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these matters to the prior suits or to the question of *res judicata;* but in view of our decision above as to the application of the principle of *res judicata* to the joint tenancy, it is clear that the lower court was right so far in its dealing with these issues. It did, in fact, reject the plaintiff's claim on the ground that there had been a partition in 1917. No attack on the finding in this respect has been made before us in appeal, and it is, therefore, unnecessary for us to further consider this question. The lower appellate court, after considering the partition and matters bearing thereon, arrived at the conclusion that "the plaintiff respondent has totally failed to substantiate his claim." The result is that the appeal fails in its entirety, and is dismissed with costs.

Appeal dismissed.

Before Mr. Justice Dalal and Mr. Justice Pullan.

HUSAINI BEGAM (PLAINTIFF) *v.* MUHAMMAD MEHDI (DEFENDANT).*

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January, 24

Muhammadan law—Shias—Will—Legacy—Consent of heirs—Death of legatee in lifetime of testator.

According to the Shia law a testator can leave a legacy to an heir so long as it does not exceed one-third of his estate. Such a legacy is valid without the consent of the other heirs; but where it exceeds one-third, it is not valid without the consent of all the heirs. Such consent may be given either before or after the death of the testator.

If a legacy is not addeemed by the testator, the death of the legatee does not cause a lapse, but the legacy descends to the legatee's heirs.

Fahmida Khanum v. *Jafri Khanum* (1), referred to.

THE facts of this case sufficiently appear from the judgement of the Court.

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* First Appeal No. 4 of 1924, from a decree of Hanuman Prasad Varma, Subordinate Judge of Bijnor at Moradabad, dated the 18th of September, 1923.

(1) (1908) I.L.R., 30 All., 153.

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HUSAINI BEGAM v. MUHAMMAD MEHDI.

Mr. *Nihal Chand* and Maulvi *Mukhtar Ahmad*, for the appellant.

Dr. *Surendra Nath Sen* and Mr. *Syed Mohammad Husain*, for the respondent.

DALAL and PULLAN, JJ. :—This is an appeal by a Muhammadan lady, Musammat Masiti Begam, against a decree of the Subordinate Judge of Moradabad, who dismissed her suit for possession of the village of Hakimpur Qazi, which she sought to obtain from her nephew Saiyid Muhammad Mehdi. The case turns entirely on the question whether this property has been validly bequeathed to Muhammad Mehdi by the will of his maternal grandmother, Musammat Murtazai Begam. It is admitted on both sides that if the will were set aside, the plaintiff, who is the only surviving daughter of Musammat Murtazai Begam, would be entitled to the whole of her property by inheritance. As it is, she has obtained the rest of the property left by her mother; but this property has been denied to her, as it was bequeathed by will to her sister, Musammat Husaini Begam, and is now in possession of the latter's son.

In the lower court the plaintiff actually denied the existence of the will; but this matter is not now in issue. Undoubtedly, the will was executed by Musammat Murtazai Begam in the year 1897. Apart from this objection, the will has been challenged in this Court on the ground that it is invalid under Shia law, because it purported to transfer more than one-third of the testator's estate. Reliance is placed on a ruling of this High Court in *Fahmida Khanum* v. *Jafri Khanum* (1). According to the head-note of that ruling, where a legacy exceeds one-third of the estate, it will not be valid to any extent unless the consent of the heirs, given after and not before the

(1) (1908) I.L.R., 30 All., 153.

death of the testator, has been obtained. In this case, the consent of the other heirs was undoubtedly obtained to the will at the time of its execution, but it is not proved that there was any such consent after the testator's death. The respondent denies that the property bequeathed is more than one-third of the whole estate of Musammat Murtazai Begam, and the evidence on the question is not conclusive; but we are of opinion that the ruling cited by the appellant can be distinguished from the case before us, for there one of the heirs of the testator was excluded entirely from inheritance, and in this case a certain portion is left to each of the heirs. We consider that that ruling should be confined to the case which it was designed to meet, and not applied to every case in which a Shia testator bequeaths more than one-third of his estate. The commentators to whom we have access are all of opinion that the consent required under Shia law may be obtained before the death of the testator. Ameer Ali, in the first volume of the 4th edition of his book "Muhammadan Law," page 592, writes:—

"According to the Shia law . . . a testator can leave a legacy to an heir so long as it does not exceed one-third of his estate. Such a legacy is valid without the consent of the other heirs; but where it exceeds one-third, it is not valid without the consent of all the heirs. Such consent may be given either before or after the death of the testator."

The same opinion is given by Mr. Tyabji in his book "Principles of Muhammadan Law," 2nd edition, page 784, and we consider that this is the view which we should follow in the present case.

Another question raised is whether the legacy can be valid, as the original legatee, Musammat Husaini Begam, died in the year 1902, many years

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before her mother. Baillie in his "Digest of Muhammadan Law," page 247, writes as follows :—

"In all cases of bequest, where the legatee happens to die before the testator, some doctors are of opinion that the legacy is void; but others have maintained that, although if the testator should retract the bequest, it would be null, whether the retraction takes place before or after the death of the legatee, yet if there is no retraction, the legacy descends to the heirs of the legatee. This of the two reports is most authentic and approved."

Ameer Ali takes the same view, at page 614 of volume I of "Muhammadan Law," where he distinguishes between Hanafi and Shia laws. On this point, he says—

"If the legacy is not addeemed by the testator, the death of the legatee does not cause a lapse. It descends to the legatee's heirs."

In the present case the will was assailed on every possible ground, consequently it is only natural that evidence was adduced to show that the will was revoked by Musammat Murtazai Begam.

[After discussig the evidence, the judgement concluded thus :—]

In our opinion the story of the revocation of the will is improbable, and the reasons assigned for it are insufficient. We consider that the will is a valid will that stands unrevoked, and that the plaintiff is not entitled to the property for which she has brought this suit.

We dismiss this appeal with costs.

Appeal dismissed.