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HATTAR SINGH v. AM LAL.

Mr. *Howell* and Babu *Oprokash Chandar Mukarji*, for the respondents.

The Court (SPANKIE, J., and OLDFIELD, J.,) remanded the case to the lower appellate Court for the trial of certain issues set out in the order of remand, the portion of the order of remand material to the contention above set out being as follows :—

SPANKIE, J.—The Full Bench judgment of this Court in *Chuterdharee Misser* v. *Nursingh Dutt Sookool* (1) ruled that a deed creating an interest in immoveable property exceeding in value Rs. 100, executed prior to the 1st January, 1865, is not affected by Act XVI of 1864, s. 13, although it may be registered under s. 17. All former Acts and Regulations having been repealed except in respect of registered instruments, an unregistered deed creating an interest in immoveable property exceeding in value Rs. 100, executed prior to the 1st January, 1865, is not by any provision of Act XVI of 1864 postponed to a registered instrument executed subsequently to that date. We think that the ruling is strictly applicable to the present case, and that an unregistered document executed when the Act of 1843 was in force cannot be postponed to a registered document executed in 1873. Therefore the first plea fails.

P. C.* 1881 January 27.

PRIVY COUNCIL.

MUHAMMAD FAIZ AHMAD KHAN (DEFENDANT) v. GHULAM AHMAD KHAN AND ANOTHER (PLAINTIFFS).

[On appeal from the High Court of the North-Western Provinces at Allahabad.]

Muhammadan law—Construction of instrument of gift.

One of two brothers, co-sharers in ancestral lands, died leaving a widow, who thereupon became entitled to one-fourth of her husband's share of the family inheritance. Without relinquishing her right to claim her share, in lieu thereof she received an allowance of cash and grain. The surviving brother made an arrangement with her which was carried into effect by documents. By one instrument he granted two villages to her. By another she accepted the gift, giving up her claim to any part of the ancestral estate of her husband. The first instrument, *inter alia*, stated as follows :—"I declare and record that the aforesaid sister-

Present :—SIR B. PEACOCK, SIR M. E. SMITH, SIR R. P. COLLIER, and SIR R. COUCH.

(1) N.-W. P. H .C. Rep., 1868, p. 371.

in-law may manage the said villages for herself and apply their income to meet her necessary expenses and to pay the Government revenue."

Held that these words did not cut down previous words of gift to what in the Muhammadan law is called an *ariat*; and that the transaction was neither a mere grant of a license to the widow to take the profits of the land revocable by the donor, nor a grant of an estate only for the life of the widow. It was a *hibbah-bil-ewaz*, or gift for consideration, granting the villages absolutely.

APPEAL against a decree of the High Court of the North-Western Provinces (11th July, 1877.) in part reversing and in part affirming a decree of the Subordinate Judge of Aligarh (25th May, 1876).

The question raised by this appeal related to the construction of two instruments of gift according to Muhammadan law. One was a deed of gift executed by the appellant granting two villages, Sahauli and Kamalabad, to Wali-un-nissa the widow of his deceased brother, she having become entitled on the death of her husband to a fourth part of his share in the ancestral estate of the family. Wali-un-nissa died leaving the respondents her heirs, and this suit was brought by them to obtain possession of the two villages, so granted to her, which had been taken back, wrongfully it was alleged, by the defendant on her death. The defence was that the villages had not been granted to the widow for any estate greater than for her life ; but had been granted by way of *ariat*, for her maintenance, and not by way of *hibbah-bil-ewaz*, or absolutely. It was alleged for the defence that no heritable estate had, upon the right construction of the instruments executed between the parties, been created. Both the Courts in India held that the instruments showed an absolute gift of the villages to the widow, and a decree for their possession was made in favour of the respondents. The facts of the case are stated in their Lordships' judgment.

The following is the judgment of the Subordinate Judge of Aligarh, in regard to the distinction between *hibbah* and *ariat* :—

"The material point to be decided is, whether the villages of Sahauli and Kamalabad were given to the Musammat as *ariat* or as a gift, and whether the defendant is entitled to take them back. Along with the above it will also be necessary to

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decide the nature of the gift, whether it was with or without consideration. The Court will first define *hibbah* and *ariat*, and detail the circumstances thereof as far as they are applicable to, and bear upon, the present case. To make a person the owner of the substance of a thing without consideration is a *hibbah* (gift), while to make him the owner of the profits only without consideration is an *ariat* or *commodatum* (*vide* Dúr-ul-Mukhtar, Kitab-ul-hibbah).* In a gift it is essential that the donor should be sane, owner and of age, that the thing given be not undivided (*mushaa*), and be in possession of the donor, and that there be proposal and acceptance. A gift is not void for invalid conditions; on the contrary, the conditions are void. For example, if a slave be made a gift of, with the condition that the donee should set him free, the condition is void but the gift is valid (Dúr-ul-Mukhtar, Kitab-ul-hibbah).† In an *ariat* it is not necessary that the donor should be of age, nor that the thing given should not be undivided, nor is acceptance after proposal a condition (Alamgiri).‡ In the Imadia it is explained that the *ariat* of a joint property is valid, and so are its deposit and sale.—(Dúr-ul-Mukhtar, Kitab-ul-ariat.) The words by which an *ariat* is constituted have a special chapter assigned to them in the Alamgiri, and I shall copy it in this place to shew what words are used in giving a thing in *ariat*, and of what signification:—

(Second Chapter, Kitab-ul-ariat, Alamgiri):—If he said, 'I have made thee owner of the profits of this house for a month,' or, without saying 'a month,' 'without a consideration', it will be an *ariat*. This is in the *Fatáwas* of Kazi Khan. And it is valid by the words—'I lent thee this robe, thou mayest wear it for a day, or I lent thee this house, thou mayest live therein for a year.'—(Tatarkhania). If he said, 'I make this house of mine thy

* "It is the *tamlik* (making one the proprietor) of the substance for nothing, *i.e.*, without consideration. *Ariat*. It is the *tamlik* of profits for nothing (without consideration)."

† "The conditions of its validity in the donee are sanity, majority, and ownership. The conditions of validity in the subject of the gift are that it be possessed and not joint. Its pillars are proposal and acceptance. Its effect is that it is not rendered void by invalidating conditions. Accordingly, the gift of a slave, on condition of his being set free, is correct, and the condition is void."

‡ "As to acceptance by the person to whom anything is given in *ariat*, it is not one of the conditions according to the approval of our three doctors"

"As to majority, it is not one of the conditions, so much so, that it is valid from an authorised child."

residence for one month,' or, if he said, 'thy residence for my lifetime', this will be an *ariat*.—(This is in the Zahiria). And if he said, 'I made thee be borne on her for God's sake,' it is an *ariat*.—(*Fatáwas* Kazi Khan.) And if he said, 'my house is for thee a gift by way of residence,' or, 'a residence by way of gift,' it is an *ariat*.—This is so in the Hidaya. And if he said, 'my house is for thee given by way of a residence,' or, 'a residence by way of *sadqa* (alms),' or, 'a *sadqa* by way of *ariat*,' or, a 'loan (*ariat*) by way of gift,' all this is *ariat*.—This is so in the Kafi. And if he said, 'my house is for thee, if thou survivest me, and for me if I survive thee,' or, 'for thee a *wakf*,' it is an *ariat* according to Abu Hanifa and Muhammad, but a gift according to Abu Yusuf, and the words '*rakba*' and '*habas*' are void.—This is so in Badaya. If he said, 'my house is for thee, if thou outlivest me, and for me, if I outlive thee,' or, 'a *wakf* for thee,' it will be an *ariat* according to all. This is so in Yanabia. 'I made over this ass to thee, so that thou mayest use it and feed him with grass at thy own cost,' this will be an *ariat*. This is so in Kania. If he said, 'I have given thee this tree for eating the fruit thereof,' it is an *ariat*, unless he intends a gift by it. This is so in Tamar Tashi.

These are the words from which an *ariat* is construed, and it will also appear from looking at all of them that the word '*wahabto*' (I made a gift) is not found anywhere among them. The words '*hibbahtan suknah*' or '*suknah hibbahtan*,' which are used above, do not mean a gift of the substance of the thing. They are only an elucidation of '*dari laka*', so that the meaning is that the house which is given is given for residence. I shall now give those words which constitute a gift, and they are of three kinds. First, those which are specially made (adapted) for a gift; secondly, those which denote a gift metaphorically or by implication; and thirdly, those which import *hibbah* or *ariat* equally. I copy the following from the Alamgiri, Kitab-ul-hibbah, Chapter I:—The words by which a gift is made are of three kinds; first, those which are specially adapted or made for *hibbah*: secondly, those which denote *hibbah* by implication or metaphorically; and thirdly, those which may import *hibbah* or *ariat* equally. Of the first kind there are such as these:—'I made a gift of this thing to thee,

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or 'I made thee owner of it,' or 'I made it for thee,' or 'this is for thee,' or 'I bestowed upon thee or gave thee this.' All this is *hibbah*. Of the second description are such as these—'I clothed thee in this garment,' or 'I gave thee this house for thy lifetime.' This is gift. In the same way if he said, 'this house is for thee for my age,' or 'for thy age,' or 'for my lifetime,' or 'for thy lifetime, so that when thou art dead it will revert to me,' then the gift will be valid and the condition void. But the third kind are such as these—should he say, 'this house is for thee, or for me, if I survive thee, or a *wakf* for thee,' and make it over to him, it is an *ariat* according to the two Abu Hanifa and Muhammad, and a *hibbah* (gift) according to Abu Yusuf. The above question shows that the word "*wahabto*," the meaning of which is 'I made a gift of,' is a word specially adapted for gift (*hibbah*), and is not used to denote a loan. And this is the word which has been used in the document entitled *hibbah-nama*, deed of gift. None of the doubtful words have been used in this document and the words used after it are by way of advice, (*mash-wara*). There is an example in the law-books eminently applicable to the present case which makes it clear that the transaction in dispute was one of *hibbah* and not of *ariat*. This example is to be found in all the books; in the Hidaya, in the Dúr-ul-Mukhtar, and in the Alamgiri:—'*dari laka hibbahtan taskunahu*.' 'My house is for thee by way of gift that thou mayest live in it.' It is a rule in Arabic that a verb sentence is never used as explicative (*tafsir*) of a noun sentence; '*dari laka hibbahtan*' is a noun sentence, and '*taskunahu*' a verb sentence; '*taskunahu*' cannot therefore be explicative of the preceeding sentence. On the contrary, the donor, by way of advice, counsels the donee to live in it; and the latter is free to adopt the counsel or not. Among the sentences by which a valid gift may be made, the following appears in the law-books:—Dúr-ul-Mukhtar, 'my house is for thee that thou mayest live in it'. Because the words 'that thou mayest live' (*taskunahu*) are an advice, and not an explanation, for a verb is not adapted to be explicative of a noun. So then he counsels him in the mode of his proprietorship by telling him to live in it. So if he likes, he can accept the advice, or he may not accept it. But if it be said, '*dari laka hibbahtan suknah*'

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or '*suknah hibbahtan*,' as mentioned in the words used to describe an *ariat*, there '*hibbahtan suknah*' is a *tafsir* or explanation of ownership, contrary to '*dari laka hibbahtan taskunahu*,' where it is not a *tafsir*. Hidaya :—If he said, 'by way of gift, that thou mayest live in it,' then it is a gift, for his saying '*taskunahu*,' 'that thou mayest live in it,' is an advice, and not an explanation, and it is an index of the object, unlike his saying '*hibbahtan suknah*,' for it is a *tafsir* to it. In the deed of gift, the words 'made a gift of' and 'put her in possession' are followed by the direction, that 'the sister-in-law may manage the villages and apply their income to meet her necessary expenses and to pay the Government revenue;' this is all by way of advice, and the transaction of gift concluded with the preceding words. The words '*hibbah kiyá*' (made a gift of) denote their real meaning, and are made use of with reference to the two villages. It is a rule in every language that a word is always understood to be used in its literal meaning, though of course when the literal meaning is not applicable the metaphorical one may be understood. It is not necessary to refer to Arabic books alone for further corroboration of this fact. The word gift is perfectly applicable in its literal sense in the document, where these words are used. The donor was not a minor, nor the subject of gift *mushaa* (undivided). There is no reason why the word *hibbah* should be held to mean an *ariat* (loan), and why, when it is clearly stated that the mauzas of Sahauli and Kamalabad are made a gift of, the context should be construed to mean that the profits of the mauzas Kamalabad and Sahauli were given as *ariat*. On a perusal of the whole document it clearly appears that Faiz Ahmad Khan never even thought of effecting an *ariat*. He has used sufficient words by which nothing but a gift could be intended. The whole manner is that of a gift, and there is not even the trace of an *ariat*. The value of the property was fixed, the full stamp-duty was paid, and lest the property should be suspected to be *mushaa*, or undivided, and the gift vitiated on that account, he stated that both villages are owned by me without the partnership of any one else. Then, using the word '*hibbah*,' he declared that he had made a gift and confirmed it, so far as to write that neither he nor his heirs shall have any claim. At the conclusion he expressed the nature of the document, by saying that he had written it by way of a deed of

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gift. He also stated in the document that he had made over the possession to the Musammát, which is the completion of the gift, (but which is not necessary in an *ariat* or loan). He made the Musammát execute a document in the way of *kabuliat* (acceptance), which was necessary for the validity of the gift (not necessary in an *ariat*). After the conclusion of the words of the document and writing '*fakat*' (end), the words headed "P. S.—I promise," used by the defendant, further elucidated the nature of the gift, and show that it was a *hibbah-bil-ewaz* (gift for consideration). There is no reason why all the words should not be understood in their literal sense, and why the transaction should be considered as *ariat* (*commodatum*), about which there is no word at all in the whole document. The transaction cannot be considered to be an *ariat*, unless all the words be construed in a sense other than literal : but for this there must be a very strong reason, which the Court thinks does not exist."

The Subordinate Judge, after examining the words of the *ikrar-nama* given by the widow, concluded thus :—" Considering all these circumstances, the opinion of the Court is that both the villages were given to the Musammát as a gift, and not as an *ariat* (loan); that the document is clearly a *hibbah-nama* (deed of gift), and not an *ariat-nama* (a deed of loan) ; that both the villages were Wali-un-nissa's property by reason of the gift and heritable. According to the Muhammadan law, in an unconditional (*mahz*) gift, a donor is no longer competent to recede from the gift on the death of the donee, or, in other words, to get the property back, and in *hibbah-bil-ewaz* (gift for a consideration) the doctrine is clearer. Therefore, whatever be the description of this gift, the defendant is not entitled to get the estate back. The plaintiffs, who are the legal heirs of Wali-un-nissa, deceased, have a right according to the Muhammadan law to bring the claim."

This was upheld in the High Court which stated in its judgment:—

The Subordinate Judge, who enjoys a high reputation as a Muhammadan lawyer, has held that the language of these instruments proves an absolute gift. We do not venture to follow him

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into the nice distinction of Arabic Grammarians. It appears to us, reading the instruments together, that the words on which the appellant relies, "for the expenses of my sister-in-law," both declare the object of the gift and limit the interest created by the words of gift. These words standing alone would, it is admitted, confer an absolute estate on the lady, and we agree with the Subordinate Judge that, reading the one instrument with the other passage on which the appellant relies, they declare the object of the gift rather than restrict its operation. Wali-un-nissa, at the same time, caused her name to be expunged from the registers of Datauli Khas and Deosaini. That the parties so regarded the instrument of the 1st January, 1867, as conveying an absolute estate to her, appears from the circumstances that the lady's name was substituted for that of Faiz Ahmad Khan; that neither he nor his agents took any pains to have any right remaining in him recorded; that settlement was made with Wali-un-nissa, who is declared in the registers to be the sole owner, and in the record-of-rights as being competent to transfer the property, and where it is added that on the lady's death it would pass to her heirs. Seeing that the agents of the appellant did nothing to preserve his rights either when the lady's name was registered or when the records-of-rights was prepared, it may well be inferred that they did not consider he had any rights left in him.

Graham, Q. C., and *J. T. Woodroffe*, for the appellant.

Leith, Q. C., and *C. W. Arathoon*, for the respondents.

For the appellant it was urged that the widow acquired, upon the true construction of the documents, only the right to receive the rents and profits of the villages during her life, for her maintenance. She had not acquired the proprietary right. The intention of the parties had not, in the decisions under appeal, received effect; nor had the absence of words of inheritance, in the instrument of gift, been duly considered. On this point *Lekhraj Roy* v. *Kanhya Singh* (1) was cited. There was not a complete *hibbah-bil-ewaz*. Reference was made to Baillie's Digest of Muhammadan law, Part I., Book VIII., Chap. I, p. 515, on gifts, and Part I.

(1) 14 W. R. 262.

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Book VIII., Chap. III, on *karz*. The Hidaya (Grady, p. 478,) vol. III., Book XXIX., on *ariat* or loan.

Counsel for the respondents were not called upon.

Their Lordships' judgment was delivered by

SIR MONTAGUE E. SMITH.—This suit was brought by the two respondents, Haji Ghulam Ahmad Khan and Haji Inayat-ullah Khan, claiming as heirs of their sister, Musammat Wali-un-nissa, to recover two villages, mauza Sahauli and mauza Kamalabad in zila Aligarh. The original defendant and appellant here was Faiz Ahmad Khan. He has died since the appeal to Her Majesty, and is now represented by his sons, who are his heirs. The question in the appeal turns upon the construction of two instruments. A third was executed to carry the transaction into effect; but the case really turns upon the construction of two instruments, one a deed of gift, and the other an agreement in which the gift is accepted.

In order to understand the position of the parties, who are Muhammadans, it will be necessary to refer to a few facts. Murad Khan, who was the talukdar of Datauli and the owner of several villages, having died, his grandsons, Muhammad Husain Khan and the defendant Faiz Ahmad Khan, succeeded to his estate; their father, Abdul Rahman Khan, having died in the grandfather's lifetime. Abdul Rahman Khan left a widow, Musammat Wazir-un-nissa, the mother of his two sons, who is still living. Husain Khan, the elder grandson, died on the 31st of August, 1838, leaving as his widow, Musammat Wali-un-nissa, the sister of the two respondents, who now, as her heirs, claim the mauzas in question. On the death of Husain Khan his share in the estates which descended from his grandfather would fall, according to Muhammadan law, to his brother, Faiz Ahmad Khan, his mother, Wazir-un-nissa, and his widow, Wali-un-nissa, as co-sharers; the latter, as widow, being entitled to a fourth. The estates had stood in the register in the name of Husain Khan, his brother Faiz Ahmad Khan being a minor; but after Husain's death they were placed in the names of his mother, his widow, and his brother, Faiz Ahmad Khan. Although the estates were so placed in the names

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of the mother and widow, the two ladies did not enter into possession or receipt of the profits of them, but received allowances of money and grain. Wali-un-nissa, the widow, received annually 500 rupees and 100 maunds of grain. In 1856 the two ladies executed a power of attorney authorising a mukhtar to expunge their names from the register; and in 1857 the power of attorney was acted upon, but partially only. Their names were expunged from the register with regard to the greater part of the estates, but two villages were left standing in their names, namely, Datauli Khas and Deosaini; and these villages remained in their names down to the time of the transaction which is in question. On attaining his majority Faiz Ahmad made a pilgrimage to Mecca. During his absence there appears to have been some dispute between the manager of the estate and the ladies or those acting for them, and some contest took place during the Government settlement which was then being prosecuted. It is not immaterial to refer to these proceedings, which show that, though the two ladies were receiving an allowance in money and grain, they had not given up their claim to a share of the estates. What took place is shortly stated in the judgment of the Subordinate Judge as follows:—"The revision of the settlement in this district commenced in 1863; and Wali-un-nissa then, probably with the advice of Muhammad Inayat-ul-lah Khan, (the cause of which, perhaps, might have been those very disputes,) presented applications through her agent for entry of her name in respect of the villages of the estate. But those applications were withdrawn about ten or twenty days after, on the 27th May, 1863, (as proved by the evidence of Farzand Ali, mukhtar). The disputes were prolonged regarding Datauli Khas, in respect of which Wali-un-nissa's name had continued to be entered. The cause of this appears to have been that, in the *wajib-ul-arz*, Faiz Ahmad Khan had caused the name of Wali-un-nissa to be entered in regard to a $1\frac{3}{4}$ biswa share with receiving Rs. 500 cash and 100 maunds of corn. The Musammat applied for entry of her name in respect of a two-anna share, and also stated that the agents of Faiz Ahmad Khan had wrongly stated her right to $1\frac{3}{4}$ biswas, and her receipt of Rs. 500 cash and 100 maunds of corn." It thus appears that, although an allowance in money and grain was made, Faiz Ahmad or his

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agents admitted that the widow was entitled to 1¾ biswas; and there is no satisfactory evidence to show that by taking the allowance she had relinquished her right to a share if she chose to insist upon it. These proceedings occurred in the absence of Faiz Ahmad at Mecca. After the discussion before the Deputy Collector the case was brought before the Collector, who very properly said that the Collectorate had nothing to do with the rights of the parties, and that the whole matter had better stand over until Faiz Ahmad returned. Faiz Ahmad returned from Mecca in the year 1866; and steps were then taken to come to an arrangement with his brother's widow, which was carried into effect by the documents which are now to be construed.

The instrument executed by Faiz Ahmad Khan bears date the 1st of January, 1867. It states that he intended again to go to Mecca, and goes on thus:—"The karindas cannot properly meet the requirements of the services due to Bibi Wali-un-nissa, my sister-in-law (brother's wife); and whereas from before Rs. 500 cash and 100 maunds of grain were fixed on my part for necessary purposes, by way of rendering service to her, therefore I have now, with great pleasure, willingly and voluntarily made a gift of mauza Sahauli, assessed at Rs. 1,310-5-1, and of mauza Kamalabad, assessed at Rs. 281-11-3, villages appertaining to pargana Atauli, in the zila of Aligarh, valued altogether at Rs. 10,000, and owned by me without the partnership of any other person, for all the expenses of the said sister-in-law, and put her in possession." If it had stopped here, there could be little doubt that the instrument would contain an absolute gift of the two mauzas. It goes on:—"I do declare and record that the aforesaid sister-in-law may manage the said villages for herself, and apply their income to meet her necessary expenses and to pay Government revenue." Those words, it is contended, cut down the previous words of gift, not even to a gift for life, but to what in Muhammadan law is called an *ariat* or loan, which would seem to be no more than a licence to take the profits of the land, revocable by the donor. Undoubtedly, those words require consideration. They may have been inserted either to show that an *ariat* was intended, or merely to show the motive and consideration of the gift. In order to ascertain which of

those two meanings the words properly bear, the rest of the document is material to be considered. It goes on:—"And that I and my heirs shall make no objection or opposition." These words seem to be entirely opposed to the view that an *ariat* in the sense of a resumable loan or licence was intended. It goes on: "I therefore have written these few words as a deed of gift,"—the grantor here distinctly describes the deed or instrument he is signing as a deed or instrument of gift,—"that it may serve as evidence." Then, written by way of postscript, he says:—"I declare that these villages have been given in lieu of the former Rs. 500 cash and 100 maunds of grain, and that henceforth the said money and the grain shall not be given." This, taken in its plain sense, is a statement of one of the considerations for the gift; and it was necessary to be stated, otherwise a claim might have been made for a continuance of the allowance of the rupees and grain in addition to the benefit which the donee took under the deed.

The Musammat executed an *ikrar-nama*, dated on the 3rd January, 1867, but which was, in fact, executed on the same day as the deed of gift; and the two instruments evidently form but one transaction. It contains a recital of her having received the money and grain, and of some of the facts relating to the register and to her name having been upon it and expunged; and then it proceeds thus:—"Muhammad Faiz Ahmad Khan has now returned from Arabia, but notwithstanding that I had caused my name to be expunged he gave me mauzas Sahauli and Kamalabad, in taluka Datauli, for my maintenance and support, I am now satisfied and contented with this property." The word "property" surely implies that she had the estates. The mere right to take the usufruct so long as the grantor pleased could hardly be described as property, nor would it be a provision with which she was likely to be satisfied and contented. Then there is this important relinquishment of claim on the part of the Musammat: "I do declare that neither I have nor shall have any claim in future respecting the estate of Datauli Khas, the villages of the taluka Datauli, Burhansi, Deosaini, the villages in taluka Malakpur and Rahwara, and other detached villages, and also respecting the moveable and

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immoveable property constituting the ancestral estate of Muhammad Faiz Ahmad Khan;" that is, she disclaims and relinquishes all her right as a co-sharer to the whole of the ancestral estate; and it is plain that not only had her name remained up to this time on the register in respect of the two villages, Datauli and Deosaini, but that she had done nothing which would have amounted to a release of her right as co-sharer in the ancestral property. It is evident that Faiz Ahmad, in obtaining from the widow this release of her right, considered that he was getting something valuable; and undoubtedly she was giving up a valuable right for that which, according to the appellant's present contention, would not be a fair or reasonable equivalent for it.

The question upon these instruments, as already stated, is whether, read together, as their Lordships think they must be, they constitute a gift by Faiz Ahmad Khan to Wali-un-nissa, or amount only to an *ariat* or loan. The allegation in the appellant's pleading below is that the latter is the true construction. Upon this question their Lordships have the benefit of an able and learned judgment from a Muhammadan Judge of whom the High Court says that he enjoys a high reputation as a Muhammadan lawyer. This learned Judge has referred to many books of authority on Muhammadan law, from which he has given extracts and also instances in his judgment. He is clearly of opinion that this instrument contains words which in Muhammadan law have a technical signification as words of gift, and which, when used as they are in it, do by law constitute a gift. He also thinks that the words "that she might maintain herself out of the estates" describe one of the objects of the gift, and do not limit or cut down its operation.

Their lordships do not think it necessary to discuss the authorities cited, but there are two short passages in the judgment of the learned Subordinate Judge that may be usefully referred to. He says:—"There is no reason why the word *hibbah* should be held to mean an *ariat* (loan), and why, when it is clearly stated that the mauzas of Sahauli and Kamalabad are made a gift of, the context should be construed to mean that the profits of the mauzas Kamalabad and Sahauli were given as *ariat*." It may be

observed that, if it had been meant to give the profits only, the deed might have been so expressed, but the mauzas themselves are given. Then he concludes his judgment in this way :—"Considering all these circumstances, the opinion of the Court is that both the villages were given to the Musammat as a gift, and not as an *ariat* (loan); that the document is clearly a *hibbah-nama* (deed of gift), and not an *ariat-nama* (a deed of loan); that both the villages were Musammat Wali-un-nissa's property by reason of the gift, and heritable. According to the Muhammadan law, in an unconditional (*mahz*) gift a donor is no longer competent to recede from the gift on death of the donee, or, in other words, to get the property back, and in *hibbah-bil-ewaz* (gift for a consideration) the doctrine is clearer." The gift in this case appears to their Lordships to be a *hibbah-bil-ewaz*.

Some difficulty was felt by the learned counsel for the appellant in condescending upon the definition of an *ariat*. It was pointed out to them that in the written statement of the appellant the contention was this :—"This mode of giving, where the word acceptance (*ejab*) denotes the proprietorship of the profits and not the proprietorship of the area, is called *ariat* (*commodatum*) in the Muhammadan law; that is to say, the proprietary right of the person who gives is not extinguished, and he can resume (the estate) at any time. It is therefore not valid, according to the Muhammadan law, to claim by inheritance to the said Musammat an estate which she herself did not own." This statement is in accordance with what is said of *ariat* in the Hidaya, Book 29. The learned counsel Mr. Graham at first adopted this statement; but feeling how difficult it was to support the instrument as an *ariat* having this effect, both the learned counsel for the appellant afterwards endeavoured to construe it as being something intermediate between an absolute gift and an *ariat*. This was obviously a departure from the view originally taken by those who advised the appellant in the Courts below, and no authority in Muhammadan law for holding that any such construction could be given to the document has been shown. Their Lordships are satisfied, as the High Court below was satisfied, that the Muhammadan Judge has come to a correct conclusion that the transaction was a

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gift for a consideration, and that the words relied on to cut it down to an *ariat* have not that effect. It is to be observed that the Subordinate Judge cites various instances from books on Muhammadan law in which very similar words, used after words of absolute gift, have been read as being descriptive of the motive or consideration of the gift, and ineffectual to control the operation of technical words of gift.

For these reasons their Lordships think that the judgments below are right; and they will humbly advise Her Majesty to affirm the decree of the High Court, and to dismiss this appeal with costs.

Solicitors for the appellant: Messrs. *Barrow and Rogers.*

Solicitor for the respondents: Mr. *T. L. Wilson.*

CIVIL JURISDICTION.

1881
January 31.

Before Mr. Justice Spankie and Mr. Justice Oldfield.

KALLU MAL (DEFENDANT) *v.* BROWN (PLAINTIFF).*

Attachment of Property—Suit to establish Right—Suit for compensation for Wrongful attachment—Act X. of 1877 (Civil Procedure Code), ss. 279, 283.

An order striking off an objection to the attachment of property attached in execution of a decree for default of prosecution is not "conclusive" as regards the right which the objector claimed to the property, within the meaning of s. 283 of Act X of 1877.

Held, therefore, where a person objected to the attachment of certain moveable property attached in execution of a decree, claiming it as his own, and his objection was struck off for default of prosecution, that such person might sue for damages for the wrongful attachment of such property without suing to establish the right which he claimed thereto.

THIS was an application to the High Court for the exercise of its powers of revision under s. 622 of Act X of 1877. One Kallu Mal had been sued in the Court of Small Causes at Allahabad by one Brown for compensation for the wrongful attachment in the execution of his decree against one Joakim of a carriage belonging to Brown. It appeared in that suit that, when such carriage had been attached, the plaintiff objected under s. 278 of Act X. of 1877 to the attachment, claiming such carriage as his own property.

* Application, No. 918. of 1880, for revision under s. 622 of Act X of 1877 of an order of R. D. Alexander, Esq., Judge of the Court of Small Causes at Allahabad, dated the 11th September, 1880.