Khan was "considerably involved." But he did not know that however this might be, there was still an ample surplus of assets; and this important fact, of which the High Court was in possession, but of which the Subordinate Judge was not aware, might well warrant a different conclusion from that which was arrived at in the Court of first instance.

Upon the whole, though the case is not free from difficulty, their Lordships are of opinion that the High Court was right, that the transaction was not fictitious and that the decree made in the High Court should stand. Their Lordships will, therefore, humbly advise His Majesty that this appeal should be dismissed with costs.

J. V. W.

Appeal dismissed.

Solicitors for the appellants :— *Barrow Rogers and Nevill.*

Solicitor for respondent no. 1 :—*Douglas Grant.*

APPELLATE CIVIL.

Before Justice Sir Pramada Charan Banerji and Mr. Justice Tudball.

MUHAMMAD JUNAID (PLAINTIFF) *v.* AULIA BIBI AND OTHERS (DEFENDANTS).*

Muhammadan law—Will—Bequests to heirs and to strangers—Civil Procedure Code (1908), *order XXII, rule* 4—*Legal representative—Abatement of suit.*

In giving effect to the will of a Muhammadan which contains bequests to heirs and also to strangers the principle to be followed is that the bequests to the heirs will be invalid unless in each case they are assented to by the other heirs; but the bequests to the strangers will be valid to the extent of one-third of the testator's property.

Held also that an application to bring upon the record as representative of a deceased defendant a person who is not in fact such representative will be of no avail to save the running of limitation in favour of the person who really is the legal representative.

THE facts of this case are fully stated in the judgment of the Court.

Dr. *S. M. Sulaiman*, for the appellant.

Mr. *A. E. Ryves*, Munshi *Gokul Prasad*, The Hon'ble Dr. *Tej Bahadur Sapru*, Munshi *Damodar Das*, Mr. *N. P. Singh*, Mr. *Zahur Ahmad*, Mr *S. A. Haidar*, Pandit *Baldeo Ram*

* First Appeal No. 328 of 1917, from a decree of Kunwar Sen, Subordinate Judge of Allahabad, dated the 28th of February, 1917.

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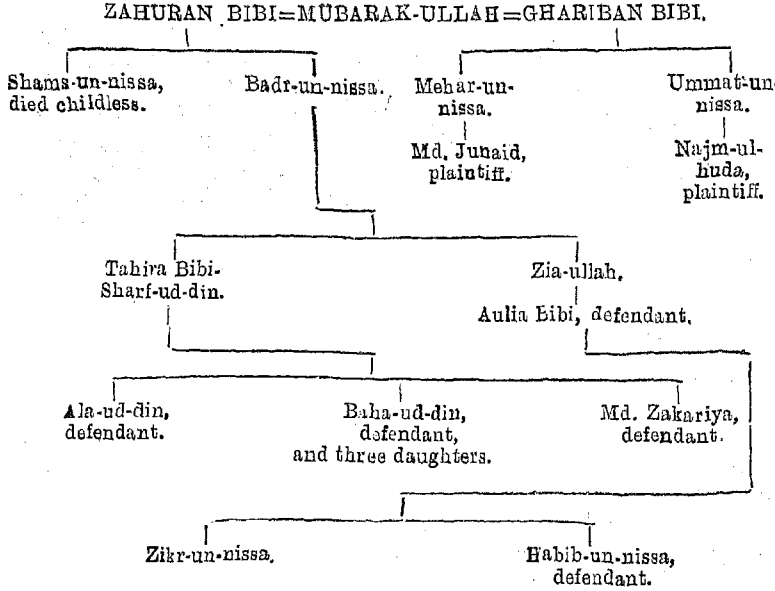
Dave, Maulvi *Haidar Mehdi* and Mr. *G. Banerji*, for the respondents.

BANERJI and TUDBALL, JJ. :—This appeal is connected with F. A. No. 322 of 1917. They arise out of two suits Nos. 17 and 18 of 1915 brought in the court below by two of the heirs of one Musammat Badr-un-nissa, in which they each claimed a $\frac{1}{6}$th share in her estate. Attached to each plaint are five lists of property; lists A to D cover zamindari property and the fifth list covers house property.

The defendants include, among others, the other heirs of the deceased, some persons who claim under an alleged will, and numerous transferees to whose hands various portions of the estate have gone either by voluntary transfers by deeds or by involuntary sales in execution of decrees.

The following pedigree is necessary to the understanding of the case.



That the two plaintiffs are heirs who would in the absence of a will take each a $\frac{1}{6}$th share in the estate is not in dispute.

The estate originally came from Mubarak-ullah. He died leaving his wives and daughters. Then one wife Zahuran Bibi and one daughter (childless) died. There was a dispute among the members of the family as to be extent of their respective

shares and these were settled by an award of arbitrators on the 26th of July, 1897. The award was made a rule of court and a decree followed on the 30th of July, 1898.

Subsequently, on the 30th of September, 1901, there was another award by which the shares of the various members of the family were partitioned. Certain shares were allotted to Badr-un-nissa and certain shares to her son Zia-ullah.

After this Badr-un-nissa and Zia-ullah by deed, dated the 21st of December, 1901, exchanged some of their properties.

In the properties entered in list A, Badr-un-nissa had originally been given an 8 anna, 10 pie, 4 kirant, 1 dant, 10 kant share and Zia-ullah also received a specific corresponding share in each of the same properties. In the other properties they received various shares.

On the 9th of September, 1902, Zia-ullah died. His mother was one of his heirs and in list A properties, she as his heir received a 1 anna, 2 pies, 5 kirants, 2 dants, 15 kants share thus bringing her total share in list A to 10 annas, 10 kirants, 1 dant, 5 kants.

On the 26th of November, 1902, Badr-un-nissa also died.

The two plaintiffs, Mehr-un-nissa (who has died *pendente lite* and is now represented by her son Muhammad Junaid) and Najmul Huda became entitled to a $\frac{1}{6}$th share each in her estate.

These two suits were filed on the 20th and 21st of November, 1914, just within the period of 12 years limitation. This enormous delay in bringing these suits has resulted in the number of defendants increasing to the number of 80 in one suit and 78 in the other. Many persons have died and been succeeded by their heirs and there have been numerous transfers, both voluntary and involuntary, to many of which the two present plaintiff have been parties.

As a result there has been a good deal of confusion as to the actual properties in which the plaintiff has a share and in several instances he has been unable to clearly indicate the properties in which he has a right.

After the death of Badr-un-nissa the three grandsons (sons of Musammat Tahira Bibi) *viz.*, Muhammad Zakaria, Alauddin

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and Bahauddin, set up a will according to which the deceased gave 1/3rd of her estate to them in equal shares and 2/3rds in equal shares to Musammat Aulia Bibi and her two daughters, Zikr-un-nissa and Habib-un-nissa. There was litigation between grandsons on the one side and Aulia Bibi and her two daughters on the other, to which the present plaintiffs were not parties. The grandsons won it, the will being held proved. The result of this was that the grandsons took possession of 1/3rd of the estate. The rest remained in the hands of Aulia Bibi and her daughters.

Zikr-un-nissa died on the 10th of May, 1907, and her heirs were her mother and sister and defendants nos. 11, 12, 13 and two others, Sharfuddin and Muhammad Yahia. The grandson Muhammad Zakaria died leaving Sharfuddin, his father, and others as his heirs. Then Sharfuddin died leaving heirs and Muhammad Yahia did the same.

Sharfuddin and the defendants 1—4 and 11—13 sold some of the properties in list A to one Abdul Hamid who in turn sold them to others of the defendants. Abdul Hamid has died and his heirs have been made parties to these suits. Certain properties were mortgaged by Badr-un-nissa, Zia-ullah and Abdul Hamid and Najm-ul-Huda (plaintiff in the connected suit). The mortgagees have been made parties and also numerous others who are said to be in unlawful possession of some of the properties. The plaintiff in the present case claimed possession of a 1/6th share and Rs. 1,000 as mesne profits for three years prior to suit and also future mesne profits. It is unnecessary to set out all the various defences that were raised. The defendants 3—5 (Ala-ud-din *etc.*) and 7 to 9, put forward the will under which they claimed that they were legally in possession of $\frac{1}{3}$rd of the estate by reason of which the plaintiff was only entitled to 1/6th in the remaining 2/3rds, *i. e.*, to a 1/9th share in the estate of Badr-un-nissa.

This is the main question with which we are concerned in this appeal. The other defendants raised various defences and we will deal with them where necessary when dealing with the various points raised by the appellant.

* * * * * * *

Admittedly under the Muhammadan law, the testatrix could only devise 1/3rd of her estate to the legatees. She purported to deal with the whole. Her will, therefore, can only operate as to one-third.

It is argued that the legacies will all abate rateably and that the three males are only entitled to 1/3rd of 1/3rd and the three females to 2/3rd of 1/3rd.

As to the females it is argued that Aulia Bibi repudiated the will and therefore the devise to her falls through. And her two daughters being heirs, the will in favour of them is void in the absence of the consent of the other heirs given after the testatrix' death.

Therefore there remain 2/3rds of this 1/3rd not disposed by the will and the plaintiff is therefore entitled to the 1/9th share decreed *plus* 1/6th of 2/3rds of 1/3rd more.

It is by no means admitted that Aulia Bibi repudiated the will. There is a contest between the defendants themselves as to the extent of their shares in the 1/3rd of the estate on which the will operates. But for the purposes of this appeal it is unnecessary for us to decide the dispute between the defendants on this point. We may assume that, by reason of a repudiation by Aulia Bibi and the fact that her daughters are heirs and the other heirs have not consented, the will is void as to the devise in favour of the ladies. This in our opinion leaves only the devise of 1/3rd in favour of the males to operate, and as by law the testatrix can dispose of 1/3rd of her estate by will, the three males would be entitled to take the 1/3rd left to them.

It is the duty of the court to carry out the wishes of a testator so far as that can be done within the law. According to the plaintiff the devise in favour of the ladies is void in law. It must, therefore, be as if it had not been made. There remains, therefore, a valid devise of 1/3rd of the estate in favour of the males.

Appellant's counsel would have us make both the valid and the invalid devise abate each to one-third and then wipe out the invalid one. He quotes the case wherein a testator dealing with only 1/3rd of his estate gave one-half thereof to a stanger

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and one-half to an heir. The stranger takes only ½ of the 1/3rd but this is because the testator wished him only to take so much, *i. e.*, the testator's will so far as is possible within the law is carried out.

He next quotes the case in which a testator makes a devise of more than 1/3rd in favour of several persons entitled to take under a will and shows that they abate rateably. Again this is merely carrying out the wish of the testator so far as it is possible to do so within the law.

He has not been able to quote any case from any book on Muhammadan law to cover the case before us, and we think that the proper principle to follow is that we should carry out the testator's wish so far as it is possible within the law.

Badr-un-nissa desired to give 1/3rd of her estate to her three grandsons. Assuming that the bequest to the three females fails, there remains one-third of the estate available for the three males.

We would also refer to the law laid down as being the correct law in Shama Charan Sircar's Tagore Law Lectures of 1874 at page 46 in the following terms :— "If a bequest is made to an heir and also to a stranger, the bequest with respect to the heir's portion, even if it were less than a third, is not valid without the consent of the other heirs, *while that which respects the portion of the stranger* is valid without such consent, provided *the portion bequeathed to him does not exceed one-third of the testator's estate*, otherwise the consent of the heirs is requisite to the validity of such bequest."

Again at page 592, Vol. I, of Ameer Ali's Muhammadan Law (4th Ed.), there is an instance of a man who died acknowledging a debt of 252 *dirhams* due to his wife and leaving (subject to the payment of this debt) the *whole* of his estate to his wife and two strangers.

The debt having been first paid the estate was divided as follows :—

3/12 to the widow, her legal share of 1/4th as an heir.

4/12 to the strangers, being the whole of the 1/3rd of the estate on which the will could operate,

5/12 to the other heirs.

This is clearly against the contention on behalf of the appellant. According to his theory the two strangers would take only ½ of ⅓rd-1/6th, *i. e.*, 2/12ths and the other heirs would take 7/12ths.

In our opinion, therefore, there is no force in this contention and the plaintiff is only entitled to his 1/6th share in 2/3rds of the estate, *i. e.* 1/9th of the whole estate.

* * * * * * *

We deal next with the plea raised as to the non-abatement of the suit as against Musammat Munni. The facts are not in dispute.

The suit was instituted on the 21st of November, 1914. Two persons Shambhu Nath and his son, Lachmi Narain, were made parties.

On the 26th of January, 1915, Lachmi Narain died; on the 23rd of March, 1915, the plaintiff made an application stating that Shambhu Nath and his son were joint and the father was the legal representative and that a note should be made on the record to that effect.

This was done by an order, dated the 19th of April, 1915. Shambhu Nath's written statement was filed on the 26th of June, 1915, from which it was clear that he was not the legal representative but that Musammat Munni, the widow, was the legal representative of the deceased. There was still time for the plaintiff to apply to the court to have her brought on the record, but she delayed still further and it was not until the 19th of August, 1915, that she applied to have her made a party. An order was made accordingly.

As she was a minor an application was made for the appointment of a third party as guardian.

It was then discovered by the plaintiff that the Court of Wards had taken charge of the minor's estate.

On the 9th of October, 1915, he applied to have the Collector made a party as representing the Court of Wards.

The Collector pleaded that the suit as against Munni Bibi had abated. The court went into the facts and accepted the Collector's plea as good.

The learned counsel for the appellant admits that the application as against Munni Bibi was made more than 6 months after

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the death of Lachmi Narain, but he pleads that the application of the 23rd of March asking the court to note on the record that Shambhu Nath was a legal representative of the deceased was a good application made under order XXII, rule 4, and that the subsequent application was merely one in continuation thereof. In the alternative he suggests that the father was the true representative. We cannot accept the first plea. It amounts to this that it was open to the plaintiff to ask the court to add somebody, other than the legal representative, as a party to the suit and that such an application would bind the real representative. Whatever the law may have been under the old Code of Civil Procedure, the present law is clear and such an application as that of the 23rd of March, 1915, cannot affect the true representative. It is clear that the suit did abate so far as Munni Bibi is concerned.

* * * * * * *

No other point was pressed for our decision. The result is that, except in respect to mesne profits from the date of suit up to the date of possession and in respect to item no. 16 of list D., Khata No. 79, as shown on page 71 of the paper book, the appeal will fail.

Decree modified.

Before Mr. Justice Piggott and Mr. Justice Walsh.

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April, 13.

MUHAMMAD YAQUB (APPLICANT) *v.* NAZIR AHMAD AND OTHERS (OPPOSITE PARTIES)*

Act No. IV of 1912 (Indian Lunacy Act), Chapter V—Lunacy—Inquisition as to mental condition of alleged lunatic—Procedure.

An inquisition under Chapter V of the Indian Lunacy Act once started must be prosecuted to the end. Before such an inquisition is ordered there ought to be a careful and thorough preliminary inquiry and the Judge ought to satisfy himself that there is a real ground for an inquisition.

An application for an inquisition should ordinarily be supported by affidavit or by examination on oath of the applicant, and by a medical certificate of some doctor as to the condition of the alleged lunatic. It would also be desirable, in many cases, that the Judge should seek some personal interview with the alleged lunatic with a view to satisfy himself that there is a real ground for supposing the existence of an abnormal mental condition which might bring the person within the Lunacy Act.

* First Appeal No. 72 of 1919, from an order of E. H. Ashworth, District Judge of Cawnpore, dated the 24th of January, 1919.