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property to Koibullo whom I have adopted"), and that this gift was not dependent on the performance of certain ceremonies by his widows. In the present case, their Lordships are of opinion that it was the intention of Dhanraj to give his property to Murlidhar as his adopted son capable of inheriting by virtue of the adoption; and that, as the adoption was invalid according to the general Hindu law, and not warranted by family custom, it gave no right to inherit, and the gift therefore had no effect upon the property.

The learned Judges of the High Court appear to have been influenced in coming to their decision by the fact that, under the *wajib-ul-arz*, Murlidhar was to get half the property, and that this was "more than a validly-adopted son would get." "This is an indication," they say, "that the adoption was not the reason or motive of the bequest." But what are the words used? "If, after this agreement a son is born to me, half the property will be received by him, and half by the adopted son." This is not a gift to Murlidhar personally, but a division of the estate according to the family custom which Dhanraj was endeavouring to establish, and according to which the adopted son was to take an equal share with natural-born sons.

In the opinion of their Lordships the claim of Murlidhar wholly fails, and they will humbly advise His Majesty that the appeal ought to be allowed, and that the decrees of the Subordinate Judge and the High Court ought to be reversed, and the plaintiff's suit dismissed, with costs in both the lower Courts. The respondent must also pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellant—*Pyke and Parrott.*

J. V. W.

P. C. 1906 *February* 22, 23. *April* 10.

HUB ALI (DEFENDANT) *v.* WAZIR-UN-NISSA AND ANOTHER (PLAINTIFFS).

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

Muhammadan law—Marriage—Ghair kuf *wife—Custom of exclusion from inheritance—Proof of custom—Entry in* wajib-ul-arz *—Mortgage by conditional sale—Mortgagee taking possession without foreclosure proceedings—Trespasser—Suit for ejectment without redeeming—Regulation XVII of* 1806.

In a suit by a Muhammadan lady to recover possession, as her husband's heir, of his immovable property, the question arose whether she was a *ghair kuf*

Present:—Lord DAVEY, SIR ANDREW SCOBLE and SIR ARTHUR WILSON.

wife, and so excluded by custom from inheritance as heir to her husband. The only reliable evidence of the custom was the village *wajib-ul-arz* which stated that "a married wife belonging to a *(ghair kuf)* different caste and an unmarried wife or their descendants" would "be entitled to maintenance" but not "to any share" of the property. The document bore the signature, amongst others, of the husband, and commenced with words meaning "by agreement," and so did not purport to be a record of immemorial custom, and the rules of inheritance laid down in it were based, not upon Muhammadan, but upon Hindu, law. *Held*, that in the absence of other evidence the entry in the *wajib-ul-arz* was insufficient to establish the custom.

A deed of 11th May, 1871, executed by the husband in favour of a person through whom the defendant made title, hypothecated the village property in suit in consideration of a loan of Rs. 2,000, stipulating that, in default of payment, the transaction should be "a complete sale" in 30 years or on the death of the mortgagor, whichever first occurred. The deed recited and renewed a former deed made in 1866, between the same parties, described as a "mortgage deed by conditional sale," and containing the same terms except that the period for repayment was five years. The mortgagor died in 1881, and the defendant, the representative of the mortgagee, then took forcible possession without any foreclosure proceedings under Regulation XVII of 1806, the law then in force. *Held*, that the deed of 1871 was a mortgage by conditional sale. There was under it a right of foreclosure on failure of the mortgagor to redeem within the time limited by the terms of Regulation XVII of 1806; but in taking possession as he did, the defendant was a mere trespasser and liable to ejectment in this suit.

APPEAL from a judgment and decree (7th January, 1902) of the Court of the Judicial Commissioner of Oudh, which reversed a judgment and decree (4th February, 1893) of the District Judge of Fyzabad.

The suit out of which this appeal arose was for possession of certain immovable property and for mesne profits under the following circumstances. The property in suit, which was an eight-anna share in the villages of Hasanpur, Tanda, and Asauna in the district of Bara Banki, belonged to one Raza Ali, who, prior to the annexation of Oudh, resided at Seota in the district of Sitapur. After he had claimed and obtained a decree for the property, he came to live at Tanda, where he resided from 1865 till his death in 1881.

In order to obtain funds for proceedings to recover the property, he borrowed money from one Tajammul Husain Khan, and on the 28th February, 1866, executed in his favour a mortgage of his share in the villages. The deed was in the

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ordinary form of a mortgage by conditional sale, with a covenant that it should become a complete sale if payment were not made within five years. On 11th May, 1871, Raza Ali, being unable to pay, executed a fresh mortgage by conditional sale, which provided that Tajammul Husain Khan should have the right to foreclose at the expiration of thirty years or on the death of Raza Ali, whichever event first occurred.

Raza Ali died on 2nd January, 1881, and, previous to that, Tajammul Husain Khan had died and been succeeded by Kazim Husain Khan, who on 4th January, 1881 took forcible possession of the mortgaged property. His only legal remedy would have been to take foreclosure proceedings under Bengal Regulation XVII of 1806; but, notwithstanding the illegality of his possession, the Revenue Courts, on 22nd March, 1881, made an order in his favour for mutation of names. Previous to that order, Hub Ali, the present appellant, brought a suit for pre-emption against Kazim Husain Khan, in which he obtained a final decree in the Judicial Commissioner's Court, on 14th November, 1884, in execution of which Hub Ali obtained possession of the property in suit.

The present suit was brought on 13th August, 1890, by the present respondents, Wazir-un-nissa and Sughra Bibi, claiming as widow and daughter of Raza Ali, and by one Inayat-ullah, claiming under a conveyance executed in his favour by the first and second plaintiffs on 8th February, 1890. The defendants were Kazim Husain Khan and Hub Ali.

The plaint stated the facts as already given and the wrongful taking of possession on 4th January, 1881.

The defendant, Kazim Husain Khan, pleaded his right to possession of the property under the mortgage. The defendant, Hub Ali, alleged that Wazir-un-nissa was never married to Raza Ali, and that Sugra Bibi was therefore not his legitimate daughter; that even if married to Raza Ali, she was a *ghair kuf* woman, and that she and her daughter were therefore, by custom, excluded from inheritance; that the transaction embodied in the deed of 11th May, 1871, became an absolute sale on Raza Ali's death; and no right to or claim in the property affected

by the deed remained to his heirs, nor was there any necessity to take foreclosure proceedings. He also pleaded that the plaintiffs on their own allegations ought to have sued for redemption, and that the suit in its present form would not lie.

The District Judge held that the deed of 11th May, 1871, was a mortgage by conditional sale, under the terms of which Kazim Husain Khan could not legally obtain possession, except by foreclosure proceedings under Regulation XVII of 1806; that the plaintiffs 1 and 2 had not established that they were the wife and legitimate daughter, respectively, of Raza Ali; and that they were excluded from succession by the custom as recorded in the *wajib-ul-arz*. In accordance with these findings he dismissed the suit.

On appeal, the Court of the Judicial Commissioner (Mr. *Ross Scott*, Judicial Commissioner and Mr. *G. T. Spankie.*, Additional Judicial Commissioner) affirmed the findings of the District Judge as to the nature of the deed of 11th May 1871, and as to the necessity for foreclosure preceedings; but were of opinion that the plaintiffs had proved the marriage of Wazir-un-nissa, and that the defendants had not proved the custom excluding the plaintiffs 1 and 2 from inheriting. They therefore reversed the decree of the District Judge, and made a decree for possession with mesne profits and costs.

The material portion of their judgment was as follows:—

"I think the question whether Musammat Wazir-un-nissa was or was not the lawful wife of Raza Ali, must be decided with the assistance of the admitted facts, and the facts proved by the documentary evidence to which I referred. These facts are that the patwari, on the death of Raza Ali, reported that Musammat Wazir-un-nissa, his wife, and Musammat Sughra, his daughter, were his heirs; that Hub Ali, defendant, deposed, in a former suit, that Musammat Wazir-un-nissa was the *zauja* (wife) of Raza Ali, and that Hadi Husain and his brothers, in their application for mutation of names in their favour, on the death of Raza Ali, said that she was his wife but not *ahl-i-kuf*. The patwari had no apparent motive for making a false report, and was in a position to know whether she was regarded as the wife of the deceased or not; and the fact that he did make the report, when apparently Musammat Wazir-un-nissa and everyone else believed that Kazim Husain was entitled to the property under the terms of the deed executed by Raza Ali, is strong evidence that Musammat Wazir-un-nissa was the lawful wife of Raza Ali. Hub Ali has endeavoured to explain that the word *zauja* which occurred in his former deposition does not necessarily mean wife, and

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does include a mistress or concubine, but its meaning must be taken to be wife, and he would not have used it with reference to Musammat Wazir-un-nissa, if he believed her to be merely the mistress of Raza Ali.

"For the defendants it is argued that, had she been his wife, Raza Ali would not have left her unprovided for; but although she and others believed that Kazim Husain, under the terms of the mortgage, became absolute owner of the property on Raza Ali's death, the latter may have known that she was entitled to redeem the mortgage on payment of Rs. 2,000, and, as she was entitled to the movable property also, he may have thought that she was sufficiently provided for. As Hadi Husain and his brothers or their mother, who are the heirs of Raza Ali, if Musammat Wazir-un-nissa was not his wife, could have been made plaintiffs, it is unlikely that the third plaintiff or his master, the Raja of Mahmudabad, would risk their money on an unnecessary attempt to prove that she was his wife if in fact she was not.

"There is no evidence that until the present suit was instituted, nearly 10 years after his death, it was ever stated that she was not his wife, and as Hub Ali, the defendant, is shown not to be a truthful witness, there is little doubt that he would not hesitate to defeat the plaintiff's claim and maintain his own title to the property by adducing false evidence. I think, therefore, that the facts to which I have referred afford a sufficient reason for accepting the evidence to prove that a marriage did take place between Musammat Wazir-un-nissa and Raza Ali, and that she is his lawful wife, and Musammat Sughra his legitimate daughter.

"The custom that wives of a deceased proprietor who are *ghair kuf* and their children do not inherit his property is recorded in the *wajib-ul-arz* of the village; but the *wajib-ul-arz* begins with the words '*ba-ikrar*' or 'by agreement,' and it therefore cannot be presumed to be necessarily the record of an old and established custom. It does not purport to be more than an agreement between the parties who signed it, and there is no clear evidence of instances in which the custom was recognised and acted on. Under Muhammadan law the marriage of a female with a male of inferior position is discouraged; but there appears to be no authority under that law for supposing that a man should not marry a woman who is socially inferior. It is stated that a man raises his wife to his own position. *Primâ facie*, therefore, the alleged custom has no support from Muhammadan law. Even if it be assumed that it exists, the evidence does not prove that Musammat Wazir-un-nissa was the *ghair kuf* wife of Raza Ali. *Kuf* in Arabic denotes equality, and a *ghair kuf* wife is one who is her husband's social inferior. The defendants' witnesses have for the most part deposed that a marriage is *ghair kuf* which takes place between persons whose families have not previously intermarried. No doubt the fact of previous intermarriage is a rough-and-ready test of equality between the parties to a proposed marriage, and some of the witnesses probably believe that when no such intermarriage has taken place, the families are *ghair kuf* to one another; but the evidence does not prove that this is the meaning to be attached to the words; and, as stated above, Hub Ali admitted that two of his nieces married into families with which his family had not previously intermarried. It has not been proved that the

social position of Musammat Wazir-un-nissa's family was inferior to that of Raza Ali. When married, he appears to have been a *sawar*, and the only property he had was that for which he had instituted a suit against his relative, Abdul Wahid; so that, whatever may have been the position of his family, his own social position was therefore not a high one, and had there not been some flaw in his character or descent, it is probable he would have been married before he was 45 years of age. There is no evidence from which it can be found that Musammat Wazir-un-nissa was much, if anything, his social inferior, and there is evidence that her sister, Musammat Amiran, and the daughters of the latter, married men who are not alleged to have been socially inferior to Raza Ali. Even if the *wajib-ul-arz* established the alleged custom, which it does not, or if the custom were established from the evidence, I would find that Musammat Wazir-un-nissa was not the *ghair kuf* wife of Raza Ali, and that neither she nor her daughter, Musammat Sughra, is excluded from inheriting.

"There remains the question whether, under the mortgage of the 11th May, 1871, Kazim Husain was entitled to enter into possession of the mortgaged property, without taking foreclosure proceedings, and the transaction by the document was one of absolute sale on the death of Raza Ali. The transaction is stated in the document to be a mortgage by conditional sale, and no possession by the mortgagee was provided for in it. The conditions stated in it are that 'so long as any portion of this debt remains unpaid, no charge, hypothecation, mortgage or gift of the property to any other person will be valid. If, God forbid, I or my representatives, or heirs, do, or attempt to do anything contrary to the terms of this deed, then the creditor, his heirs, and representatives, shall have the option of enforcing fulfilment of its terms through the Court. The second condition is, if, God forbid, within the period limited, I die, then after me, the whole share of *zamindari* in the villages of Hasanpur, Tanda and Asauna, as detailed below, in part, and in its entirety, exclusive of Sadwapur, owned and possessed by me and hypothecated as above, shall be regarded as a complete sale in favour of Muhammad Tajammul Husain Khan, creditor, in lieu of the debt, and none of my sharers, representatives or heirs shall expressly or otherwise have any claim or right remaining, and the said creditor henceforth shall be the real owner of the said property, and this deed shall be considered as a sale-deed.' In my opinion, it is certain that the parties regarded the transaction as a mortgage, the property being pledged as security for the payment of the debt without interest, and no right was given to the mortgagee to take possession without having recourse to the proceedings required under Regulation XVII of 1806. By taking possession as he did, Kasim Husain became a trespasser, and Hub Ali, defendant, being his representative has no better right to possession. It is not alleged that Musammat Wazir-un-nissa gave him possession. She did not object at the time to his taking possession, as she, like others, probably believed that under the terms of the deed, he was entitled to take possession as owner. I therefore would hold that the defendant, Hub Ali, is not entitled to possession, and would allow the appeal, and setting aside the decree of the lower court, decree the plaintiff's claim with costs in both courts."

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On this appeal

H. Cowell, for the appellant, contended that on the proper construction of the deed of 11th May, 1871, its effect was to invest Tajammul Husain Khan or his heir with an absolute title to the property in suit at the death of Raza Ali, and that title was now vested in the appellant. But, if the effect of that deed was to create a mortgage, which the respondents were entitled to redeem, their only remedy was to take proceedings for redemption under Regulation XVII of 1806, which was introduced into Oudh by Act XX of 1876, and was in force at the time of Raza Ali's death, or to proceed with the same object under the Transfer of Property Act (IV of 1882), when it came into force. It was necessary for the respondents strictly to follow the procedure under one or other of those enactments, and, as they had omitted to take that remedy, the title of the appellant under the deed of 1871 had become absolute, and they could not now sue for possession. Reference was made to *Mansur Ali Khan* v. *Sarju Prasad* (1); and the Transfer of Property Act, section 58(3), and section 98. It was also contended on the evidence that the marriage of Raza Ali and Wazir-un-nissa was not a valid marriage, and that even if it were, a custom was established by which neither Wazir-un-nissa nor her daughter could inherit, and therefore had no right to the property in suit as representatives of Raza Ali.

DeGruyther for the respondent, Wazir-un-nissa, contended that the evidence sufficiently established that Wazir-un-nissa was the wife of Raza Ali, and Sughra Bibi his legitimate daughter, that the custom relied on to exclude them from inheriting was not proved; the *wajib-ul-arz* was not conclusive as to the custom and could not be accepted as proof of it. The meaning of "*ghair kuf*" as used in the *wajib-ul-arz* was not clear, but it was submitted that the custom of exclusion could not be extended to a case like this, where the husband and wife were equal in social position, one being a Syed and the other a Sheikh.

As to the construction of the deed of 11th May, 1871, possession of the property could not legally have been taken by the mortgagee under it without proper foreclosure proceedings; and both courts in India had held that the possession taken was illegal.

(1) (1886) L. R. 13 ; I. A. 13, I. L. R., 9 All., 20.

Reference was made to Act No. XVIII of 1876, section 10; and Macpherson on mortgages, 7th edition, page 293. As to the contention that the proper remedy was a suit for redemption and not one for possession, *Forbes* v. *Ameer-oon-nissa Begum* (1) was referred to.

Connell replied, referring to Limitation Act (XV of 1877), schedule II, article 116, as to the period of limitation for a suit for breach of contract: and to *Lekraj Kuar* v. *Mahpal Singh* (2), as to the *wajib-ul-arz* as evidence of the custom excluding the respondent.

1906, *April 10th.*—The judgment of their Lordships was delivered by SIR ARTHUR WILSON—

The suit out of which this appeal arises was instituted on the 13th August, 1890. The plaintiffs were Sughra Bibi and Wazir-un-nissa (claiming to be daughter and widow, and, as such, co-heiresses, of one Raza Ali, deceased) and Inayat-ullah, an assignee from the ladies of a share of their inheritance. The defendants were Kazim Husain Khan and the present appellant, Hub Ali, whose connection with the matters in dispute will be explained later.

The case presented on behalf of the plaintiffs was that about 1856 or 1857 Raza Ali, whose home was then at Seota, was lawfully married to Wazir-un-nissa, and resided with her there for some time, and that Sughra Bibi was the legitimate daughter of that marriage; that subsequently Raza Ali migrated to Tanda, whither he was shortly followed by his wife and daughter, who lived with him there until his death, which took place on the 2nd January, 1881; and that they, as such widow and daughter, were his lawful heirs according to Muhammadan law. It was further alleged that Raza Ali, at the time of his death, was the owner of an eight-anna share in the villages Hasanpur, Tanda and Asauna; and that on the 11th May, 1871, he had mortgaged that property by deed of conditional sale to Raja Tajammul Husain Khan, for a period of 30 years, without possession, to secure a principal sum of Rs. 2,000, without interest. It was then said that on the 4th January, 1881,

(1)(1865) 10 Moore's I. A. 340. (2)(1879) L. R., 7 I. A. 63 (70): I. L. R., 5 Calc., 744 (754, 755).

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immediately after the death of Raza Ali, the defendant, Kazim Husain Khan, the representative of the original mortgagee, without any foreclosure or other legal proceedings, procured mutation of names for the mortgaged property in his own favour, and shortly afterwards entered into possession; and that the other defendant had obtained a decree in a pre-emption suit against Kazim Husain Khan, to which the plaintiffs were no parties, and acquired possession of the property. On the basis of the case thus indicated, the plaintiffs asked for a decree for possession of the property and mesne profits.

In answer to this case, the defendant Hub Ali, now appellant, denied that Wazir-un-nissa was the wife, or Sughra Bibi the daughter, of Raza Ali. He alleged, secondly, that, if there had been a marriage, both wife and daughter were excluded from inheritance under the terms of the *wajib-ul-arz* on the ground that the wife was a *ghair kuf* woman. It was set up, thirdly, that by the terms of the alleged mortgage, the property vested absolutely in the mortgagee on the death of Raza Ali, and that the mortgagee, and after his death his representative, was entitled to take possession without any legal proceedings. It was said, lastly, that the plaintiffs ought, upon their own view of the case, to have sued for redemption and could not sue for possession. These were the four questions discussed before the Courts in India, and again argued on the appeal before their Lordships.

The District Judge dismissed the suit. He held that the marriage of Wazir-un-nissa was not proved. He held further that, if a marriage did take place, the wife was *ghair kuf* within the meaning of the *wajib-ul-arz* and that therefore, mother and daughter were excluded from inheritance. On the other hand he thought that the document called a mortgage by conditional sale, was really so, that the mortgagee or his representative had no right except to have recourse to foreclosure proceedings, and that, in taking possession as he did, he was a trespasser, against whom a suit for possession might properly lie.

In the Court of the Judicial Commissioner it was held that Wazir-un-nissa was the lawfully-married wife of Raza Ali, and Sughra Bibi their legitimate daughter, that the alleged custom based upon the *wajib-ul-arz* to exclude a *ghair kuf* wife and her

daughter was not proved and that, if it were proved, Wazir-un-nissa was not a wife of that class. It was further held, in concurrence with the first court, that the document of the 11th May, 1871, was a mortgage by conditional sale, and that the entry by the representative of the mortgagee was a mere trespass; and accordingly, a decree was given to the plaintiffs for possession and mesne profits.

Their Lordships agree with the conclusions arrived at by the Court of the Judicial Commissioner on all points.

As to the fact of the marriage, it was spoken to by the Qazi, who says he performed the ceremony, and by four other witnesses who profess to have been present. Those witnesses were disbelieved by the First Court, for reasons which are not very convincing; reasons which are quite sufficient to demand an examination of the evidence in support of the marriage as a whole and with care, but not sufficient to justify the summary rejection of the testimony of the witnesses in question. The next branch of the evidence in support of the marriage relates to the position and treatment of the alleged wife and of her daughter. With regard to this it seems clear that, from the time of the alleged marriage, Wazir-un-nissa lived with Raza Ali, as his wife, down to his death. She and her daughter lived in the inner apartments of the house, whereas a mistress who was kept by Raza Ali, lived at the same time in the outer apartments. As to the amount of social intercourse between the two ladies and others more or less connected with Raza Ali's family, the evidence is loose, as is usual in such cases. The daughter, Sughra Bibi, whose parentage is not disputed, was married by her father with considerable ceremony and publicity, to a man of respectable family. Upon the death of Raza Ali, the patwari, in his official report, declared that Wazir-un-nissa, his wife and Sughra, his daughter were his heirs. The present appellant himself, in his evidence on a former occasion, describes Wazir-un-nissa as the wife of Raza Ali.

From all this their Lordships think the proper inference is that the marriage did take place; and it follows that the widow and daughter were heirs of Raza Ali, under the Muhammadan law, unless there was something special to exclude them.

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The special circumstance relied upon as excluding them from the inheritance was that Wazir-un-nissa (it was said) was a *ghair kuf* wife and that she and her daughter were excluded by custom. Apart from the *wajib-ul-arz* it appears to their Lordships that there is absolutely no evidence of any custom on the subject. There is simply a series of statements by witnesses, as to what is usual and what they consider becoming, with reference to intermarriages between different groups of Muhammadan families, but there is no instance produced of anybody having been excluded from inheritance in consequence of a marriage not in accordance with the witnesses' views of propriety. The District Judge based his finding upon a statement in the *wajib-ul-arz* of the village of Hasanpur Tanda. That document, under the heading "transfer of property and right of inheritance," says:—

"A married wife belonging to a *(ghair kuf)* different caste, and an unmarried wife, or their descendants will, provided they bear good conduct, be entitled to maintenance according to their status, and they will not be entitled to any share whether the property be partitioned or unpartitioned."

That document bears the signatures, amongst others, of Raza Ali and the present appellant; and the fact that Raza Ali signed it makes it admissible, for what it is worth, against those who are claiming as his heirs. But the Judicial Commissioner has pointed out that the document commences with words meaning "by agreement," so that it does not purport to be a record of immemorial custom. The learned Counsel for the first respondent drew attention to the fact that, though the parties were all Muhammadans, the rules of inheritance laid down are really based, not upon Muhammadan, but on Hindu law. In the absence of other evidence in support of the alleged custom, their Lordships are of opinion that the entry in the *wajib-ul-arz* is insufficient to establish it. They further agree with the Judicial Commissioner that, supposing such a custom to be established, the case of Wazir-un-nissa has not been shown to fall within it. Raza Ali was by family a Syed, Wazir-un-nissa was by family a Sheikh, and the social position of her father is stated to have been good. If any conclusion can be drawn from the vague and conflicting statements of the witnesses, it appears to their Lordships to be that such a marriage would not fall within the ban implied by the term "*ghair kuf*."

The nature of the mortgage transaction and its legal effect have next to be considered. On the 28th September, 1866, Raza Ali executed a deed of mortgage in favour of Tajammul for Rs. 2,000, repayable in five years, hypothecating the two villages in question as security, and providing in paragraph 3, that if "I die within the fixed period without paying the said loan, then after me the whole share of my *zamindari* which has been hypothecated, shall be considered as a complete sale to Tajammul . . . in lieu of the debt." The same paragraph describes the deed as a "mortgage deed by conditional sale."

On the 11th May, 1871, the mortgagor executed a second deed in favour of the mortgagee. This deed recited the former mortgage. It recited that the time for payment had nearly expired, and the mortgagor could not pay off the debt, and that at his request the mortgagee had extended anew the period for payment to 30 years from the next year, upon terms which are stated. First, the mortgagor pledged himself for payment at the prescribed time. Thirdly, it was agreed, that if the mortgagor should die within the fixed period, then "after me the whole share of *zamindari* . . . . hypothecated as above shall be considered as a complete sale" to Tajammul. The fourth condition provided that when the creditor became entitled to and possessed of the property, he should be bound to make provision for the maintenance of certain male members of the family to which the mortgagor belonged.

At the time when the mortgage of the 11th May, 1871, was entered into, and also at the time when the representative of the mortgagee took possession of the property, after the death of Raza Ali, the law governing the matter was Bengal Regulation XVII of 1806; the Transfer of Property Act had not passed.

Their Lordships think it clear, as did both the Courts in India, that the mortgage of 1871 was in substance, what it describes itself as being, a mortgage by way of conditional sale. For the appellant it was suggested that the document might be read as containing two separate and distinct transactions,—first, a mortgage by mere hypothecation, which was not a conditional sale; and secondly, a conditional sale which was not a mortgage. This, in their Lordships' opinion, would be to apply an artificial and

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illegitimate method of construction to a document which can be naturally, and without difficulty, construed and applied as a whole.

Such being the nature of the transaction, the rights of the parties under the Regulation admit of no doubt. The mortgagee or his representative had the right to take legal proceedings with a view to foreclosure; and that foreclosure he could have obtained, if, after the proper steps had been taken, the representative of the mortgagor had failed to redeem within the time limited for that purpose by the terms of the Regulation. But there was no right to take possession of the property without the proceedings prescribed by law. In entering as he did, therefore, the representative of the mortgagee was a mere trespasser, and the heirs of the mortgagor are entitled to sue him in ejectment as such.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellant will pay the costs.

Appeal dismissed.

Solicitors for the appellant—*Barrow, Rogers & Nevill.*

Solicitors for the first respondent—*Watkins & Lempriere.*

J. V. W.

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APPELLATE CIVIL.

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

MAHARAJ SINGH (DEFENDANT) *v.* BALWANT SINGH (PLAINTIFF).*

Hindu law—Joint Hindu family—Liability of sons for their father's debts—Debts incurred for immoral purposes—Money borrowed to discharge such debts—Burden of proof—Minority—Mortgage executed by a minor.

One Shankar Singh, the owner of considerable property, both movable and immovable, incurred heavy debts for immoral objects and without any necessity. He died on the 24th of August, 1901, leaving two sons, Sheoraj Singh and Maharaj Singh, him surviving. Shankar Singh and his sons were members of a joint Hindu family. To pay off his father's debts, Sheoraj Singh, professing himself to be sole owner of his father's property, mortgaged a large part thereof to the Bank of Upper India to secure a loan of Rs. 3,00,000. Maharaj Singh, the younger brother, joined in the mortgage,

*First Appeal No. 158 of 1903, from a decree of Maulvi Maula Bakhsh, Additional Subordinate Judge of Aligarh, dated the 14th of April, 1903.