. The will was found by the lower appellate Court to be the genuine last will of the testatrix and was made at a time when she was competent to make a will. We dismiss, the appeal, but, having regard to the fact that the respondents set up the case that the will was executed by the testatrix and entirely failed to prove this, we allow no costs of this appeal.

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June 8.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir George Knox.

JAI KUMAR AND OTHERS (DEFENDANTS) *v.* GAURI NATH (PLAINTIFF).*

Act No. IX of 1872 *(Indian Contract Act), section* 23—*Contract—Agreement opposed to public policy—Promissory note given for repayment of money in respect of which a criminal prosecution might possibly have lain.*

Where a *bonâ fide* debt exists and where the transactions between the parties involve a civil liability as well as possibly a criminal act, a promissory note given by the debtor by a third party as security for the debt constitutes a valid agreement.

Keir v. *Leeman* (1), *Flower* v. *Sadler* (2) and *Kessowji Tulsidas* v. *Hurjivan Muljí* (3), referred to.

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* Second Appeal No. 338 of 1905, from a decree of Rai Bahadur Lala Baij Nath, Judge of the Small Cause Court, Allahabad, exercising the powers of a Subordinate Judge, dated the 24th of January, 1905, reversing the decree of Babu Bhola Nath Seth, Munsif of Allahabad, dated the 21st of September 1904.

(1) (1844) L. R., 9 Q. B., 371, 392: 72 R. R., 293.
(2) (1882) L. R., 10 Q. B. D., 572.
(3) (1887) I. L. R., 11 Bom., 566.