ORIGINAL JURISDICTION (*a*)

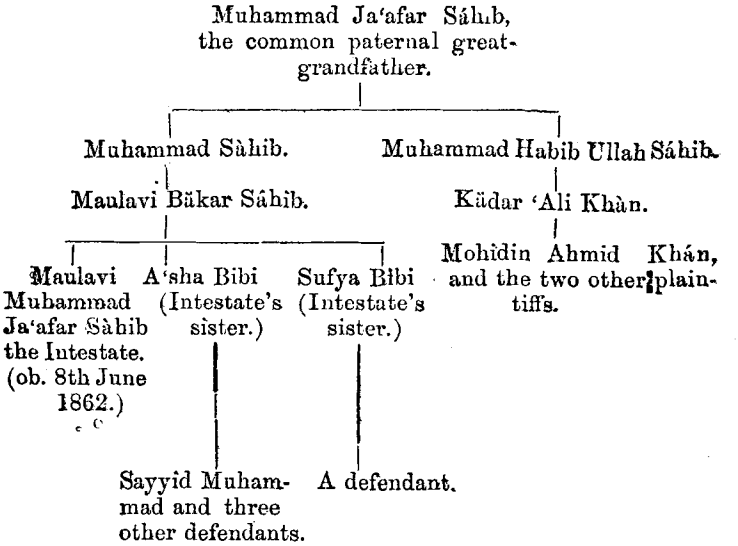
MOHIDIN AHMID KHÂN and others *v.* SAYYID MUHAMMAD and others.

By Muhammadan law descendants in the male line of the paternal great-grandfather of an intestate are within the class of 'residuary' heirs, and entitled to take to the exclusion of the children of the intestate's sisters of the whole blood.

In a suit between Muhammadans a pedigree may be satisfactorily established merely by oral evidence.

1862. *December* 4, 5.

THIS was a suit to obtain possession of the real and personal estate of Maulavi Muhammad Ja'afar Sáhib, late of Madras, who died intestate in June 1862. The plaintiffs claimed as descendants in the male line of Muhammad Ja'afar Sáhib, the common paternal great-grandfather of the intestate and themselves : the defendants claimed as the children of the intestate's sisters of the whole blood. All the parties were Muhammadans and Sunnis. Their relative position will be more easily understood from the following pedigree.



The Advocate General (Mayne with him) for the plaintiffs.

Branson, for the defendants, contended that the plaintiffs on their own shewing were 'residuaries' (*b*) in the colla-

(*a*) Present Scotland, C. J. and Bittleston, J.

(*b*) 'Residuaries' ('*asbàt*, literally 'nerves,' 'ligaments') are the heirs entitled to the residue (if any) after the 'sharers' (*ashabe faraiz*, literally 'masters of successions') have been satisfied, see Elberling's *Treatise on Inheritance*, &c. §§ 113,-121 ; Sice, *Traite des Lois Mahometanes*, chap. II.

teral line, and that, as regarded succession, the class of such residuaries was confined to paternal uncles and their lineal male descendants. He cited the following passage from Sir Wm. Macnaghten's *Principles and Precedents of Muhammadan Law*, chap. I, sec. III, cl. 43 :— 1862. December 4, 5.

"Where there is no son, nor daughter, nor son's son, nor son's daughter, however low in descent, nor father, nor grandfather, nor other lineal male ancestor, nor mother, nor mother's mother, nor father's mother, nor other lineal female ancestor, nor widow, nor husband, nor brother of the half or whole blood, nor sons, how low soever, of the brethren of the whole blood or of those by the same father only, nor sister of the half or whole blood, nor paternal uncle nor paternal uncle's son, how low soever, (all of whom are termed either sharers or residuaries), the daughter's children and the children of the son's daughters succeed ; and they are termed the first class of distant kindred." *(a)*

SCOTLAND, C. J. :—The plaintiffs claim, though the common paternal grandfather, as related to the deceased Maulavi Muhammad Ja'afar Sáhib in the sixth degree ; and seek to recover the estate of the deceased from the defendants, the children of his sisters of the whole blood. The first question is whether the pedigree on which the plaintiffs rely is made out satisfactorily ?

The plaintiffs' case rests entirely on the oral statements of deceased relatives ; and certainly in England this kind of evidence would not be regarded as satisfactory if unsupported by the usual evidence derived from registers of births, marriages and deaths, entries made by members of the family in books, inscriptions on tomb-stones or monuments, or the like. But here I have no judicial knowledge of the existence among Muhammadans of a register of births and deaths ; neither am I aware that it is ever possible to procure among them evidence of the other descriptions which I have mentioned. Nothing of this kind has been shewn or suggested. We must therefore deal with and give effect to the oral evidence in this case. Some of the witness, no doubt, were

(a) 'Distant kindred' (*zavi'l-arham*, literally 'persons of the wombs') are persons related to the deceased, but taking only when he has left neither 'sharers' nor 'residuaries.'

1862. *December* 4, 5.

personally interested, but that goes to their credit, not to their competency. [His Lordship here minutely analysed the evidence and continued thus :] The mode, moreover, in which all the plaintiffs' witnesses gave their testimony was such as to lead to the conviction that they were telling the truth : they were unshaken, too, by a severe cross-examination ; and the defendants have failed to adduce any direct evidence to meet the case made by their opponents. I must accordingly regard the plaintiffs' relationship as proved by trustworthy testimony.

Then as to the law. The question—raised, I believe, for the first time in this Court—is whether descendants in the male line of the paternal great-grandfather of an intestate are within the class of "residuary heirs," and therefore entitled to take to the exclusion of sons and daughters of the intestate's sisters of the whole blood—the intestate being the person last legally possessed of the property ? There is no doubt that sisters' children surviving their mothers can only be entitled to succeed as "distant kindred ;" and it seems equally clear that before the class of "distant kindred" can take any share in the property, all the relations of the deceased, who come within the class of "residuary heirs" must be exhausted. There is no ground, I think, for the argument put forward on the part of the defendants, that assuming collateral male relations claiming through the great-grandfather of the deceased to be within the class of "residuaries," their claim to succeed does not arise until after the "distant kindred" in the same degree of relationship with the paternal uncles have been exhausted. If male descendants claiming through the great-grandfather of the deceased are properly among the number of his "residuary heirs," they, equally with the male descendants from the grandfather—that is paternal uncles and their lineal male issue—are entitled to the property to the exclusion of all "distant kindred."

Here the plaintiffs claim through Muhammad Ja'afar Sáhib as the common paternal great-grandfather of the deceased and themselves ; and the point of Muhammadan law which we are called upon to decide is, whether, assuming their alleged relationship to be proved, they are included in

1862.
December 4, 5.

the class of "residuary heirs" to the deceased in the male collateral line; for, if so, they are legally entitled to succeed, to the exclusion of the "distant kindred."

Now the general rule of law as regards "residuaries" in their own right is stated upon the authority of the *Sirajiyyah*(*a*) to be this: "every male in whose line of relation to the deceased to female enters" is a residuary in his own right (*b*); and succeeds as such preferably to any "distant kindred." This was adopted and acted upon in the case of *Bhanoo Beebee* v. *Emaum Buksh* (*c*). No question is or can be made as to the undoubted application of this rule to males in the right line of ascent and descent, as well as to collateral male descendants of the deceased's grandfather. But on the authority of a passage in Sir Wm. Macnaghten's work on the *Principles and Precedents of Muhammadan Law* it is contended that as regards collaterals the class of "residuaries" is confined to paternal uncles and their lineal male descendants. And certainly the passage in question does afford ground for the argument. In enumerating in cap. I. sec. III. cl. 43 "shares" and "residuaries" who take before "distant kindred," the very learned author does expressly mention paternal uncles and their sons—thus impliedly excluding paternal granduncles and their male issue. But in Mr. Baillie's book this difficulty is dealt with very clearly and satisfactorily. He says (p. 78): "The only passage in the translation of the *Sirajiyah* bearing directly on the point that I am aware of, is the following, which does certainly seem to countenance the doctrine of the limitation of residuaries in the collateral line to the descendants of the grandfather, though it is at the same time obviously inconsistent with the general definition of the term with which the paragraph commences. Now the residuary in his own right is every male in whose line of relation to the deceased no female enters; and of this sort there are four classes; the offspring of the deceased and his root, and the offspring of his father and of his *nearest* grandfather, a preference being given, I mean a preference in the

(*a*) Baillie 72, Macnaghten's Principles and Precedents of Muham. Law p.

(*b*) 1 S. D. A. Rep. 68—H. Colebrooke and Harington, J J.

(*c*) The highest authority on the law of inheritance among the Sunnis of India. It has been translated by Sir William Jones.

1862. December 4, 5.

right of inheritance, according to proximity of degree. The offspring of the deceased or his sons *first* ; then their sons, in how low a degree soever : then *comes* his root, or his father, then his paternal grandfather, and their paternal grandfathers ; then the offspring of his father, or his brothers, then their sons, how low soever ; and then the offspring of his grandfather or his uncles, then their sons how low soever" (*a*). Mr. Baillie then points out that the word 'nearest' in this quotation crept in by mistake into Sir W. Jones' version of the Sirájiyyah. "There is nothing in the preceding quotation which cannot be reconciled with the definition of "residuary" at its commencement, except the words "nearest grandfather ; and we have fortunately the means of shewing beyond dispute that these are an inadvertence of the translator. In the copy of the text annexed to the translation, the vowel-marks are inserted, and if these be correct, it is obvious that the words "nearest" and "grandfather" cannot agree together : and they are so distinct from each other in the Calcutta edition, which contains both the text and the commentary printed together, that the commentator stops at the word "grandfather," to make an observation of the sentence that concludes with it, before he suffers the reader to proceed to the next, which begins with the word "nearest" (*b*). The passage, as it stands in the Calcutta edition, and stripped of the commentary, a part of which has slipt into the text of Sir William Jones' copy, and may have given rise to the mistake in question, is literally as follows : "and they are four classes : the offspring of the deceased, and his root, and the offspring of his father, and the offspring of his grand-father. The nearest is nearest. I mean by this, that the first in the inheritance is the offspring of the deceased, or the sons ; then their sons, how low soever ; then his root, or the father ; then the grand-father, or father's father, how high soever," &c. The reader will observe, that the term grand-father is here taken in its proper comprehensive sense, to signify the lineal male ancestor however remote, and, but for the word nearest, the insertion of which I hope has been satisfactorily explained, there is nothing from which it can be gathered that the term was to be taken in a less compre-

(*a*) Sir W. Jones' Works, vol. III, p. 523.

(*b*) Shurifia, Appendix, No. 149.

1862.
December 4, 5.

hensive sense when the descendants of the grand-father are mentioned. It is true, that these are described a little lower down as uncles, but the word in the Arabic, which has been so translated, is one of equal comprehensiveness, being employed to designate not only the father's brothers, but the brother of any male ancestor however remote, provided he be connected with the deceased through males. (*a*) "It is to be observed that if the enumeration of residuaries contained in the paragraph quoted from Mr. Macnaghten's work be complete, all relatives beyond the descendants of the grand-father are excluded, though they should fall within the general definition of the *Sirájiyah*.

Mr. Baillie then quotes three distinct authorities shewing that the estate goes to the descendants of the great-grand-father. The first of his quotations is from the *Khuduri*, a book, he says, of very high authority in Arabia, and generally supposed to be the principal source from which the author of the *Hidàya* obtained the text of the law on which his own work is a commentary. The quotation is "The nearest residuaries are the sons; then their sons; then the father; then the grand-father; then brothers; then their sons; then the sons of the grand-father and they are paternal uncles; *then the sons of the father of the grand-father, and they are paternal uncles of the father* (*b*)." Then follows an extract from the *Futáwa Sirájiyah*. "The nearest residuaries to the deceased in their own right are sons; then their sons; then the sons of their sons how low soever; then the father; then the grand-father, or father's father how high soever; then the full brother; then the half-brother by the same father; then the sons of the full brother, then the sons of the half-brother by the same father; then their sons in this manner; then the father's full brother; then the father's half-brother by the same father; then the sons of the father's full brother; then the sons of the father's half-brother by the same father; then their sons after this arrangement, *then the paternal grand-father's full brother; then the paternal grand-father's half brother by the same father; then their sons after this arrangement*." (*c*)

(*a*) Sirajiyah and Shurifia, Appendix No. 150—Appendix No. 151.
(*b*) Appendix No. 151.
(*c*) Futáwa Sirájiyah, Appendix No. 152.

1862. December 4, 5.

Mr. Baillie then cites, but does not quote, a passage, from the *Futawa 'Alamgiri*. In this, he says, "the enumeration of residuaries, after proceeding in nearly the same terms as those of the last quotation, is carried one step higher to the paternal uncles of the grand-father, that is, to the descendants of the great great grand-father(*a*). "If," says Mr. Baillie, these works are to be allowed any weight at all, it "is clearly impossible that the limitation implied in the expression 'descendants of the nearest grand-father,' can be corret; and there is nothing else, even in Sir William Jones's translation of the passage previously quoted from the *Sirajiyah*, to restrict the meaning of the definition of the term 'residuary,' with which the paragraph commences, the comprehensiveness of which is worthy of the reader's particular attention. 'Now, the residuary in his own right,' says the author, 'is every male in whose line of relation to the deceased no female enters.'"

Mr. Baillie lastly refers to the case of *Doe* dem. *Sheikh Moohummud Buksh* v. *Shurf Oon Nissa Begum*, tried in the Supreme Court at Calcutta, in the second term of 1831. There "it was decided in conformity with the above authorities, which were brought to the notice of the Judges and the *fatwa* of Maulavi Morad, head Muhammadan officer of the Court, that the plaintiff, who was descended from the great grand-father of the deceased, was entitled to a share of the residue."

The passage cited by Mr. Branson is moreover inconsistent with an observation by Sir William Macnaghten in the Preliminary Remarks (*Prin. and Prec. of Muhammadan Law*, p. XI) that "the residuaries by relation are the sons and their descendants, the father and his descendants, *the paternal ancestor in any stage of ascent and his descendants*." The words italicised seem certainly, as Mr. Baillie (p. 78 n.) remarks, to conprehend the collaterals, however remote from the deceased; and I cannot help thinking that in the present case Sir William Macnaghten would have considered the plaintiffs entitled to succeed.

(*a*) Futawa 'Alamgiri, Appendix No. 153.

1862. December 4, 5.

Lastly, it is only necessary to refer to the case of *Shah Ilahi Baksh* v. *Shah Casim Ali* (*a*). There the deceased was in the sixth degree of descent in the male line from the common ancestor, and the appellant in the fourth degree from such ancestor ; so that the appellant was in the tenth degree from the deceased. And it was held by the Bengal Sadr Diwáni ' Adálat (H. Colebrooke and Harington, JJ.) that the appellant was entitled as residuary to the exclusion of the respondent, who was the son of the sister of the deceased.

Under these circumstances it is clear that judgment must be for the plaintiffs. All doubt raised by the passage cited from Sir Wm. Macnaghten's work is removed by reference to Mr. Baillie's book and to that decision in the Bengal Sadr ' Adálat. As respects their hereditary right the plaintiffs are entitled to recover. But the case must be adjourned to unable both parties to supply evidence as to the value of the property in dispute.

BITTLESTON, J. concurred.

Judgment for the plaintiffs.

(*a*) 1 S. D. A. 98 : 1 Morley Dig. 339—340.

NOTE.—In the course of the case one of the plaintiffs' witnesses, an aged and infirm Muhammadan hakim, was carried forward to give his evidence. On the Kurán being tendered to him to kiss, he said that he had no objection to the use of oaths in general, but that on the present occasion he could not touch that holy thing, as he was suffering from dysentery, and therefore in need of purification.

The Advocate General proposed to ask the witness whether he would not feel himself bound to speak the truth if he bowed his head within a few inches of the Kurán.

Branson objected.

SCOTLAND, C. J.:—This is not the case of a person entertaining a conscientious objection to the use of an oath. He merely declines to take it on the ground of present disqualification, and he must be sworn in the regular way or not at all.

Act V of 1840, substituting solemn affirmations for oaths among Hindus and Muhammadans, does not extend to any declaration or affirmation made in any of Her Majesty's courts of justice.