PRIVY COUNCIL.

Before Lord Blanesburgh, Lord Macmillan, Sir Lancelot Sanderson, and Sir George Lowndes.

1930

Dec. 16.

ABDUL GHAFUR AND OTHERS—(Plaintiffs)

versus

HUSSAIN BIBI AND OTHERS—(Defendants).

Privy Council Appeal No. 9 of 1929.
(High Court Appeal No. 1352 of 1921).

Evidence—Pedigree—Statements by deceased members of Family—Indian Evidence Act, I of 1872, s. 32 (6).

Under s. 32 (6) of the Indian Evidence Act, 1872, as by the long established rule in England, in questions of pedigree the statements of deceaesd members of the family, made before the question in dispute was raised, are evidence to prove pedigree. Such statements by deceased members may be proved not only by showing that they actually made the statements, but by showing that they acted upon, or assented to, or did anything which amounted to a recognition of, them. Evidence of the above nature cannot be disregarded on the ground that it is based on hearsay, although its weight depends upon other circumstances.

Sturla v. *Freccia* (1), applied.

Decree of the High Court reversed.

Appeal (No. 9 of 1929) from a decree of the High Court (April 27, 1925) reversing a decree of the Senior Subordinate Judge of Gujranwala (May 23, 1921).

The appellants instituted the suit in 1918 alleging by their plaint that they were collateral heirs to one Saleh-ud-Din, deceased, and that they were entitled to succeed to his properties by the customary law of their tribe in preference to the defendant-respondents. They prayed for possession of the properties or, in the alternative, for such shares as might be found due on enquiry according to Muhammadan law.

(1) (1880) 5 App. Cas. 623, 641.

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The trial judge made a decree as prayed, but an appeal to the High Court was allowed, and the suit dismissed by Martineau and Zafar Ali, JJ. upon grounds which appear from the present judgment.

NARASIMHAM and ZAFAR ULLAH KHAN, for the appellants.

The respondents did not appear.

The judgment of their Lordships was delivered by—

LORD MACMILLAN—The plaintiffs in this suit, now the appellants, sue for possession of certain properties described in their plaint, which formerly belonged to the deceased Saleh-ud-Din and which they claim by right of succession. In order that their claim may succeed they have to establish two things; (1) that they are collaterals of the deceased, and (2) that the deceased's succession was governed by customary law. The present respondents are two sisters and the children of a deceased sister of the late Saleh-ud-Din. They deny that the appellants were in any way related to the deceased and maintain that Muhammadan law alone governs the succession to the properties in question.

The Senior Subordinate Judge at Gujranwala, before whom the matter came in the first instance, decided both of the two issues above-mentioned in favour of the appellants, for whom he accordingly gave judgment. On appeal, the High Court of Judicature at Lahore (Martineau and Zafar Ali, JJ.) reversed this decision, holding that the appellants had failed to prove that they were collaterals of the deceased and finding it unnecessary to proceed to the consideration of the second topic. Hence the present appeal.

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The respondents lodged a case which was before their Lordships, but did not appear in support of it. The appeal was accordingly heard *ex parte* but counsel for the appellants very properly brought to their Lordships' notice the whole material evidence in the case.

The main question and the one on which the Senior Subordinate Judge and the High Court are at variance relates to the pedigree of the parties. The ancestor whom the appellants assert to be common to them and to the deceased Saleh-ud-Din is one Muhammad Muslim, grandson of Qazi Rahim-ud-Din. They claim that they are descended from one of the sons of Muhammad Muslim and that the deceased was a descendant of his other son. As the descents are traced through several generations in each branch, it is manifest that matters of family history not susceptible of direct proof are involved.

In approaching a pedigree problem of this nature. their Lordships think it well to recall the words of Lord Blackburn in *Sturla* v. *Freccia* (1).

" It has been established for a long while that in questions of pedigree, I suppose upon the ground that they were matters relating to a time long past, and that it was really necessary to relax the strict rules of evidence there for the purpose of doing justice—but for whatever reason, the statement of deceased members of the family, made *ante litem motam*, before there was anything to throw doubt upon them, are evidence to prove pedigree. And such statements by deceased members of the family may be proved not only by showing that they actually made the statements, but by showing that they acted upon them, or

(1) (1880) 5 App. Cas. 623, 641.

assented to them, or did anything that amounted to showing that they recognised them. If any member of the family, as a person who presumably would know all about the family, had stated such and such a pedigree, that evidence would be receivable, its weight depending upon other circumstances."

The rule of evidence thus enunciated is in accord with the terms of Section 32 (6) of the Indian Evidence Act, 1872, which is applicable to the present case.

Now it is fortunate for the appellants that in each of the two families which they seek to connect—their own and that of the deceased—there was an enthusiastic genealogist much interested in domestic annals and achievements. On the side of the deceased there was his grandfather's brother, Shah Nawaz Din, who in 1875, compiled a very elaborate genealogical tree and appended to it a series of biographical notes, obviously the result of prolonged investigation and research. He died some twenty-eight years ago. If this document is authentic and reliable, it establishes the appellants' case. It answers the above test of admissibility, for it is a statement of a deceased member of the family and was prepared long before the emergence of the present controversy. It is stated to have been "produced by a witness for the plaintiff on the 4th June, 1920." Two witnesses were examined for the plaintiffs on that date, and it does not appear which of them actually produced the document, but both of these witnesses are among the plaintiffs and so are members of the family to whose history the document purports to relate. Though apparently not formally produced until 4th June, 1920, it was put to other witnesses examined

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for the plaintiffs on earlier dates. A convenient extract from the genealogical tree embodying the portion of it material to the present case is appended by the Senior Sub-Judge to his judgment.

The appellants' family, as has been said, also included a member interested in genealogy in the person of Ghulam Hussain, father of four of the plaintiffs, and related in various degrees to the other plaintiffs. There is produced a long document to which has been given the title "Historical facts pertaining to the pedigree-table of Muhammad Shah Nawaz-ud-Din," and which appears to be largely a transcript of an expanded version of the biographical notes appended by Shah Nawaz Din to his genealogical tree. This document appears to be signed by Abdul Qadir, one of the plaintiffs, "nephew of Maulvi Ghulam Hussain, deceased, compiler of this pedigree-table (in his own hand in Persian characters)."

It is proved by the evidence of Ali Gauhar, a witness seventy years of age called for the plaintiffs, that the first document, consisting of the genealogical tree and biographical notes, is in the handwriting of Shah Nawaz Din with the exception of a few names of descendants subsequently added to the tree in another hand and by the evidence of the same witness that the second document, consisting of the historical facts, etc., in the handwriting of Ghulam Hussain. The significance of this for the present purpose is obvious, for it demonstrates that in each of the two families which the plaintiffs seek to connect, there was a common tradition and that there was agreement between them, vouched in the case of each branch by a document under the hand of a deceased member of that branch, on the material facts of their common ancestry.

Their Lordships regard this concurrence of family records as constituting by itself important evidence in support of the appellants' submission. But there is also a considerable body of oral testimony in their favour. Muhammad Qasim, who has apparently married into the appellants' branch, was acquainted with the family annalist, Shah Nawaz Din, who was of the deceased's branch, and deposes to the collateral relationship. Barkat Ali states that he is related to and knew both Shah Nawaz Din and his brother and that the plaintiffs are their collaterals through their common ancestor Muhammad Muslim. Muhammad Haidar also knew both Shah Nawaz Din and his brother who, he says, were his collaterals and also collaterals of the plaintiffs through their common descent from Muhammad Muslim. Muzaffar Ali's evidence is to the same effect. Ali Gauhar, the witness mentioned above, says that Ghulam Hussain and Shah Nawaz Din stated before him that they were collaterals. There is further supporting testimony of witnesses acquainted with both branches, which it is unnecessary to detail.

As against this substantial body of evidence, oral and documentary, the defendants content themselves with adducing two or three witnesses who merely deny the existence of the alleged collateral relationship and say they never heard it asserted by members with whom they were acquainted of either branch.

A special point, however, is taken by the defence. It is common ground that the deceased's family were Qureshis by caste, while one of the defendants' witnesses says that Amir Ahmad, one of the plaintiffs, is Khokar by caste and another says that " Amir Ahmad gives his caste as Khokar." The term " caste " is

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inaccurately used but apparently if the plaintiffs were Khokars and not Qureshis, this would be inconsistent with their being related collaterally to the deceased's branch. There is, however, positive evidence that the plaintiffs are Qureshis, and while it appears that the plaintiff Amir Ahmad's son, who is employed in the Forest Department, is entered in their books as Khokar, there is a statement by Amir Ahmad that this entry is not correct and that his son is Qureshi. There is no allegation in the defendants' pleadings that the plaintiffs are Khokars and so cannot be collaterals of the deceased's family and in any event their Lordships are satisfied that the point has not been established against the plaintiffs.

The question of the relationship of the parties into which, in view of the divergence of opinion in the Courts below, their Lordships have thus thought it right to enter at some length, is briefly disposed of by the Senior Subordinate Judge who is content to find for the plaintiffs on the oral evidence, the two documents to which allusion has been made above and a guardianship petition by Makbul Hussain, brother-in-law of Saleh-ud-Din, in 1904, in which he states *inter alia* that Shah Din, said to be the person of that name shown in the pedigree of the appellants' branch, was a relative of Saleh-ud-Din.

In the High Court, the pedigree table is rejected as unsatisfactory evidence, first because some of the plaintiffs' witnesses said that it was in the handwriting of Shah Nawaz Din, whereas the whole of it could not be in his handwriting as it contains an entry of his own death, and entries of the names of persons who were born after his death, but this was put right by the subsequent witness Ali Gauhar. In the second place, the learned Judges of the High Court

point out, what is true, that the genealogical tree is largely based on hearsay, but this circumstance does not vitiate pedigree evidence, as their Lordships have already stated. In particular, the High Court Judges discount on this ground the evidence of Allah Ditta, thirty-five years of age, who was the *mirasi* of Shah Nawaz Din and his brother. But it is the business of a *mirasi*, who is a hereditary family bard, to acquaint himself with the details of the family history, whose glories he recounts in song on ceremonial occasions, and the fact that he must speak from hearsay does not render his evidence valueless. A point is also made by the learned Judges of an alleged discrepancy in the identification of the Shah Din mentioned in Makbul Hussain's petition with the Shah Din entered in the pedigree of the appellants' branch of the family, but this may well have arisen from the peculiar method of reckoning the degrees of relationship which obtains in this part of India and in any event, their Lordships do not find it necessary to rely on the evidence of Makbul Hussain's petition. A further discrepancy arising from the mention of Saleh-ud-Din's grandfather in a sale deed as being the grandson of Wali, not Mulla, Muhammad, appears to their Lordships quite unimportant, even if it is a misnomer, which is not certain, for Wali may be a descriptive title and may have been used of Mulla Muhammad.

Upon the whole matter, their Lordships find that the criticisms of the High Court on the evidence for the plaintiffs are insufficient to displace its value and cogency and they agree with the Senior Subordinate Judge that the plaintiffs have satisfactorily established their collateral relationship to the deceased Saleh-ud-Din.

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The second point in the case, as to the law applicable to the deceased's succession, is not discussed by the High Court. Their Lordships find in the evidence for the plaintiffs sufficient proof derived from several past instances that customary and not Muhammadan law governs succession in the family of the deceased and in this they agree with the conclusion of the Senior Subordinate Judge. Their Lordships will accordingly humbly advise His Majesty that the appeal should be allowed, the judgment of the High Court, dated 27th April, 1925, recalled, and the decree of the Senior Subordinate Judge of 23rd May 1921, restored. The appellants will be found entitled to their costs here and below.

A. M. T.

Appeal accepted.

Solicitors for appellants :—*Douglas Grant and Dold.*