MUHAMMAD KAMIL (DEFENDANTS) *v.* IMTIAZ FATIMA (PLAINTIFF) and another appeal and cross-appeal consolidated.

P. C. 1908 *November* 19 1909 *July* 30.

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

Muhammadan Law—Inheritance—Distribution of Muhammadan's estate—Custom excluding females—Concurrent findings of fact as to existence of custom—Practice of Privy Council—Limitation Act (XV of 1877), Schedule II, Articles 123, 144—Share of sister where daughters are excluded—Compromise of former suit—Effect of compromise as estoppel—Renunciation of claim—Omission to make claim in a former suit—Civil Procedure Code (XIV of 1882), section 43.

In a suit brought in 1899 for a share of her sister's immovable property the distribution of which the plaintiff contended was governed by the Muhammadan Law, the defendant set up a family custom, excluding female heirs, as governing the rights of the parties. Both the courts in India held on the evidence that the custom alleged by the defendants to exist was not established.

Held by the Judicial Committee that the existence of the custom was a question of fact, and that their usual practice of accepting concurrent findings of fact should be followed.

A Muhammadan died in 1865 possessed of immovable property which passed first to his mother and, on her death shortly afterwards, to his two widows each taking an 8 anna share. On the death of the senior widow on 24th January 1888 the junior widow had possession of the whole estate until her death on 19th December 1894 when mutation of names was made in favour of the defendants who were nephews of the senior widow, and who as the result of litigation were eventually left possessed of only the 8 anna share which had belonged to her. In a suit instituted on 11th February 1903 by her sister to recover from the estate of a brother who died on 7th February 1891 a share of property which had devolved upon him on the death of his sister, the senior widow, and other property which he had inherited from his father, the plaintiff claimed the latter as sole heir on the ground that the widow and daughters were excluded by custom from inheriting, and that the defendants' fathers had predeceased the brother whose estate she was claiming.

Held in respect of the former property that the cause of action arose at the earliest from the death of junior widow, and the suit having been brought within 12 years from that date was not barred by limitation.

The Court of the Judicial Commissioners held that the daughters but not the widow were excluded by custom, and calculated the share of the plaintiff on the principle that as the custom by which daughters were excluded was founded on the notion that property should not be allowed to pass into another family, the exclusion should operate for the benefit of the persons who became heirs in default of daughters who should therefore be treated as non existent so as to let in the defendants, the nephews, and their Lordships of the Judicial Committee affirmed that view.

In 1895 the plaintiff had brought a suit for maintenance against her brothers who were in possession of their father's property, and in that suit she made a

Present:—Lord MACNAGHTEN, Lord ATKINSON, Sir ANDREW SCOBLE and Sir ARTHUR WILSON.

1909

MUHAMMAD KAMIL v. IMTIAZ FATIMA.

compromise with them on 10th September 1896 on the terms that they would pay her an allowance of Rs. 60 per annum for life; and objection was taken in the suit brought in 1903 that by her statements and conduct she had relinquished any right to her father's property, being estopped by the compromise made in the suit of 1895, and by her omission to make her present claim in either of the former suits.

Held for the reasons given by the Court of the Judicial Commissioner, that under the circumstances no renunciation could be implied from the plaintiff's compromise of her suit, nor from her omission to make the present claim previously: and there was no estoppel. The onus was on the defendants who alleged such relinquishment and estoppel to establish their case, and on the evidence they had failed to do so.

CONSOLIDATED APPEALS 50 of 1906 from a judgment and decree (7th September 1904) of the court of the Judicial Commissioner of Oudh which modified a decree (12th December 1900) of the court of the Subordinate Judge of Hardoi and appeal and cross-appeals 44 and 65 of 1906 from a judgment and decree (19th January 1905) of the court of the Judicial Commissioner of Oudh which reversed a decree (31st August 1903) of the court of the Subordinate Judge of Hardoi.

The above decisions were given in two suits brought by Imtiaz Fatima the respondent in appeals 50 and 44. The suit out of which appeal 50 arose was instituted on 31st October 1899 to recover the share the plaintiff claimed to be entitled to under the Muhammadan Law in the Gopawan Estate left by her sister Musammat Bhagbhari. The suit which resulted in appeal 44 was brought on 11th February 1903 to recover property which her brother Muhammad Mubarak inherited from Bhagbhari in the same estate, and also other property referred to as the Gonda Rao estate, which Muhammad Mubarak inherited from his father Muhammad Bakhsh. The pedigree of the parties which is set out in the judgment of their Lordships of the Judicial Committee shows the relationships of the litigants and assists in making the litigation intelligible.

The main portion of the property in dispute formed the estate of Murtaza Bakhsh who on the preparation of the lists of Taluqdars made in accordance with the provisions of the Oudh Estates' Act (I of 1869), section 8, was entered in lists 1 and 3. Murtaza Bakhsh died on 16th January 1865 leaving him surviving his mother Musammat Munirunnissa and two widows Musammats Bhagbhari and Imtiaz Fatima of whom Bhagbhari was the

senior. On his death mutation of names in respect of the whole estate was effected in favour of his mother, who died shortly afterwards, and on her death the names of the two widows were entered in the Revenue Registers as each entitled to an 8 annas share. Bhagbhari died on 24th January 1888, and her co-widow Imtiaz Fatima retained possession of the whole estate until her death on 19th December 1894. Mutation of names was then made in favour of the appellants Muhammad Kamil, Muhammad Akil, and Muhammad Fazil in respect of a 12 annas share, and in favour of Muhammad Abdussamad for the remaining share of 4 annas of the estate.

On 14th March 1895 Qurban Husain, Aulad Husain, and Maula Bakhsh brought a suit to recover from Muhammad Kamil, Muhammad Akil, Muhammad Fazil, and Muhammad Abdussamad the 8 anna share which had been held by Imtiaz Fatima deceased claiming title thereto as her next heirs. On the 26th May 1896 the Subordinate Judge of Hardoi made a decree in their favour. That decree was, on 10th May 1899, confirmed on appeal by the court of the Judicial Commissioner of Oudh, and the decree of the latter court was confirmed on appeal to His Majesty in Council by the judgment of their Lordships of the Judicial Committee on 25th November 1903 (see the case of *Muhammad Abdussamad* v. *Qurban Husain* (1). In execution of the decree in that suit a 6 anna share was taken from the present appellants, and a 2 anna share from Muhammad Abdussamad and the present litigation only concerns the remaining 8 anna share which had been held by Musammat Bhagbhari the senior widow of Murtaza Bakhsh.

In the suit to recover that share Imtiaz Fatima, the plaintiff alleged that Musammat Bhagbhari was the absolute owner of the share; that on her death the succession thereto was governed by the Muhammadan Law of the Sunni Sect; and that she (the plaintiff) was under that law entitled to a 1 anna $1\frac{5}{7}$ pie share, and she prayed for a decree against the appellants' 6 anna share only, stating that Muhammad Abdussamad was already in possession of less than he was really entitled to by Muhammadan Law.

(1) I. L. R., 26 All. 119.

1909

MUHAMMAD KAMIL v. IMTIAZ FATIMA.

The defendants 1, 2 and 3 (the present appellants) pleaded in defence that the succession was governed by Act I of 1869 in accordance with which Musammut Bhagbhari held not an absolute, but only a life estate; that even if Muhammadan Law governed the succession a custom prevailed in the family which excludes the plaintiff from inheriting; and that if the plaintiff was entitled to any share it should be recovered from the share in the possession of Muhammad Abdussamad who was not entitled to a share at all. They also pleaded limitation. The defendant Muhammad Abdussamad admitted the plaintiff's claim.

On the issues raised by the pleadings the Subordinate Judge held that the succession was governed by the Muhammadan law; that the custom excluding female heirs from succession was not proved; that the suit was not barred by limitation; and that the plaintiff could recover her share from all the defendants; and accordingly he made a decree in her favour for the share as claimed.

On appeal the Court of the Judicial Commissioner MR. C. RUSTOMJEE, 1st Additional Judicial Commissioner, and (MR. E. CHAMIER, 2nd Additional Judicial Commissioner) agreed with the Subordinate Judge that the custom set up by the three first defendants had not been proved; that Muhammad Abdussamad the 4th defendant, was not entitled to any share at all of the estate; that the other three defendants had allowed him to have a two anna share by an arrangement which for the purposes of the suit must be considered binding on all the defendants. The decree of the Subordinate Judge was therefore modified being limited to the recovery from the first three defendants of three-fourths of the share decreed to her.

The suit out of which appeal 44 arose was brought on 11th February 1903, by Imtiaz Fatima to recover the estate of her brother Muhammad Mubarak, who died on 7th February 1891. The property in suit consisted mainly of a share amounting to 2 annas $3\frac{3}{7}$ pies in the estate of Murtaza Bakhsh to which it was alleged he had succeeded on the death of his sister Musammat Bhagbhari; and also property which he had inherited from his father Muhammad Bakhsh. To this suit all the members of the family, including Musammat Tamiz-un-nissa the widow of

Muhammad Mubarak were made defendants. The plaintiff claimed as sole heir on the ground that the widow (as having no male issue) and daughters of Muhammad Mubarak were excluded by custom from inheriting, and that Muhammad Amir and Muhammad Ahmad having both predeceased Muhammad Mubarak their children had no right to any share in his estate.

Muhammad Kamil, Muhammad Akil, and Muhammad Fazil, in addition to the pleas raised in the first suit, contended that the plaintiff was estopped by her conduct from advancing her present claim.

Musammat Abida, sister of the first three defendants, asserted in her written statement that there was no cause of action against her. Musammats Jia Bibi, Nanhi Bibi, and Bano Bibi, daughters of Muhammad Mubarak, denied that there was any custom excluding them from succession, and claimed their shares in their father's estate. Musammat Tamiz-un-nissa denied the custom excluding her, claimed her share in the estate and also her dower, and pleaded that the suit was barred by limitation. Muhammad Abdussamad denied the plaintiff's title, and set up a custom excluding her from succession.

The only issues now material were "(2) Is the plaintiff estopped from claiming the property by right of inheritance because of her suit instituted on 25th November 1895 and of the compromise filed in that suit, dated 10th September 1896 ? (3) and (4) Is the suit barred by section 13 or section 43 of the Civil Procedure Code ?"

The Subordinate Judge decided on the 2nd issue that the plaintiff was estopped from advancing her present claim. He accordingly dismissed the suit with costs.

On appeal the Court of the Judicial Commissioner (MR. E. CHAMIER, Additional Judicial Commissioner, and MR. C. RUSTOMJEE, Officiating Additional Judicial Commissioner) on 9th August 1904 made an order reversing the judgment of the court below on the question of estoppel. On 7th September 1904 the Appellate Court further decided that the suit was not barred either by section 13 or by section 43 of the Code of Civil Procedure. The court decided that the daughters, but not the widow were excluded from succession by custom; and that the share

1909

MUHAMMAD KAMIL v. IMTIAZ FATIMA.

to which the plaintiff was entitled in Muhammad Mubarak's estate was one-half. Eventually, after the case had been remanded to the Subordinate Judge for evidence on certain issues on which however the plaintiff tendered no evidence, the court of the Judicial Commissioner made a final decree in favour of the plaintiff for a 1 anna $1\frac{5}{7}$ pie share in the property inherited by Muhammad Mubarak from Musammat Bhagbhari, and for a $\frac{1}{2}$ share in the remainder of the estate.

The material portion of the judgment of the Judicial Commissioner's Court was as follows:—

"It is important to remember that the plaintiff is claiming two distinct properties. First, she claims the whole share (2 annas 3 pies odd) which Muhammad Mubarak inherited from his sister Bhagbhari (for convenience I will refer to this as the claim to a share in the Gopamau estate), and secondly, she claims the whole of the property, which her brother Muhammad Mubarak inherited from his father on the allegation, that his widow and daughters are excluded by custom and that his nephews were by her rendered *mahjub-ul-irs*.

"The Subordinate Judge has, I think, failed to notice that the plea of estoppel does not apply to the claim to a share in the Gopamau estate. The only grounds upon which it is suggested that the plaintiff has lost her right to claim her share in the Gopamau estate is that she has by her conduct impliedly relinquished her rights. Muhammad Mubarak, as already stated, died in February 1891, when Imtiaz Fatima was in possession of the whole of the Gopamau estate (except a few villages which had been alienated by her), and Mubarak and his brother and nephew were in the middle of their suit against her. When Imtiaz Fatima died Abdussamad and the sons of Muhammad Amir took possession, but they gave no share to Mubarak's widow or to the plaintiff. It is said that the plaintiff should have sued for her share when she sued for arrears of maintenance in 1895. Possibly she might have done so, but the two claims were totally dissimilar and joinder of the two would have been very inconvenient. However, it is sufficient to say, that she was not bound to make such a claim and probably her advisers thought it better to await the decision of this court in the suit brought by Kurban Husain and Bint-ul-Fatima, for if that suit failed the present plaintiff had no case. Under these circumstances the plaintiff cannot be supposed to have given up her claim in 1895. Then it is said that she might have claimed this same share when she brought her suit in October 1899. It is to be noticed that as Bhagbhari died in January 1888, it may well have been supposed that the period of limitation was running out, but Muhammad Mubarak did not die till 1891 and only 8 years had expired. Whatever the reason may have been for not including in the suit of 1899, the claim now made in respect of the share in the Gopamau estate, it is plain that if both claims have been advanced there would have been a joinder of two different causes of action, of which one might have been regarded as arising on the death of Bhagbhari, and the other as arising on the death of Mubarak. I do not desire to decide now the question whether section 43 of the Code of Civil Procedure

bars the present claim to a share in the Gopamau estate, but it is obvious that the plaintiff's advisers may have supposed that the two claims could not or need not be made in the same suit."

After referring to passages in the case of *Hurmatoolnissa Begam* v. *Alladhia Khan* (1) and *Ramani Ammal* v. *Kulanthai Nauchear* (2), as to whether renunciation under Muhammadan law may be implied, and as to the presumption to be drawn by acqiescence in a rival claim, the judgment with reference to the passage from the latter case proceeded :

"There being, so far as I know, no special rule of Muhammadan law regarding the renunciation of inheritance, I consider that this passage may be applied to Muhammadans as well as to Hindus. Indeed, there is possibly more reason for care in the case of a Muhammdan lady than in the case of a Hindu, for the former, as a rule, observes the parda more strictly than the latter. I do not think it would be right to infer from the plaintiff's inaction in 1895 and 1899, that she intended to abandon her claim to a share in the property which had devolved upon Mubarak upon the death of Bhagbhari."

"As regards the other claim there are two questions, namely whether the plaintiff has by implication abandoned her right, and whether she is estopped from claiming it. It is said that renunciation should be inferred from the facts that she made no claim to her mother's property in the mutation proceedings, that she made no such claim when the brother, nephew, and widow divided the property amongst themselves, that she made no such claim in the suit brought by her in 1889, and that the present suit has been brought on the last day of limitation. The defendants who resist this appeal also rely upon the following statements, made by the plaintiff when under examination as a witness in the suit of 1899, namely, that she could not say, whether any daughter in her father's or grandfather's families had ever claimed a share as against her brother, that she could give no instance of such a claim having been made, and that there were no other heirs to her sister Bhaghbari than Abdussamad and the three sons of Muhammad Amir. The last statement was qualified by a subsequent passage in her evidence, and it is clear that she was not held bound by the admission, for she obtained a decree in that suit for a sister's share. From the two other statements one may infer that the plaintiff was doubtful whether a sister could claim a share against her brothers, and this inference is strengthened by the fact that the plaintiff made no claim to a share in her sister's property till 1899, and made no claim to her brother's property till the very last day on which the claim could be made. Her conduct during a long period suggests to my mind that she did not intend to claim her brother's property, and that she was under the impression, for several years at least, that she could not claim it. But before a pardanashin lady can be held by implication to have renounced her rights, it must, I think, be shown that she was aware of them. Her failure to claim her brother's property in 1899 is of little value as indicating renunciation, for she was then claiming a sister's share in her sister's property. She may have been under the impression that she had

(1) (1871) 17 W. R. P. C., 108. (2) (1871) 14 Moore's I. A., 346.

1909

MUHAMMAD KAMIL v. IMTIAZ FATIMA.

forfeited her rights in Muhammad Mubarak's property, by accepting the maintenance from Abdussamad and the sons of Muhammad Amir, or she may have instituted the suit of 1899 for the smaller of the two properties as a test case, or because she had not funds wherewith to make another claim involving payment of a larger amount of court fees. On the whole I am of opinion that if she is not estopped from putting forward her claim she cannot be held to have renounced her rights by implication.

"Then, has an estoppel been made out? As I have already said, I think it is possible that when she brought her suit in 1895, she was under the impression that she could not claim Muhammad Mubarak's property. Such a supposition is consistent with the language of her plaint in that suit where she describes the defendants as the heirs of her brother and makes a claim to a larger sum than she was entitled to if she herself was entitled to the property of Muhammad Mubarak. As held in *Sarat Chandar Dey v. Gopal Chandar Laha* (1) it is not a condition of estoppel resulting, that the person inducing the belief acted with a full knowledge of the circumstances and under no mistake or misapprehension. It must be conceded that the statements made in the plaint of 1895 were calculated to induce a belief that the plaintiff had no right to or had abandoned her right to Mubarak's property, therefore the first requisite of an estoppel is, in my opinion, made out. But then the question remains whether the defendants to that suit were by those statements induced to act upon such a belief. This may be proved by direct evidence or may be a matter of inference. In this case there is no direct evidence on the question. All that we have to guide us is the plaint, the written defence, the replication, the *sulehnama* or compromise and the judgment which was passed thereon. The plaintiff claimed as of right a heritable *guzara* of Rs. 60 per annum. The defendants denied that there had been any agreement to pay such a *guzara* or indeed any *guzara* at all. Eight months after the replication the parties put in the *sulehnama* wherein it is stated that the defendants have agreed to give the plaintiffs *for her life only* Rs. 60 per annum *bataur parwarish*, by way of an allowance, which the plaintiff had accepted, and that it had been agreed that the plaintiff's heirs should have no right to get the sum now fixed" (or "to get a sum fixed:" the words are *kisi tarah ka koi haq muqarrara pane ka na hoga*—Counsel seemed to be agreed that this should be translated in the former sense as if the word *raqam* had appeared before the word *muqarrara*). We know nothing of the negotiations, which led up to this compromise. The defendants certainly knew as much as and probably knew more than the plaintiff knew about her rights. It may not have occurred to them that the plaintiff could claim Muhammad Mubarak's property, or they may have refused to concede her demand for a heritable *guzara* for fear that she or her heirs might claim that property. Were they induced by the plaint to believe that she was giving up property worth Rs. 40,000 or more for a life payment of Rs. 60 per annum? Were they in any way influenced by the plaint in agreeing to pay her Rs. 60 per annum for life? I am not satisfied that the defendants were influenced by any belief induced by the statements in the plaint. They knew at least

(1) (1892) I. L. R., 20 Calc., 296; L. R., 19 I. A., 203.

as much about her right to claim the property as she herself did, and if they construed the plaint as equivalent to an undertaking that the plaintiff would not claim a share, I am not satisfied that they altered their position in any way in consequence thereof. The circumstance that the three sons of Muhammad Amir agreed to be responsible for half the *guzara* and Abdussamad held himself responsible for the other half seems to throw no light on the question. It is noticeable that in pleading an estoppel the defendants Nos. 1, 2 and 3 say (paragraph 33 of their written statement) that in consequence of the plaintiff's statements and acts they have spent thousands of rupees in litigation for the protection of the property and matters connected with it (*muamalat mutaaliqi*). They have not proved this allegation and they have nowhere pleaded that the *sulehnama* was one of the results of the plaintiff's acts, or of her statement in the suit of 1895. They might at least have come forward and sworn that it was so. Had they done so they could have been cross-examined as to the events, which led up to the *sulehnama*. It was for them to make good the estoppel and in my opinion they have failed.

"The next question is what share the plaintiff is entitled to in the property in the suit. Except in regard to one or two items there is no dispute as to the extent of the property, which Muhammad Mubarak inherited from his father and held at his death. It is set out in lists 6, 7, 8, 9 and 10 attached to the plaint. There is also no dispute as to the extent of the property left by Musammat Bhagbhari. It is set out in lists 1 to 5 attached to the plaint. If Abdussammad was excluded from succession to Bhagbhari the share of Mubarak amounted to 3 annas $2\frac{2}{7}$ pies, but the plaintiff allows a share to Abdussamad with the result that according to her Mubarak's share was only 2 annas $2\frac{2}{7}$ pies. The question is what portion of this share and of the property inherited by Mubarak from his father descended to the plaintiff on the death of Mubarak. According to the Muhammadan law Mubarak's share would devolve as follows. Tamizunnissa, widow $\frac{1}{8}=3\frac{3}{7}$ pies; daughter $\frac{3}{8}=1$ anna $6\frac{4}{7}$ pies; plaintiff $\frac{5}{24}=5\frac{5}{7}$ pies making a total of 2 annas $3\frac{3}{7}$ pies.

"But the daughters are excluded by custom and therefore the question arises whether they should be treated as non-existent or whether they should be treated as existing, but not taking any share (i.e., as existing for the purpose of making the plaintiff a residuary) or whether their shares under the Muhammadan law should be divided among the widow and the plaintiff by the analogy of the doctrine of the increase. If the daughters are treated as non-existent then Mubarak's share devolved as follows:—Taimz-unnissa $\frac{1}{4}=6\frac{4}{7}$ pies; plaintiff $\frac{1}{8}=1$ anna $1\frac{1}{7}$ pies; defendants 1, 2, 3 and 9 residue in equal shares, i. e. $1\frac{1}{7}$ pies each $=6\frac{4}{7}$ pies, making a total of 2 annas $3\frac{3}{7}$ pies.

"If they are treated as existing for the purpose above stated but as taking no share, then the share devolved as follows:—Tamizunnissa $\frac{1}{8}=3\frac{3}{7}$ pies; plaintiff residue=2 annas making a total of 2 annas $3\frac{3}{7}$ pies.

"If the daughters' shares are divided between the widow and the plaintiff then the widow would take $\frac{1}{8}+\frac{3}{8}+\frac{3}{8}=10\frac{3}{7}$ pies; and the plaintiff $\frac{5}{24}+\frac{3}{8}+\frac{3}{8}=1$ anna $5\frac{1}{7}$ pies making a total of 2 annas $3\frac{3}{7}$ pies.

"There is no authority on this question, but seeing that the custom by which daughters are excluded is founded on the notion that property should not be allowed

1909

MUHAMMAD KAMIL v. IMTIAZ FATIMA.

to pass into another family, I think that the exclusion of the daughters should operate for the benefit of other persons who become heirs in default of daughters, and therefore the daughter should be treated as non-existent so as to let in the nephews. The plaintiff's share in the property, specified in lists 1 to 5, is therefore in my opinion 1 anna 1¾ pies."

Muhammad Kamil, Muhammad Akil, and Muhammad Fazil appealed to His Majesty in Council from the decree of 7th September made in the first suit, and also from the decree of 19th January 1905 made in the second suit; and Imtiaz Fatima obtained leave to bring a cross appeal against so much of the latter decree as reduced the amount claimed by her.

On these appeals

DeGruyther, K. C., and *S. A. Kyffin*, for the appellants in appeals 50 and 44, and respondents in appeal 65 contended that the succession to such of the property as formed the estate of Murtaza Bakhsh was governed not by Muhammadan law, but by the provisions of the Oudh Estates Act (I of 1869) under which the plaintiff had no claim to it, as was shown by the wajib-ularz of the estate and other documentary evidence. As to the succession to the property claimed Sir Roland Wilsons' Mahammadan law, 2nd edition, pages 180, 181 and chapter VIII, paragraph 219, 233 and 234 were referred to. The custom set up, excluding, among other females, sisters, from succession was established by the evidence; whether a custom excluding daughters was or was not proved the plaintiff was not entitled to any share of the property which it was submitted had been wrongly decreed to her. It was also contended that as regarded the property inherited by Muhammad Mubarak from Bhagbhari the suit was barred by limitation, it not having been instituted within 12 years from the 24th January 1888, the date of the death of Bhagbhari. The court was bound to take notice of limitation whether raised or not as a defence. The Limitation Act (XV of 1877), section 4; and *Har Narain Singh* v. *Chaudhrain Bhagwant Kuar* (1) were referred to.

It was further contended that the plaintiff was estopped from claiming the property in suit by right of inheritance because of her suit instituted on 25th November 1895, and of the compromise dated 10th September 1896, filed in court in that suit; and

(1) (1891) I. L. R., 13 All., 300 (304); L. R. 18 I. A. 55 (58).

that the suit was barred by sections 13 and 43 of the Civil Procedure Code as not having been included in the plaintiff's former suits either in 1895 or 1899.

Kenworthy Brown and *St. George Jackson*, for the respondent in appeals 50 and 44, and appellant in the cross appeal contended that the law governing the succession to the property in suit was settled by the case of *Muhammad Abdussamad* v. *Qurban Husain* (1), to be the Muhammadan law. As to the custom set up excluding certain females it was contended that there were concurrent judgments of the courts in India finding as a fact that the custom had not been proved and as the plaintiff was therefore not excluded from inheritance there was, it was submitted, no good reason in fact or in law why she should not recover under Muhammadan law the shares she was claiming in the present suits. As to her right to a share as a sister reference was made to *Meherjan Begam* v. *Shajadi Begam* (2)

As to estoppel for the reasons given by the court of the Judicial Commissioner there was none made out, and that court was right in holding that she was not debarred either by acquiescence or conduct from recovering the shares in the property she was claiming in the present suit. Reference was made to section 115 of the Evidence Act (I of 1872). Nor was her present claim against her brother's estate barred by section 43 of the Civil Procedure Code it being a distinct cause of action and one which could not properly be joined with the claim in her former suits.

As to limitation it was submitted that the period applicable was 12 years under article 144, Schedule II of Act XV of 1877, and that the time ran from 19th December 1894 the date of the death of Imtiaz Fatima the co-widow of Bhagbhari when the cause of action arose; the suits were therefore not barred. Reference was made to the cases of *Mahomed Riasat Ali* v. *Hasin Banu* (3); *Keshav Jagannath* v. *Narayan Sakkaram* (4) and to article 123, Schedule II of the Limitation Act. The plea of limitation was not pressed in the appellate court in India: if it had been the suit would have been remanded on that point.

(1) (1903) I. L. R., 26 All. 119; L. R. 31 I. A. 30.
(2) (1899) I. L. R., 24 Bom., 112.
(3) (1893) I. L. R., 21 Calc., 167 (162, 163); L. R., 20 I. A., 155 (158, 159).
(4) (1889) I. L. R., 14 Bom., 236 (241).

1909

MUHAMMAD KAMIL v. IMTIAZ FATIMA.

On the cross appeal it was contended that in arriving at their conclusion as to what was the plaintiff's proper share the Judicial Commissioners had erred in considering that Muhammad Kamil, Muhammad Akil, Muhammad Fazil, and Muhammad Abdussamad should be taken into consideration and it was submitted that they were not entitled to participate in Muhammad Mubarak's property of either description. The share she claimed therefore should not have been reduced.

DeGruyther, K. C., replied referring to *Muhammad Abdussamad* v. *Qurban Husain* (1); *Willis* v. *Lord Howe* (2); Limitation Act, section 28; and Evidence Act, section 102 as to an admission in the 2nd suit that the daughters of Muhammad Mubarak were not entitled to any share of their father's estate. [*Kenworthy Brown* referred to article 122 of schedule II of the Limitation Act].

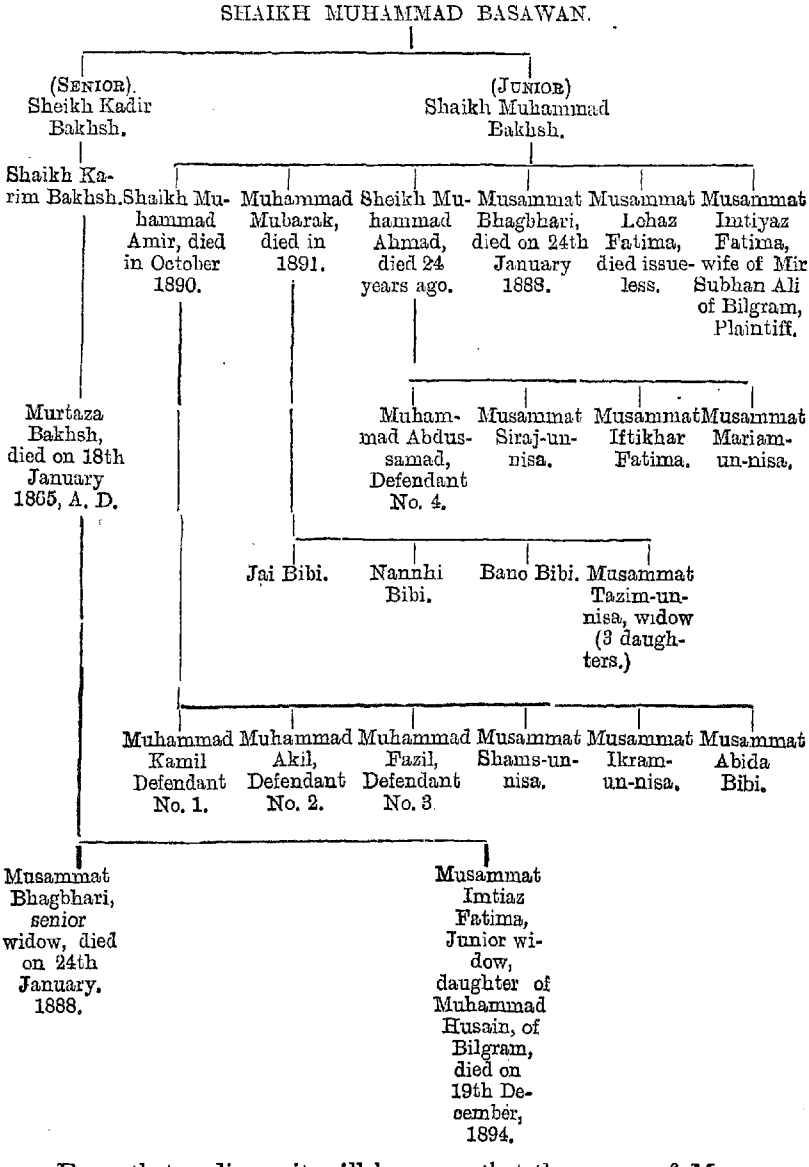
1909, *July 30th* :—The judgment of their Lordships was delivered by SIR ARTHUR WILSON :—

These are three consolidated appeals from the decrees of the Court of the Judicial Commissioner of Oudh, dated the 7th of September 1904, and the 19th of January 1905, modifying or reversing those of the Subordinate Judge of Hardoi. These decrees arise out of two suits, and the suits

(1) (1903) I. L. R., 26 All., 119 : L. R., 31 I. A., 30.

(2) (1893) L. R., 2 Ch. 545 (553).

in question will become intelligible from the following pedigree:—



From that pedigree it will be seen that the name of Musammat Bhagbhari occurs twice, first in the position which she occupied by birth, and, secondly, as the senior widow of Martaza Bakhsh. She had, amongst others, a brother Mubarak and a

1909

MUHAMMAD KAMIL v. IMTIAZ FATIMA.

sister Imtiaz Fatima, plaintiff in two suits, and the principal respondent in the first two of these appeals. Another Imtiaz Fatima was the junior widow of Martaza Bakhsh, co-widow therefore with Bhagbhari. This Imtiaz Fatima is called in the courts below No. 1. Martaza Bakhsh died in January 1865, Bhagbhari, his senior widow, on the 24th January, 1888, Imtiaz Fatima No. 1, the Junior widow, on the 19th December 1894, and Mubarak in 1891.

Martaza died possessed of property which passed first to his mother, and after her death, to his two widows, of whom each held an eight anna share. After the death of Bhagbhari, her co-widow, Imtiaz Fatima, No. 1, retained possession of the whole estate until her death. On her death mutation of names was made in favour of the principal appellants in respect of a twelve anna share, and in favour of Abdussamad for the remaining four annas. The position of Abdussamad appears from the pedigree, as does that of the principal appellants.

The first of the present suits was instituted on the 31st of October 1899. It related to a share in the 8 anna share of Martaza's estates which had been held by his senior widow Bhagbhari. The judgment of the first court in this case decided that the rights of the parties were governed by the Muhammadan law, and not by family custom, as had been alleged, and this was affirmed on appeal. The existence of such a custom is a question of fact, and as to this question the courts in India concurred in their judgment. On this point therefore their Lordships see no reason why they should not follow their usual practice of accepting concurrent findings of fact.

The second of the suits now in question was instituted on the 11th of February 1903 in the same court as the first suit. The dispute related to the estate of Muhammad Mubarak, who died on the 7th of February 1891, including in that estate a share of the estate which had been that of Martaza Bakhsh and which Mubarak was said to have inherited from Bhagbhari, and also property which he took by inheritance from his father.

With regard to the property taken by Mubarak from Bhagbhari a question was raised which does not apply to the estate which he took from his father—the question of limitation. As

to this question of limitation, their Lordships are of opinion that it was properly dealt with in the courts below, and that the time began to run, at soonest, from the death of Imtiaz Fatima, the co-widow of Bhagbhari, and not from any earlier period.

Another question raised was whether the now plaintiff, Imtiaz Fatima, had relinquished her claim, or was estopped from pressing it. Their Lordships are of opinion that the question has been rightly and satisfactorily dealt with by the Judicial Commissioners. It lay upon those who alleged such relinquishment or estopped to establish their case, and their Lordships agree in thinking that they have failed to do so.

There remains one question, namely, what shares did the plaintiff, Imtiaz Fatima, take in property inherited by Mubarak from Bhagbhari, and that inherited by him from his father, respectively? Upon this point their Lordships see no reason to dissent from the view taken by the Judicial Commissioners, or from the reasons given in support of that view.

This disposes of the questions raised upon these appeals. The result is that their Lordships will humbly advise His Majesty that all the appeals should be dismissed.

The appellants in the first two appeals will pay to Imtiaz Fatima (who alone appeared in those appeals) her costs of the appeals and Imtiaz Fatima will pay the respondents' cost of her cross appeal, and these costs will be set off against one another in the usual way.

Appeal dismissed.

Solicitors for the appellants in appeals 50 and 44 of 1906 and respondents in cross appeal (65 of 1906)—*Barrow Rogers and Nevill.*

Solicitors for Imtiaz Fatima, respondent, in appeals 50 and 44 of 1906 and appellant in cross appeal (65 of 1906):—*T. L. Wilson & Co.*

J. V. W.