92(1) of the Code of Civil Procedure, and that the proper remedy of the applicants in both these present applications lies in a suit properly instituted under that section.

What I have said in deciding the third issue disposes also of the fourth and fifth issues. With regard to the fourth issue, even if I had held that section 34 of the Indian Trusts Act can be applied to the present circumstances, I should have taken the view that the application of Nawab Mirza Mohammad Sadiq Ali Khan involves questions of detail, difficulty and importance, which are not proper for summary disposal. My finding on issue no. 4 therefore is that the questions raised in Miscellaneous Case no. 1 of 1932 ought to be decided in a regular suit, and are not proper on any view of the matter for summary disposal under section 34 of the Indian Trusts Act. My finding on issue no. 5 is that this Court has no jurisdiction to appoint a trustee or trustees under section 74 of the Indian Trusts Act, and that the matter must be decided in a regular suit.

The result is that both the applications are dismissed with costs.

Application dismissed.

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NAWAB MIRZA MOHAMMAD SADIQ ALI KHAN *v.* NAWAB KAZIM ALI KHAN *alias* NANHAN SAHIB

Smith, J.

APPELLATE CRIMINAL

Before Mr. Justice E. M. Nanavutty

GAYA DIN AND OTHERS (APPELLANTS) *v.* KING-EMPEROR (COMPLAINANT-RESPONDENT)*

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Indian Penal Code (Act XLV of 1860), sections 52, 99, 147, 225 and 332—"Good faith"—"Due care and attention", meaning of—Sub-Inspector of Police making report of an offence of rioting and of voluntarily causing hurt to a public servant in the discharge of his duty—Sub-Inspector proceeding two days after making report to arrest accused—Good faith, whether proved—Public servant, whether justified in doing a thing on his mere belief—Criminal Procedure Code (Act

*Criminal Appeal No. 501 of 1933, against the order of S. Khurshed Hasan, Additional Sessions Judge of Kheri, dated the 15th of November, 1933.

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V of 1898), sections 161 and 403—Acquittal of accused of offences committed on a certain date—Trial for similar offences alleged to be committed a couple of days later, if barred—Judgment of acquittal in previous trial, relevancy of —Refusal of a person to make statement before investigating police officer—Detention of such person until statement is made, legality of—Common object not proved—Charge of rioting, if can be legally sustained.

The phrase "due care and attention" in section 52 of the Indian Penal Code implies genuine effort to reach the truth and not the ready acceptance of an ill-natured belief. When a question arises as to whether a person acted in good faith, then it devolves upon him to show not merely that he had a good intention but that he exercised such care and skill as the duty reasonably demanded for its due discharge. Where the question is whether a public servant was justified in doing a certain thing, his justification must have a better foundation than his mere private belief, for a man may be very foolish in believing himself justified but the law could not adopt so vague and unsafe a criterion.

Where, therefore, a Sub-Inspector of Police goes to a village to arrest the accused in connexion with an offence alleged to have been committed two days earlier and the allegations of the commission of the offence contained in the report made by the Sub-Inspector himself are found by a Magistrate after due enquiry to be incorrect, he cannot be said to have been acting in good faith and under colour of his office. The mere fact that the Sub-Inspector went to the village dressed up in his uniform to arrest the accused will not justify one in saying that he was acting in good faith, when, as a matter of fact, he was acting in entire bad faith and in the most illegal and reprehensible manner and in such a case the accused cannot be held guilty under sections 225 and 332 of the Indian Penal Code, if they offer resistance to the Police.

It is perfectly open to the prosecution, notwithstanding the judgment of acquittal of a Magistrate in respect of the offences said to have been committed on a certain date to prove that those very same accused who were acquitted along with other persons of offences of rioting and of voluntarily causing hurt to a public servant in the discharge of his duty committed those very offences afresh a couple of days later. There is no question of the Magistrate's judgment of acquittal acting as a bar to the trial of the accused in the subsequent case under the provisions of section 403 of the Code of Criminal Procedure; but the judgment of acquittal in the previous case is

relevant for the purpose of showing that the trial of the accused in the previous case resulted in a complete vindication of their innocence.

A person has a legal right to decline to answer any question put to him by a Sub-Inspector and that officer acts illegally when he tells a constable and a chaukidar to see that that person does not leave the place without making a statement.

When the common object of the accused, is found to be not proved, then the charge of rioting under section 147 of the Indian Penal Code cannot be legally sustained.

Messrs. *H. G. Walford* and *Munawwar Abbas*, for the appellants.

The Assistant Government Advocate (Mr. *H. K. Ghosh*), for the Crown.

NANAVUTTY, J.:—This is an appeal against the judgment of Syed Khurshed Husain, Additional Sessions Judge at Kheri, convicting the appellants Gaya Din and 23 others of offences under sections 147, 332/149, 224, and 225 of the Indian Penal Code and sentencing them each to various terms of rigorous imprisonment for each offence, and further convicting the appellant Paragi of offences under sections 147, 332/149 and 225 of the Indian Penal Code and sentencing him under section 562 of the Code of Criminal Procedure to be released on his furnishing a personal bond for Rs.1,000, tenable for two years, to keep the peace and to be of good behaviour.

I have heard the learned counsel for the appellants as also the learned Assistant Government Advocate and perused the voluminous evidence on the record.

The case for the prosecution is as follows:

On the 21st of November, 1932, a petition was presented to the Deputy Commissioner of Kheri by Debi and Laltu, Barbers of village Barwi, praying that the Deputy Commissioner may be pleased to order an enquiry into their character and good behaviour and have their fair name vindicated. This was a miscellaneous application which the Deputy Commissioner received in his executive capacity, and on the same day he sent the petition to the Sub-divisional

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Magistrate of Lakhimpur for disposal. The latter officer sent the petition on the 16th of December, 1932, to the Station Officer of Thana Nimgaon for report. Ultimately the petition came, on the 29th of December, 1932, to Sub-Inspector Thakur Sheo Prasad Singh, the second officer of Thana Nimgaon, for enquiry. On the 30th of December, 1932, Sub-Inspector Sheo Prasad Singh instead of going to village Barwi where the applicants resided, to make his enquiry, went to village Tikaula to investigate the matter and he sent Constable Khudayar Beg to fetch the applicants Laltu and Debi before him. Laltu and Debi came to village Tikaula along with Jwala Prasad, Gajadhar Kurmi, Baldeo Kurmi, and Gaya Din, all residents of village Barwi, at about 4 p.m. on the afternoon of the 30th of December, 1932. Avadh Bihari, the mukhtar of Jwala Prasad, and Zalim Singh were also present. The first question that Sub-Inspector Sheo Prasad Singh put to Laltu was whether the latter had filed the petition (exhibit E), in the Court of the Deputy Commissioner of Kheri of his own accord or at the instance of one Mata Din. Before Laltu could reply Jwala Prasad told Laltu not to answer the question and to leave the place. Laltu thereupon started to go, but Sub-Inspector Sheo Prasad Singh told Constable Khudayar Beg and Tota Chaukidar not to let Laltu go away before he gave his statement. Thereupon without any rhyme or reason Jwala Prasad is said to have ordered his companions to beat the Constable and Tota Chaukidar is said to have received two lathi blows. Upon this, Sub-Inspector Sheo Prasad Singh and his men arrested five persons, namely, Jwala Prasad, Gajadhar, Debi, Zalim Singh and Baldeo. Laltu and Gaya Din, two very old and decrepit looking men, are said to have run away. Sub-Inspector Sheo Prasad Singh made a written report of the alleged occurrence (exhibit 18) and sent it to Thana Nimgaon, and accordingly offences under sections 332/149, 353 and 147 of the Indian

Penal Code were registered at the police station as crime No. 98 on the 30th of December, 1932. Three days later on the night between the 1st and 2nd January, 1933, at 3 a.m. Sub-Inspector Sheo Prasad Singh went with four chaukidars and about 30 or 40 villagers to arrest Laltu and Gaya Din, who were said to be absconding and who were wanted for offences under sections 147, 332/149 and 353 of the Indian Penal Code. Laltu was arrested at his house without any difficulty and placed under the custody of Chaukidars Hansa and Tota. After Laltu's arrest the Sub-Inspector went with his men to the house of Mata Din in order to arrest Gaya Din. The Sub-Inspector called out to Gaya Din to come out and surrender himself. Gaya Din is then said to have cried out to Ram Lal and Jwala Prasad to come to his help. Thereupon those who were on the roof of Mata Din's house, known as the "ganj" began to hurl brickbats at the thanadar and his men, and the Sub-Inspector has also deposed that Jwala Prasad sent a shower of arrows at him. The men who had been gathered to help the Sub-Inspector in effecting the arrest of Laltu and Gaya Din then began to disperse. Thereafter Baldeo, the brother of Laltu, also called upon the men of his village to help him in rescuing Laltu from police custody. Then the Sub-Inspector thought that it was high time to leave the place and he took Laltu away with him. When the Sub-Inspector had got clear of the village he sat down under a *"bargad"* tree and wrote out his report of the occurrence, and sent it to Police Station Nimgaon. That report is exhibit 5 in the present case. Another case under sections 146, 332/149, 224 and 225 of the Indian Penal Code was registered against Jwala Prasad and several others and was investigated by Mr. Shahab-Uddin, Station Officer of Police Station Nimgaon, and by Mr. Mohammad Hafeez, Inspector of Police. The accused in the present case were prosecuted on the 17th of February, 1933, in the Court of Mr. Laiq Ali, Magistrate of the 1st class, who

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after recording the evidence of a few prosecution witnesses, reported to the District Magistrate that he might be relieved of the necessity of trying this case as he had on the 2nd of March, 1933, decided the riot case out of which the present prosecution arose. The case was accordingly sent to the Court of another Magistrate who also excused himself from the necessity of trying this case on the ground that he knew too much about the facts of the case, and ultimately the case was sent by the District Magistrate to the Court of Mr. Mohammad Mustafa who, instead of deciding the case himself as Mr. Laiq Ali had done in respect of the previous case, committed all the accused to the Court of Session to stand their trial on charges under sections 147, 332/149, 224 and 225 of the Indian Penal Code, and the Additional Sessions Judge has convicted them all of the offences with which they stood charged and sentenced them to various terms of rigorous imprisonment, such as could have been legally imposed by a Magistrate of the 1st class.

The judgment of the trial court is so prolix and so ill-digested that it has furnished no help to me at all in deciding this appeal.

The first point for determination in this case is whether the prosecution has proved that Sub-Inspector Sheo Prasad Singh was acting in "good faith" and under colour of his office when he went at the unearthly hour of 3 a.m. to village Barwi on the night between the 1st and 2nd of January, 1933, to arrest the two men Laltu and Gaya Din, who were said to be wanted on charges of riot and of causing hurt to a public servant in the discharge of his duty. Section 52 of the Indian Penal Code defines the phrase "good faith".

> "Nothing is said to be done or believed in 'good faith' which is done or believed without due care and attention."

The phrase "due care and attention" implies genuine effort to reach the truth and not the ready acceptance of an ill-natured belief. When a question arises as to

whether a person acted in good faith, then it devolves upon him to show not merely that he had a good intention but that he exercised such care and skill as the duty reasonably demanded for its due discharge. Where the question is whether a public servant was justified in doing a certain thing, his justification must have a better foundation than his mere private belief, for a man may be very foolish in believing himself justified but the law could not adopt so vague and unsafe a criterion. The learned Assistant Government Advocate has conceded that it may perhaps be held that the Sub-Inspector acted very foolishly and tactlessly in going at the unearthly hour of 3 a.m. to arrest two old and decrepit men like Laltu and Gaya Din, who were charged with offences of rioting and of causing hurt, but he has strongly argued on behalf of the Crown that the Sub-Inspector was acting in good faith inasmuch as the persons Laltu and Gaya Din, whom he sought to arrest, were charged with having committed cognizable offences, and that this fact legally justified Sub-Inspector Sheo Prasad Singh in going to village Barwi, even at dead of night to arrest the two men, who were charged with cognizable offences.

I regret I cannot for a moment accept this contention urged on behalf of the Crown by the learned Assistant Government Advocate. If the report (exhibit 18) upon which the prosecution was started in respect of the alleged riot on the afternoon of the 30th of December, 1932 had not been made by Sub-Inspector Sheo Prasad Singh himself, and if that officer had not been present at the time of the commission of the alleged offences of riot and of causing hurt to a public servant in the execution of his duty, then I might have perhaps accepted the contention of the learned Assistant Government Advocate that Sub-Inspector Sheo Prasad Singh being ignorant of the true facts acted in good faith, though foolishly, when he went at 3 a.m. to arrest Laltu and Gaya Din. In view of the events which have actually taken place, and in view of the fact that Sub-Inspector

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Sheo Prasad Singh himself wrote the report (exhibit 18) which initiated the prosecution of the accused for offences under sections 147, 332/149 of the Indian Penal Code, I cannot bring myself to believe that that police officer acted in good faith when he went to make the arrest of Laltu and Gaya Din. It must be remembered that Sub-Inspector Sheo Prasad Singh was present when these alleged offences are said to have taken place on the afternoon of the 30th of December, 1932, and that he himself wrote the first information report from his own personal knowledge. That being the case, it was essential for the Crown to prove the actual commission of the offences of riot and of causing hurt to a public servant, to wit, the chaukidar Tota, on the afternoon of the 30th December, 1932, in order to lay the foundation for the successful prosecution of the accused in the present trial. There is no *"prima facie"* proof even on the record of the case as framed by the learned Additional Sessions Judge to show that these offences were committed. Tota Chaukidar who is said to have been injured in the discharge of his duty by Laltu and Gaya Din has not even been examined in the case. The story of the riot as deposed to by Sub-Inspector Sheo Prasad Singh is, on the face of it highly improbable and unbelievable. In the first place it is not easy to understand why Sub-Inspector Sheo Prasad Singh, instead of making enquiries about Laltu's character and conduct from the people of his own village, thought it proper to send for Laltu at village Tikaula. In the second place, after Laltu had declined to answer the question which the Sub-Inspector had put to him, there was nothing more for that officer to do but to make his report to the Sub-divisional Officer in the manner which he thought best, and to state therein that the applicant declined to furnish him with any information. Laltu had a legal right to decline to answer any question put to him by Sub-Inspector Sheo Prasad Singh and that officer acted illegally when he told Constable Khudayar

Beg and Tota Chaukidar to see that Laltu did not leave the place without making a statement. In the third place, the question put by the Sub-Inspector to Laltu goes clearly to show that he, the Sub-Inspector was on the side of the Lalas of Lallanpur and against Jwala Prasad and Mata Din. It was also a question which was entirely irrelevant to the subject-matter of the enquiry which the police were called upon to make by the Sub-divisional Magistrate of Lakhimpur. The latter officer wanted to know whether the names of Laltu and Debi, Barbers, had been placed on the register of police surveillance, and if so on what grounds these men were held to be bad characters. The quarrel, if any, between the Lalas of Lallanpur and Mata Din and Jwala Prasad had nothing whatsoever to do with the question of the good or bad character of the applicants Laltu and Debi. In the fourth place, the alleged reason or motive for the commission of the said riot on the afternoon of the 30th of December, 1932 is, on the face of it, absurd and un-believable. And finally, there is the judgment of the Magistrate, Mr. Laiq Ali, acquitting all seven accused tried in that case of the alleged offences of rioting and of voluntarily causing hurt to the Chaukidar Tota in the discharge of his duty. This judgment of the Magistrate is relevant for the purpose of showing that the trial of the accused in the case in which they stood charged with having committed the offences of rioting and of voluntarily causing hurt to a public servant in the discharge of his duty resulted in a complete vindication of their innocence. This judgment of acquittal ought to have deterred the Committing Magistrate from sending up the present case to the Court of Session for trial, and it ought to have given much food for anxious thought to the learned Additional Sessions Judge. The learned trial Judge has completely failed to envisage the facts of this case in their true perspective. There is no question here of the Magistrate's judgment of acquittal acting as a bar to the trial of the accused in the present

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case under the provisions of section 403 of the Code of Criminal Procedure. It was perfectly open to the prosecution, notwithstanding the judgment of acquittal of Mr. Laiq Ali, in respect of the offences said to have been committed on the 30th of December, 1932, to prove that those very same accused who were acquitted along with other persons committed fresh offences of riot and of voluntarily causing hurt to a public servant in the discharge of his duty on the night between the 1st and 2nd of January, 1933; but,—and here comes the main and cardinal difficulty for the prosecution—it must not be forgotten that Sub-Inspector Sheo Prasad Singh was purporting to arrest Laltu and Gaya Din on the night of the 1st-2nd January, 1933, in connection with the alleged commission of offences on the afternoon of the 30th of December, 1932. It is not enough for the Crown to urge that as a report of a cognizable offence had been made at Thana Nimgaon by Sub-Inspector Sheo Prasad Singh that therefore, that officer was acting in good faith and under colour of his office when he went to village Barwi to arrest Laltu and Gaya Din. The allegations of the commission of offences made in that report (exhibit 18), have been found by a Magistrate of the 1st class after due enquiry to be incorrect, and, therefore, the mere making of that report by the Sub-Inspector will not by itself prove the good faith of that officer or justify his conduct on the night between the 1st and 2nd of January, 1933.

To prove the incidents that took place in village Tikaula the prosecution has examined in the present case three witnesses, namely, P. W. 8, Sub-Inspector Sheo Prasad Singh, P. W. 9, Khudayar Beg, and P. W. 3, Chankidar Chhanga Pasi. There is evidence on the record, which I believe to be true, which goes to show that Gaya Din was released by Sub-Inspector Sheo Prasad Singh himself in order to go and fetch Mata Din, and that Laltu was also released by the Sub-Inspector on the 31st of December, 1932 to go and fetch Mata Din.

Mata Din, however, instead of going to see Sub-Inspector Sheo Prasad Singh at Thana Nimgaon proceeded at once to Lakhimpur, and there, through his lawyer Pandit Ram Das Chaturvedi, he filed an application for bail (exhibit B), on the 31st of December, 1932. In this application he asked for bail on behalf of Laltu and five others. No bail application was put in on behalf of Gaya Din, because Gaya Din had been released by the Sub-Inspector himself for the purpose of fetching Mata Din before the bail application was put in. It was when Mata Din did not turn up at Thana Nimgaon that Laltu also was sent by the Sub-Inspector to go and fetch Mata Din. Laltu on reaching Barwi came to know that Mata Din and Gaya Din had both gone to headquarters and so he did nothing in the matter. When Sub-Inspector Sheo Prasad Singh found that the hasty action of Mata Din had precipitated matters and forced his hands, he felt compelled then to send to Lakhimpur jail the five persons who were with him at the thana as accused persons charged under sections 147 and 332/149 of the Indian Penal Code. These persons had remained in police custody for more than 48 hours. This was in defiance of the express provisions of section 61 of the Code of Criminal Procedure. The reason for this illegal act was, I take it, that Sub-Inspector Sheo Prasad Singh did not really want to prosecute these persons for offences under sections 147 and 332/149 of the Indian Penal Code in the first instance, but when he found that an application for bail had been presented in the Court of the Sub-divisional Magistrate by Mata Din on behalf of these accused persons and the matter brought to the knowledge of the Magistrate he had no alternative but to proceed with the case initiated by him by his report (exhibit 18) to the bitter end. P. W. 3, Chhanga chaukidar, has admitted in his cross-examination that he was present when the occurrence at Tikaula took place and that 6 or 7 persons were arrested by Sub-Inspector Sheo Prasad Singh at Tikaula, and that Laltu was one of them.

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If Laltu was arrested on the evening of the 30th of December, 1932 by Sub-Inspector Sheo Prasad Singh, then no explanation is forthcoming on behalf of the prosecution as to how he came to be released by the Sub-Inspector, and there is further no explanation forthcoming as to why Sub-Inspector Sheo Prasad Singh, after releasing Laltu of his own accord, thought fit to go to his house at dead of night to re-arrest him. The entire proceedings of the Sub-Inspector are thus proved to be illegal and high-handed and most reprehensible.

The learned Assistant Government Advocate on behalf of the Crown has argued that the appellants had no right of private defence against the acts of Sub-Inspector Sheo Prasad Singh, even though those acts might not be strictly justifiable by law. Section 99 of the Indian Penal Code runs as follows:

> "There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by a public servant acting in good faith under colour of his office, though that act may not be strictly justifiable by law."

In the present case I have shown above at great length that the conduct of the public servant concerned, namely the Sub-Inspector, was not such that the Court can safely say that he was acting in good faith and under colour of his office. The mere fact that Sub-Inspector Sheo Prasad Singh went to village Barwi dressed up in his uniform to arrest Laltu and Gaya Din will not justify one in saying that he was acting in good faith, when, as a matter of fact, he was acting in entire bad faith and in the most illegal and reprehensible manner.

The learned counsel for the Crown finally urged that even if the charge under section 332/149 of the Indian Penal Code could not be legally sustained upon the evidence on the record, the accused might at least be convicted of the offences of causing simple hurt and of riot. The oral evidence on this point is, in my opinion, very

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shaky. The medical evidence does not corroborate the charge that the accused hurled arrows at the Sub-Inspector and his party. In fact the story of the appellants having sent a shower of arrows at the police party had been tacitly abandoned by the learned Government Pleader of Kheri in the trial Court. The medical evidence in my opinion goes to show that in all probability the men who accompanied the Sub-Inspector on the night of the occurrence got hurt when in their flight on a dark night they stumbled and fell to the ground and so hurt their shin-bones and their foreheads. In any case, where the major portion of the prosecution evidence is found to be false and tainted with gross exaggerations, it is impossible for me to build up a case of an offence under section 323 of the Indian Penal Code out of the mass of lies told by the prosecution witnesses. When the common object of the appellants, as alleged by the prosecution, is found to be not proved, then the charge of rioting under section 147 of the Indian Penal Code as framed by the Committing Magistrate can also not be legally sustained.

The offences under sections 224 and 225 of the Indian Penal Code are also in my opinion not proved upon the evidence on the record. Gaya Din was released by the Sub-Inspector himself and there was no question of his offering any resistance or illegal obstruction to the lawful apprehension of himself, nor can the persons who sided with him be legally liable for punishment under section 225 of the Indian Penal Code. In my opinion the case for the prosecution breaks down completely and the appellants are entitled to an acquittal.

For the reasons given above, I allow this appeal, set aside the convictions and sentences passed upon the appellants and acquit them of the offences charged. The appellants, with the exception of Paragi, are on bail granted by this Court. Their bail bonds are cancelled. The appellant Paragi has been released by the trial Court on his furnishing a personal bond of Rs.1,000

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under section 562 of the Code of Criminal Procedure. That security bond executed by Paragi is also hereby cancelled.

Appeal allowed.

APPELLATE CIVIL

Before Sir Syed Wazir Hasan, Knight, Chief Judge and Mr. Justice E. M. Nanavutty

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ALI BAHADUR KHAN AND OTHERS (DEFENDANTS-APPELLANTS) *v.* HAFIZ SAMIULLAH KHAN AND OTHERS (PLAINTIFFS-RESPONDENTS)*

Interpretation of documents—Adoption—Will—Declaration by one that he had adopted a person as son and that he should remain in possession of all his assets like a natural born son generation after generation—Document both a deed of adoption and a testamentary disposition—Invalidity of adoption, whether invalidates the bequest.

Where a person executed a document in favour of a relation of his which ran as follows "whereas I have no male issue and I had adopted *H* and since a long time I have been maintaining and bringing him up as my own natural-born son and have been keeping him joint with me, so under this deed of adoption, I do hereby declare *H* aforesaid to be the adopted son of me, the declarant, so that there may not arise dispute and quarrel, and *H* aforesaid should remain in possession and occupation, like my son, generation after generation, descent after descent, after the death of me, of the entire assets of me," *held*, that the document is a deed of adoption in the sense that it contains a declaration as to the adoption of *H* as a fact which had happened before; but it is also a testamentary disposition of all his property in favour of *H*. The word "aforesaid" in the above document means "the adopted son of the declarant", and the reference to the status of *H* as an adopted son is merely a description of the donee and not a motive of the gift.

If a document is a deed of adoption as well as a testamentary disposition, the reference to the donee as an adopted son being merely a description of the object of the bounty and not the motive of the gift, the invalidity of the adoption does not

*Second Civil Appeal No. 213 of 1932, against the decree of G. C. Badhwar, I.C.S., District Judge of Fyzabad, dated the 5th of May 1932, confirming the decree of M. Ziauddin Ahmad, Subordinate Judge of Sultanpur, dated the 21st of May, 1931.