of the *altumgha* and pension to the appellant, with mesne profits of the one, and arrears of the other, since 1188; specifying, at the same time, that the decree regarded only the relative rights of the parties, which alone were before the Court; and had no reference to the continuance or otherwise of the grant, or pension, by Government.(a)

MOOHUMMUD SADIK, *Appellant v.* MOOHUMMUD ALI AND OTHERS (SONS OF MOHUBBUT ALI), *Respondents.* (1798. *December 6th.*)

If a Moohummudan assign property for a pious endowment; and he (or his executor on his part) appoint a trustee; and such trustee (there being no special provision for his successor) on his death bed bequeath the trust to his sons; the bequest is good in law; and the sons entitled to the superintendence jointly, and to the lawful profits accruing from it; not subject to the confirmation of the ruling power, nor removeable *quam diu se bene gesserint;* but on proof of misconduct, or breach of their trust, the ruling power shall appoint another or others in their stead.

THIS suit was instituted in the former Adawlut of the city of Benares, by the late Moohubbut Ali, against Mohummud Sadik, to prevent the defendant's molestation of the plaintiff in the *towleut* or superintendence of the tomb of Sheikh Moohummud Ali Huzeen, a Moohummudan saint, and of other buildings; which superintendence the plaintiff stated himself to have held thirty years, under an assignment from Moohummud Hoosein, executor to the will of Ali Huzeen; and under confirmatory *sunnuds* from the ruling powers of the time. The profits of the superintendence were stated to amount to about 400 rupees *per annum.* The defendant, son of the executor, insisted, that the plaintiff had abused the trust, and that he had a right to displace him; which abuse of trust the plaintiff denied. The **[23]** plaintiff died during the original trial of the suit before the former Court, at Benares, and was succeeded by his sons; and a decision was passed in the present City Court, in February 1796, which directed, that the defendant, agreeably to the order of the former Court, should confer the superintendence on either of the sons of Mohubbut Ali, whom he might deem qualified; and should not dismiss him except on proof of misconduct to the satisfaction of the Court.

The Provincial Court of Benares, in appeal, reversed the above decision, after taking an opinion from their law officers; and decreed, that the sons of Mohubbut Ali should share the superintendence amongst them, and the emoluments accruing; the heir of the executor having no right of interference.

In appeal from the above decree by Moohummud Sadik to the Sudder Dewanny Adawlut, the proceedings were given to the Moohummudan law officers for their perusal and opinion; the points on which the case appeared to the Court to turn, and on which the opinions of the law officers were required, being 1st, whether the *towleut-nameh* granted by the executor of Ali Huzeen to Mohubbut Ali (and his heirs), and confirmatory *sunnuds* obtained by Mohubbut Ali, from the King Shah Aulum: the Nabob Shujaodowla; the Raja Cheit Sing,

---

[22] **(a)** As a question of Moohummudan law, this was a very simple case of inheritance, (*Sirajiyyah*, p. 5).

zemindar of Benares; and the Company's Resident in the province (the two latter only of which mentioned the heirs of Mohubbut Ali); entitled the grantee, or any of them, since his death (with or without the particular nomination of Mohubbut Ali), to the superintendence of the *durgah* of Ali Huzeen, and of the buildings and lands attached thereto; independent of any interference on the part of the executor or his sons; as well as independent of any appointment or confirmation by the Government; 2nd, in case the heirs or assignees of Mohubbut Ali were not entitled, on his death, to succeed him in the superintendence, whether the appointment of his successor was legally vested in the son of the executor, or in the Government; and, in either case, whether such appointment must be under any, and what restrictions, as to the person nominated. The law officers gave their opinion as follows: We have considered the proceedings in the case, and shall preface our *futwa* by stating, that *wukf*, according to the opinions of Yusuf and Moohummud **[24]** (which on this point are adopted as law), implies the relinquishing the proprietary right in any article of property, such as lands, tenements, and the rest: and consecrating it in such manner to the service of God, that it may be of benefit to men; provided always, that the thing appropriated be, at the time of appropriation, the property of the appropriator; as is specifically stated in the *Buhr-i-rayik*. *Towleut* implies the consignment of the thing appropriated, by the appropriator, to another person, for the purpose of such person's applying it in the manner designed; and the appointment of the trustee or superintendent is vested in the appropriator, in order that he may, confer the office on a person of integrity, morality, information and economy: and, on the death of the appropriator, the power of appointing a superintendent is vested in his executor, or should he have left no executor, in the *cazee* and *hakim*, that is, the magistrate and the sovereign. It is stated in the *Buhr-i-rayik*, in a quotation from the *Futawa-soghra*, that in the event of the demise of the superintendent while the appropriator is in existence, the latter, and not the *cazee*, is authorized to appoint another superintendent; and that, if the appropriator be dead, his executor has a title superior to the *cazee's*; and, in the event of the appropriator not having appointed an executor, the nomination falls to the *cazee* and *hakim*. We now proceed to state, that it appears that the spot on which Sheikh Ali Huzeen erected his tomb, was a rugged uneven jungle; and that the Sheikh, after clearing it, allotted part of it for a burial ground, and appropriated the remainder for a mosque; and that, contiguous to the spot in question, is an old apartment, denominated the *astanah* (or abode) of *Fatima, Syudut-on-nissa*, and another called the *punja* (or hand) of *Shah Huzrut Murdan*. This is moreover specifically stated in the *Soorut-hal*, or written statement, made out by the Sheikh himself; a copy of which is among the proceedings. Under the *towleut-nameh*, therefore executed by the executor of the Sheikh, Mohubbut Ali was entitled during his life to the superintendence of the tomb and appropriated ground, and was not removeable by the sovereign, nor by the executor;

Definition of *wukf*.

And of *towleut*. Appointment of the superintendent vested in the appropriator: on his demise, in his executor; then in the ruling power.

especially as he had obtained confirmatory *sunnuds* from the ruling powers of the time. The superintendent having, on his death bed, assigned the superintendence of the tomb, to his own sons, as proved by the evidence of witnesses, **[25]** such assignment, according to good authorities, is valid. It is stated in the *Buhr-i-rayik*, the *Tatarkhanee*, the *Zeheerea*, the *Himadea*, and the *fusool-ool-Amadea*, that if the superintendent desire, on his death, to bequeath the superintendence to another, it is allowable for him to do so: but he would not be authorized to appoint a successor in his life time, and during health; unless the consignment of the superintendence to him have been general, that is, with permission (from the appropriator or his executor, as he may have received it from either), to confer it on another; in which case he may be authorized to appoint a successor during health. It is likewise stated in the *Buhr-i-rayik*, that if the death of the superintendent happen subsequently to that of the appropriator who appointed him, the *cazee* shall appoint a successor. It is, however, stipulated as a condition, in the *Moojtuba*, that the superintendent shall not, on his death bed, have bequeathed it to any person; and that, in the event of his having bequeathed it, the *cazee* is not authorized to appoint. There are also other authorities to this effect from which it is clear, that the superintendent is authorized, on his death bed, to appoint a successor, though the appropriator have not given him general permission. The sovereign then, according to the best authorities, is not authorized to remove the sons of Mohubbut Ali, and to confer the superintendence on Moohummud Sadik, unless it shall appear that they have been guilty of dishonesty with respect to the property appropriated, in which case the sovereign may remove them, and appoint a person of integrity in their stead. The superintendence in question belongs to all the sons of Mohubbut Ali, and is not the exclusive right of any one of them.—The temple dedicated to *Fatima*, and the *Punja* of *Huzrut Shah*, not having constituted the property of Ali Huzeen, he having himself declared them to be ancient edifices, Mohubbut Ali was not entitled to them under the *towleut-nameh* from the executor. But he might have had the superintendence of them, had it been conferred on him by the ruling powers; which, however, does not appear. The sovereign, therefore, may now, as shall be thought proper, relinquish the superintendence of these to the sons of Mohubbut Ali, or assign it to Moohummud Sadik, or any other individual.

A consignment or bequest of the trust by the superintendent to his sons, on his death bed, is good in law.

But not a consignment made during health, unless he have obtained it himself with such power.

The trustee may bequeath on his death bed without any express power to that effect. The ruling power may remove the devisees on proof of misconduct.

[26] In conformity with the above exposition of the law, the Court of Sudder Dewanny Adawlut (present W. Cowper) adjudged that the superintendence of the tomb of Sheikh Ali Huzeen was vested in all the sons of the late Mohubbut Ali, and was to be held by them in common, with all appurtenances and just emoluments annexed to it, until they should be removed by Government for misconduct in the discharge of the trust confided to them. With respect to

tne sacred building dedicated to *Syudut-on-nissa*, and the *Punja* of *Shah Huzrut*, of which, as they were not the property of Ali Huzeen, the superintendence could not be legally conferred by the *towleut-namah* of his executor, and was now to be conferred as Government should think fit, it was directed, as they had been long under the superintendence of Mohubbut Ali, and were in his possession when this suit was commenced, that they should remain with the sons of Mohubbut Ali until Government should appoint a superintendent; or some other person should show a good title to the possession of them. It was further directed, that the heirs of Mohubbut Ali should be indemnified by Moohummud Sadik for all losses sustained by them or their father, in consequence of being molested by Moohummud Sadik in the exercise of the superintendence vested in them. (a)

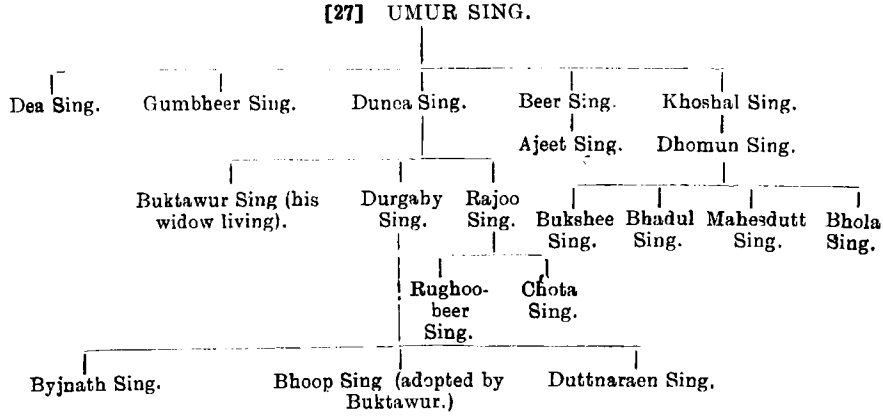
DUTTNARAEN SING, *Appellant* v. AJEET SING, BUKSHEE SINGH, AND RUGHOOBEER SING, *Respondents*. (1799. *Feb.* 14*th.*)

At the suit of some of the younger members of a Hindoo family, for shares of the family estate, the legal distribution adjudged, on its appearing, that the estate was not the exclusive right of the elder branch, but that all the members, (who had held lands for their support as being sharers) were entitled to share; though hitherto no division had been claimed.

The mere act of performing the funeral rites of a deceased Hindoo can give no title of succession, without proof of right.

An adopted son (*dattaca*) taking the estate of his adoptive father, is excluded from inheritance in his own family.

THE following is a sketch of the family of the parties in this case :—



---

[26] (a) The grounds of the opinion delivered by the law officers are fully stated in their *futwa*. The case is an illustration of the Moohummudan law concerning the nomination of a successor to a trustee for an appropriation or endowment termed *wuqf*. No special provision having been made for the succession by the person who assigned the *wuqf*, the trustee has power to bequeath the trust by the will.

With respect to the mention made of the heirs of the trustee, it should be observed, that there at first appeared a question whether the heirs were not included in the deed of assignment; the wording of which was doubtful. But the law officers do not appear to have considered them included, under the terms of the deed; though they do not particularly notice the point in their *futwa*.

Ajeet, Bukshee Sing, and Rughoobeer Sing, brought the suit against Duttnaraen Sing, in the Zillah Court of Bhagulpore, for shares of Tuppa Seroonjah, in pergunnah Pherkia, on the ground that this was the joint hereditary talook of the family. The defendent pleaded an exclusive title, as being descended from the elder branch of the family; which elder branch, he affirmed, had always held the estate, without the participation of the younger branches, who were only entitled to maintenance. The plaintiffs in reply, denied this title; as well as the fact of exclusive possession on which it was grounded: and the participation of the plaintiffs themselves appearing to the Zillah Judge to be proved by the testimony of the witnesses adduced by them, he consulted his pundit as to the shares to which the parties were respectively entitled; and gave judgment according to the distribution stated by the pundit; which judgment the Provincial Court of Patna affirmed in appeal; though it appears that several of the surviving heirs (not made parties to the suit) were not included.

In further appeal to the Sudder Dewanny Adawlut (present W. Cowper), the appellant was allowed to bring some additional evidence as to his exclusive title to the estate in contest; after consideration of which, and of counter-evidence adduced by the respondents, it was determined, that the appellant's plea of exclusive possession as proprietor, had been refuted; that the respondents and other descendants of Umur Sing, the common ancestor, were entitled to shares in the estate, according to the Hindoo law of inheritance. But previously to a final determination on the division of the estate, the **[28]** Court caused a proclamation to be issued for the purpose of ascertaining the whole of the claimants to it; and a claim being advanced (among others) by Bhoop Sing, one of the sons of Durgahy Sing, alleging that he had been adopted by Buktawur Sing, he was allowed to bring evidence on that point; on consideration of which the Court admitted his adoption, and received the following opinion from their pundits as to the legal division of the estate among the whole of the surviving claimants, as distinguished in the prefixed genealogical sketch. At the demise of Umur Sing, his surviving sons Dunia Sing, Beer Sing, and Khoshal Sing, the two others having left no male issue, take each a third of his estate. Ajeet Sing, son of Beer Sing, receives his father's share; and Dhomun Sing, son of Khoshal Sing, the share of his father. At the demise of Bhomun Sing, his four sons, Bukshee Sing, Bhadul Sing, Mahesdutt and Bhola Sing, each get a fourth of his share. Of Dunia Sing there were three sons, Durgahy Sing, Rajoo Sing, and Buktawur Sing; each of whom will take a third of his share. Duttnaraen Sing, Byjnath Sing, and Bhoop Sing, are the sons of Durgahy Sing; but as, of these, Bhoop Sing, was adopted by Buktawur Sing, the two remaining brothers will divide the share of their father, each taking half. Bhoop Sing, excluded from sharing in the estate of his natural father, will take the share of his adoptive father, Buktawur; and must maintain his adoptive father's widow. Rughoobeer Sing and Chota Sing, sons of Rajoo Sing, will divide their father's share. According to the above distribution, the Court (present W. Cowper) gave final judgment; providing in it for a suitable maintenance to be afforded by Bhoop Sing, to the

widow of his adoptive father. And it was further decreed, that the appellant should account to the several sharers for the profits of shares, since the date of the Zillah decree.

It should be observed, that, in this case, a question arose incidentally, as to what consequence would attach to an alleged circumstance, if proved, namely, that Durgahy Sing performed the funeral obsequies of Gumbheer Sing, one of the sons of Umur Sing, who died without issue; a ceremony which ought to be performed by the heirs of deceased persons. And the pundits stated, that this singly could not give him any title to the inheritance of the deceased; unless there [29] were evidence to prove the fact of the deceased having made him his heir by adoption.

Another point to which the attention of the pundits was called, was how far the adoption of Bhoop Sing by his uncle, would affect his right of succession to his natural father's estate; and, as above stated, they declared that this excluded him from any share of the paternal inheritance (a).

SHEOCHUND RAI (SON OF NUNDKOMAR RAI, DECEASED), *Appellant* v. LUBUNG DASEE (WIDOW OF RADHANATH RAI), *Respondent.*

(1799. *Feb.* 14*th.*)

In a suit by the widow of a Hindoo, as joint zemindar of an estate in right of her husband who died without issue, for a share of *moshahira* or proprietary income, judgment passed in her favour. A *ruffanameh*, set up by the defendant, importing, that the plaintiff gave up the income rightly due to her, and agreed to receive about a third of it, rejected, as not established; but the pundits gave an opinion, that, if duly executed by her, it would have been valid against her and her husband's heirs. But *Quære.*

THIS was a suit instituted by Lubung Dasee, in the Zillah Court at Burdwan, against the late Nundkomar, to recover a balance of zemindary *moshahira* due to her as joint zemindar of '9 annas pergunnah Moohummud Ameenpore, &c.' and fixed for her by Government in the year 1779, at rupees 2,409 *per annum*; to which extent a deduction was allowed on her account at the decennial settlement of the zemindary concluded with the defendant, one of the joint proprietors, in the Bengal year 1197. The Zillah Judge considered the plaintiff's claim established by the evidence adduced by her; and the defendant having failed to produce the accounts of his actual receipts from the zemindary, which were required with a view to make an equal division of the profit and loss between the three joint proprietors, *viz.*, the defendant, Lubung Dasee, and the widow of Govindchund Rai, a decree

[29] (a) The principles on which the distribution of shares was adjusted will be found in the *Mitacshara* (Ch. 1, on inheritance Sec. 5, § 2) concerning the Case of brothers leaving an unequal number of Sons; and (Sec. 11, § 32) regarding the exclusion of an adopted son (*dattaca*) from the family and estate of his natural father. The claim of the appellant, grounded on the circumstance of his father having performed the obsequies, as he alleged, of an uncle who died childless, was founded on passages of Hindoo law, which intimate, that the succession to the estate and the right of performing the obsequies, go together (*Jaganauth's* Digest, Book 5, v. 455, and 457). But those passages do not imply that the mere act of celebrating the funeral rites gives a title to the succession; but that the successor is bound to the due performance of the last rites for the person whose wealth has devolved on him.