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previous concert amongst them and there is nothing to show that they were in any sense abettors of each other. It was urged that their stories were highly improbable, but neither the Sessions Judge nor the Magistrate seems to have thought so. *A priori* there seems nothing very incredible in their statements, which, moreover, were supported by the evidence of persons other than those who say they were persuaded to pay money to the Kulkarni. Doubtless there may be a good deal of hostility to the accused; but the Sessions Judge and the Magistrate both considered the evidence overwhelming. With such a conclusion arrived at in both Courts after considering the inherent weakness of accomplice evidence it is impossible for us to interfere. We think that on the facts found, the provisions of section 161, Indian Penal Code, were rightly applied. We reject the application.

Application dismissed.

APPELLATE CIVIL.

Before Mr. Justice Fulton and Mr. Justice Crowe.

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RAMRAO NARAYAN BELLARY (ORIGINAL DEFENDANT 4), APPELLANT, *v.* RUSTUMKHAN AND OTHERS (ORIGINAL PLAINTIFFS 1, 2 AND 5), RESPONDENTS.*

Mahomedan Law—Custom—Graveyard—Land formerly used as graveyard—Right of performing rites at the graves—Regulation IV of 1827, section 26.

Certain land at Dhárwár, which had formerly been used as a graveyard by the Mahomedan community there, but which had been disused as such for twenty or thirty years, was sold by the owner to defendant 4, who thereupon commenced to prepare the foundations of a house which he proposed to build upon it. The plaintiffs, who were Mahomedan residents at Dhárwár, brought this suit, alleging that the Mahomedans of Dhárwár were accustomed to perform religious rites and ceremonies at the graves in the said land, and praying for a declaration that they were entitled so to do and for an injunction restraining the defendants from obstructing them.

Held, that they were entitled to the declaration and injunction prayed for.

* Second Appeal No. 153 of 1901.

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Per Fulton, J. :—By the custom of the country, founded on a sentiment which may almost be described as universal, the ground in which human relics are interred is regarded as for ever sacred. The members of the family of the dead are in the habit of performing certain religious services at their tombs. The ownership of the soil may be vested in others, but the permission to bury in the land, granted, as it must be, subject to the custom of the community, carries with it the right to perform all customary rites.

SECOND appeal from the decision of T. Walker, District Judge of Dhárwár, confirming the decree passed by Ráo Sáheb Sheshgiri Ramchandra Koppikar, Second Class Subordinate Judge of Dhárwár.

A certain piece of land at Dhárwár, which had twenty or thirty years previously been used as a cemetery by the Mahomedan community there, was sold by defendants 1 and 2 to defendant 4, who thereupon began to prepare the foundation of a house which he intended to build upon it. The plaintiffs, who are members of the Mahomedan community at Dhárwár, filed this suit, alleging that the land had been and was used for burying the dead, that it contained a *makán* (monument) and graves of their relations and friends, at whose tombs they were in the habit of performing religious rites and ceremonies. They prayed for a declaration that the land was public property and for an injunction restraining the defendants from obstructing them.

The Subordinate Judge held that the plaintiffs were entitled to a declaration that they were entitled to perform all such worship and ceremonies near the *makán* and the graves on the ground as are enjoined by Mahomedan customs and religion, and to an injunction restraining the defendants from obstructing the same.

This decree was confirmed in appeal by the District Judge of Dhárwár.

Defendant 4 thereupon preferred a second appeal.

D. A. Khare for appellant :—The plaintiffs in this case do not put forward any personal rights : all they claim is certain rights as trustees. The lower Courts were, therefore, not justified in passing a personal decree. We further contend that the property in question is treated as private property ; and the fact that there are some tombs on it does not, on that account only, make it a

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public property. Again, it is clear that no *wakf* can be legally established in connection with a private tomb: MacNaughten's Mahomedan Law, page 338, and *Kaleloola* v. *Nuseerudeen*.[1] The claim of the plaintiffs, therefore, cannot stand.

Shamrao Vithal, for respondents, was not called upon.

FULTON, J.:—We think that the District Judge was right in the conclusion at which he has arrived.

The land in dispute, it has been found, is a graveyard, disused, it may be, for twenty or thirty years, but retaining none the less its character as such. By the custom of the country, founded on a sentiment which may almost be described as universal, the ground in which human remains are interred is regarded as for ever sacred. The members of the families of the dead are in the habit of performing certain religious services at their tombs. The ownership of the soil may be vested in others, but the permission to bury in the land, granted, as it must be, subject to the custom of the community, carries with it the right to perform all customary rites. The District Judge may have gone too far in inferring from the facts which he found proved that the land was the property of the Mahomedan community. But those facts certainly justified him in confirming the decree of the Subordinate Judge, which directed that the plaintiffs, whose relatives have been there buried, have the right of performing all such worship and ceremonies near the *makán* and the graves on the ground in dispute as are enjoined by the Mahomedan custom and religion. Regulation IV of 1827, section 26, requires the Courts to decide according to the usage of the country, and that usage, in our opinion, amply supports the decree which has been passed.

We therefore confirm the decree with costs.

Decree confirmed.

(1) (1894) 18 Mad. 201.