

Before Mr. Justice Lindsay and Mr. Justice Kanhaiya Lal.
 MAIRAJ FATIMA AND ANOTHER (DEFENDANTS) v. ABUL WAHID
 (PLAINTIFF*).

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 May, 20.

Act No. 1 of 1872 (Indian Evidence Act), section 108—Missing person—Presumption as to death of, but not as to date of death—Muhammadan law.

The presumption of Muhammadan law that, when a person has disappeared and has not been heard of for a certain number of years, he is dead, and further that, as regards property coming to him by inheritance, he must be deemed to have died at the date of his disappearance, is a rule of evidence only and as such must be taken to have been superseded by the provisions of the Indian Evidence Act, 1872, which do not raise any presumption as to the date of the death of a person who has disappeared and has not been heard of for a certain number of years by those who would naturally hear of him. *Mazhar Ali v. Budh Singh* (1) followed.

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

Maulvi *Iqbal Ahmad*, for the appellants.

Mr. *S. A. Haidar*, for the respondent.

LINDSAY and KANHAIYA LAL, JJ. :—The facts of this case are as follows. One Musammat Aisha died on the 26th of January, 1907, leaving certain zamindari property.

This lady had a husband and three brothers, and on her death the property she left was recorded in specified shares in the names of these persons. The husband took three sihams and the brothers one siham each.

One of the brothers was Abdul Hakim, who disappeared in the year 1905 and who was still missing at the time of his sister's death. Another brother is the plaintiff in the present suit, *i e.*, Hafiz Abdul Wahid.

It is admitted that nothing has been heard of Abdul Hakim since this disappearance in 1905. The defendants in the suit are his daughter and wife. In 1916 the defendants applied to the Revenue Courts asking for mutation in their favour, on the ground that owing to the lapse of more than seven years from the date of Abdul Hakim's disappearance there was a legal presumption that he was dead.

The wife and daughter, in spite of the opposition of Abdul Wahid, got mutation made in their favour in respect of the

* Second Appeal No. 501 of 1919 from a decree of Lal Gopal Mukerji, First Additional Judge of Aligarh, dated the 22nd of January, 1919, modifying a decree of Piari Lal, Additional Munsif of Khurja, dated the 18th of July, 1918.

(1) (1884) I. L. R., All., 297.

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shares to which they would be entitled as heirs of Abdul Hakim under the Muhammadan law. Thereafter they sued the plaintiff, who is lambardar, for their share of profits, and the result has been the present suit, in which Abdul Wahid claims a declaration that he is the owner of the shares recorded in the defendants' names.

His case is that as Abdul Hakim was missing at the time Musammat Aisha died, his share was held in suspense and that as he is now alleged by the defendants to be dead, the share which has been held up becomes the property of the other heirs of Musammat Aisha of whom he is the sole survivor. It is claimed for him that according to Muhammadan law Abdul Hakim must be taken to have died at the time of his disappearance in 1905 and that consequently he could take no share of the estate of Aisha who died in 1907.

The suit failed in the court of first instance. The Munsif was of opinion that it lay upon the plaintiff to establish that Abdul Hakim predeceased his sister, and that in order to do so, he was not entitled to rely upon any presumption recognized in the Muhammadan law with regard to the date of the death of missing persons. Following the principles laid down in the Full Bench ruling of this Court in *Mazhar Ali v. Budh Singh* (1), he held that the case was governed, not by any rule of evidence contained in the Muhammadan law, but by the provisions of sections 107 and 108 of the Indian Evidence Act.

The lower appellate court took a different view, and applying the rules of Muhammadan law as laid down in the case of missing persons, held that it must be presumed that Abdul Hakim died on the day on which he disappeared in the year 1905 and that consequently no share of the estate of Musammat Aisha ever devolved upon him. He decreed the plaintiff's claim to the extent of one-half, on a finding that this was the correct share to which the plaintiff was entitled.

The case for the defendants in second appeal is that the judgment of the first court was right and that the court below was wrong in deciding the suit on the basis of the presumption which is recognized by the Muhammadan law. The Hanafi law,

(1) (1884) I. L. R., 7 All., 207.

which applies to the parties to this case, is thus laid down in Baillie's Digest (Hanifia), Second Edition, at page 713:—

“A person is missing when he has gone away and it is not known where he is, or whether he is dead or alive. Such a person according to our “sheikhs” is to be accounted alive so far as regards his own property and dead as regards the property of others, until such a time has elapsed that it is inconceivable that he should be still alive, or until his contemporaries are dead; after which he is to be accounted dead, with respect to his own property as from the day when such time is completed, or the last of his contemporaries is dead, and with respect to the property of others, as if he had died on the day of his being missing.”

This statement of the law is taken from the *Fatawa-i-Alamgiri*, a treatise on Muhammadan jurisprudence which is recognized as being of the highest authority. And the law is similarly stated in the *Hedaya* and other commentaries referred to in the judgment of MAHMUD, J., in the Full Bench case cited above (1). It is evident, therefore, that the Muhammadan law which regulates succession by and to missing persons is based upon certain presumptions regarding the date of the death of a person who has disappeared, and that different presumptions are made according as the case is one in which the right of inheritance is to be ascertained with respect to property which belonged to the missing person himself or to others, *i.e.*, to persons from whom he might have inherited. In the former case he is presumed to have died at the expiry of a period which is variously stated in different commentaries, or on the date when a judicial pronouncement is made regarding his death. In the latter case, as soon as the period expires and he is pronounced to be dead, the date of his death is taken to be the date of his disappearance. These presumptions, as pointed out by MAHMUD, J., are arrived at by resort to a rule of the Arabian system of reasoning as applied to legal questions. The rule is technically known as “*istishab*” or “*istishab-ul-hal*” (continuance of condition), and at page 310 of the report of the Full Bench case the learned Judge observes that the rule of the Muhammadan law as to missing persons has arisen from maxim relating to the subject of evidence, and that the rule of “*istishab*” which is the outcome of that maxim cannot be regarded as a rule of succession or inheritance. He goes on to say “that the rule of Muhammadan

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law as to missing persons is a rule belonging purely to the domain of legal presumptions falling under the law of evidence."

Finally he states his conclusion at page 311 of the report in the following passage :—

"The rule as to missing persons appears to my mind to be purely a rule of evidential presumption, and though before the passing of the Evidence Act there might have been perhaps some justification for the courts to apply the rule to cases of Muhammadan succession, inheritance and marriage, the provisions of clause (1), section 2, of the Evidence Act leave no doubt in my mind that we are now bound in connection with all questions of evidence to administer the rules contained in that Act, and it follows that the present case is governed by section 103 of the Statute."

Applying the principle of this ruling to the facts of the present case, we must hold that the plaintiff has failed to establish his claim. The burden lay upon him to show that Abdul Hakim was dead in 1907 when succession opened to the estate of Musammat Aisha and that consequently Abdul Hakim could not take as one of Aisha's heirs.

Both parties are alleging that Abdul Hakim is dead and according to the rule laid down in section 103 of the Evidence Act, the legal presumption is that he is now dead. But the law does not allow the raising of any presumption as to the date of Abdul Hakim's death, and a person who seeks to assign a particular date to that event must prove his assertion in the ordinary way. The plaintiff here, in order to succeed, must prove that Abdul Hakim died before succession to Musammat Aisha opened in the year 1907. He has not been able to adduce any such proof: he can only rest his case upon the presumption which the Muhammadan jurists have laid down, namely, that when a missing person is, after the lapse of a certain period, declared to be dead, he is to be presumed to have died on the date of his disappearance in cases where the question is as to his having taken by inheritance a share of the estate of a person who died subsequent to the date of his disappearance. For the reasons already given the plaintiff cannot be allowed to avail himself of any such presumption. We hold, therefore, that the judgment of the lower appellate court is erroneous and that the judgment of the first court is right.

We allow the appeal, set aside the decree of the court below, and restore the decree of the court of first instance. The appellants will get their costs both here and in the court below.

Appeal decreed.