Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Chaudhri Mehdi Hasan and others v. *Muhammad Hasan, from the Court of the Judicial Commissioner of Oudh; delivered the* 21*st March* 1906.

Present at the Hearing:

LORD MACNAGHTEN.
SIR FORD NORTH.
SIR ANDREW SCOBLE.
SIR ARTHUR WILSON.

[*Delivered by Sir Ford North.*]

This action was commenced in the year 1897 to have a deed dated the 23rd of July 1886, and executed by the Plaintiff, Chaudhri Mehdi Hasan, declared void and cancelled. The Subordinate Judge of Barabanki made a decree to that effect; but this was reversed, and the suit was dismissed, on appeal to the Court of the Judicial Commissioner of Oudh on the 31st day of July 1899.

Just before that Appeal Mehdi Hasan (hereinafter referred to as "the Plaintiff") had sold part of his interest to two persons who, by an order of the Judicial Commissioner dated the 10th day of May 1899, were joined as co-Plaintiffs with him, and these three persons are now the Appellants.

Chaudhri Nabi Bakhsh, who died many years ago, had three sons: Mehdi Hasan, the Plaintiff; Hadi Hasan, who is still living, and whose son is the Defendant Muhammad Hasan; and Razzak Bakhsh, who disappeared before 1880 and has not been heard of since. He left two children, Abdus-Sattar and Abdul Ghaffar.

41993. 125.—3/1906. [15] A

At the date of the above-mentioned deed the Plaintiff was the owner of one-third share in the villages of (1) Udaria, (2) Chhilgawan, (3) Akbarpur, (4) Raushanabad, (5) Sarawan (6) an under-proprietary holding and two houses in Nidura, and (7) certain sir lands and groves of comparatively small value. He was also owner of the entirety of a house at Chhilgawan. The other two-thirds of the above-named properties (except the house at Chhilgawan) belonged respectively to Hadi Hasan, and to Abdus-Sattar and Abdul Ghaffar.

Of the above lots 1, 2, 4, and 5 were in the possession of mortgagees; and the rest (other than the house at Chhilgawan) were in the possession of the co-sharers.

By that deed the Plaintiff stated that in lieu of Rs. 2,000 he had made a gift with consideration to the Defendant and had received the money in full, and no portion thereof was due by the donee; that he had placed the donee in possession of the villages, but as he had no other property to live on, he had set apart from the profits of Akbarpur the sum of Rs. 164. 4 annas for necessary expenses so long as he and his wife should live, and after their deaths the Defendant should have the property. Subject to a certain other small exception he gave the Defendant all his proprietary rights in the gifted property.

Shortly afterwards the deed was registered, the Plaintiff admitting its execution by him, and that he had before execution received the full sum of Rs. 2,000. Some little time afterwards mutation of names in favour of the Defendant was made in the Registers.

It is not in dispute that at the date of the deed the Plaintiff and Defendant were on friendly terms, and that a marriage (which came off about six months later) between the Defendant and a daughter of a sister-in-law of the Plaintiff was in consideration. At that time the Plaintiff was contemplating a pilgrimage

to Mecca, with his wife, and desired to provide for the management of his property by the Defendant during his absence. There is voluminous and conflicting evidence as to the persons by whom, and circumstances under which, the deed was prepared, and how it attained its final shape; and it is impossible to go through the evidence in detail, there being upwards of 100 witnesses in the case. But stating their view shortly their Lordships consider it proved that in the first instance the Plaintiff proposed to give the Defendant a Power of Attorney to manage his property during his absence; that the Defendant did not like this, and asked Muhammad Raza of Nidura, Razzak Bakhsh, Muhammad Raza of Atahra, and Sajid Ali, who were all friends of his, to try and persuade the Plaintiff to make it a deed of gift, as this would be much better than a Power of Attorney; that they agreed to do so, and called upon the Plaintiff accordingly, and endeavoured so to persuade him; that the Plaintiff at first refused, but upon the Defendant agreeing to pledge his oath that during the life of the Plaintiff and his wife he would not in any way interfere with their possession, the Plaintiff withdrew his objection; that the Defendant then said that there should be some consideration in the deed; and on the Plaintiff's objecting to this change the persons present to advise the Plaintiff to do what the Defendant wished joined in chorus, saying "Life is uncertain; as you are "willing to execute a gift why not execute "hibba-bil-ewaz, because otherwise the gift "would be considered to be collusive"; and that the Plaintiff again yielded to their persuasion; and at their instance consented to a consideration being inserted. The Defendant stated in his re-examination that the gift was made hibba-bil-ewaz because Asghar Ali suggested that it was necessary, so that it could not be impugned or challenged afterwards by any of the Plaintiff's

heirs and relations. And in his defence in this action he pleads that as the deed was made for a valuable consideration it could not be set aside.

The Judicial Commissioner of Oudh who delivered the Judgment in the Appeal Court said that he was not prepared to place reliance on the evidence of Razzak Bakhsh, Muhammad Raza of Nidura, Sajid Ali, and Muhammad Raza of Atahra. Razzak Bakhsh is in a somewhat different position from the others. There was a conflict of evidence as to whether the deed in question was drafted by Razzak Bakhsh; or was drafted by Asghar Ali, and fair copied by Razzak Bakhsh. The learned Judge took the view that Asghar Ali was the draftsman, and disbelieved Razzak Bakhsh, although the Subordinate Judge held him to be a respectable witness who, in his opinion, had spoken the truth. But the Judicial Commissioner gave no reason for his refusal to believe the three others; and the Subordinate Judge saw all of them and believed them; and their Lordships do not see any reason for treating them as unworthy of credit. A Power of Attorney is a document frequently used in India; and they are of opinion that it is far more probable that the Plaintiff first proposed a Power of Attorney, but was induced by the persuasion of the Defendant's friends to go further and execute a deed, than that the Plaintiff should voluntarily have proposed to give all his property (except a few rupees) out and out to the Defendant.

Then the next matter for consideration is whether the deed is a deed for value, for which the consideration of Rs. 2,000 was paid, or is a deed for which no value was really given, a hibba-ism-farzi. Upon this issue the Subordinate Judge examined the evidence with great patience and care, and came to the conclusion that no valuable consideration had ever passed, and that the deed of gift was not for value and was fictitious.

The Judicial Commissioner said upon this point:—

"I agree with the Lower Court in being of opinion that the "consideration of Rs. 2,000 was not paid by the donee. The "Subordinate Judge has given good reasons for his finding. I "refer also to the evidence of the witness Ibad Ali. The "probability is that it was not intended that any consideration "should pass for the gift."

At this stage it would be sufficient to say, in most cases, that there being concurrent findings in two Courts below on a question of fact, the matter must be treated as closed. But with a view to the subsequent part of the case, it is desirable to refer briefly to the mode in which this payment of the Rs. 2,000 was attempted to be supported. The Defendant says that he paid this sum to the Plaintiff, being the profits from tobacco cultivation during several years; that he paid it in May or June, one or two months before the deed was executed; Rs. 1,800 on one occasion, and Rs. 200 within two months after; that Tajammul Husain Khan, Mata Din Singh, Chauhan, Sheikh Aulad Husain, Bakar Khan, and others were present; that the money was brought tied in a cloth by Bakridi and Mohun Pasi; that the money was paid to the Plaintiff, the Rs. 200 at 10 a.m., and the Rs. 1,800 at noon. Tajammul Husain says that he was present when Aulad Husain, Bakridi, and Mohun Pasi came with Rs. 1,800, and the Defendant paid it to the Plaintiff on account of a hibba-bil-ewaz; and that the Plaintiff had executed the deed because of the regard and affection he had to the Defendant, who had married his sister-in-law's daughter (which marriage by the way did not take place until six months later). Then Mata Din Singh says that he was present when the Defendant arrived with Rs. 1,800, and put it down before the Plaintiff; that the deed was being read at the time by Tajammul Husain; that Bakridi and a Pasi brought the

money and placed it on the couch where the Plaintiff was sitting, and the Plaintiff then counted it and took it away into his house; that the Defendant said "here is the amount, "Rs. 1,800," and the Plaintiff said "this is "hibanama money." Then Bakridi says that the Defendant took the Rs. 1,800 out of a box and counted it and gave half to the witness and half to Mohan; that they tied it up in separate parcels and reached Chhilgawan a little after 1; that the Defendant then told them to place it before the Plaintiff; that they did so, and the amount was counted and tested and tied up in two bundles of Rs. 900 each; that the Plaintiff took up one and the witness the other, and placed them before the Plaintiff's wife; and that the deed was not prepared till some days after. The evidence of these witnesses varied very greatly in detail; but they all swore that the money was paid in their presence. As already mentioned, this story about payment has not found credence in any Court. It has been proved that the Defendant had not any means at the time, not even enough to pay for the stamp on the deed, which was bought by the Plaintiff. The Defendant's case is as bad a case of circumstantial mendacity as could well be, and it shows not only that the Defendant's own statements are utterly untrustworthy, but also that he had both the will and the power to suborn other persons to give false testimony in support of his case.

So far, therefore, as the Defendant's case is rested upon the deed in question being a conveyance for value, it fails entirely.

But the Defendant also sets up another defence (which is quite inconsistent with his defence that the deed was for valuable consideration), viz., that this deed was founded on the natural love and affection which the Plaintiff

had for him as his nephew, and also for the Plaintiff's niece whom the Defendant was about to marry; in pursuance of which the Plaintiff placed him at once in possession of all his property except the reserved portion of Akbarpur. It does not seem a very probable story that the Plaintiff should at once irrevocably hand over to the Defendant all his property except a few rupees; but certainly there is evidence that on many occasions subsequently the Plaintiff spoke of the property as having been given by him to the Defendant, though he often said, and says now, that this was subject to the reservation of it to himself and his wife during their lives, and subject to its being managed by the Defendant during the absence of the Plaintiff and his wife on their intended pilgrimage. The Defendant denies that any such reservation was intended, and he relies upon the absence of any such reservation from the deed except as to Akbarpur, for which special provision was made. This no doubt is a point in favour of the Defendant, but it is necessary to consider carefully all the circumstances of the case.

By the Muhammadan law (by which the present case is governed) a holder of property may in his lifetime give away the whole or part of his property if he complies with certain forms; but it is incumbent upon those who seek to set up such a transaction to show very clearly that those forms have been complied with. It may be by deed of gift simply, or by deed of gift coupled with consideration. If the former, unless accompanied by delivery of the thing given, so far as it is capable of delivery, it is invalid. If the latter (in which case delivery of possession is not necessary), actual payment of the consideration must be proved, and the *bonâ fide* intention of the donor to divest himself *in præsenti* of the property, and to confer it upon the donee, must also be proved. (See

Ranee Khujooroonissa v. *Mussamut Roushun Jehan*, L. R. 3 Ind. App. 291.

Reference was also made by the Defendant's Counsel to the Transfer of Property Act, 1882, chap. vii. as to gifts, and to certain cases decided under it which show that by the Hindu law delivery of possession is not essential. But they have no bearing upon this case, as Section 129 of the Act provides that nothing contained in that chapter should be deemed to affect any rule of Muhammadan law.

It now becomes important to consider whether the possession of the property comprised in the deed was or was not delivered to the Defendant as he alleges. The parol evidence upon this point is very voluminous and very conflicting; but upon full consideration of it their Lordships have come to the conclusion that the Defendant has failed to establish that possession was delivered, and in doing so they rely especially upon certain matters which seem to them beyond dispute.

Part of the property described in the deed and claimed by the Defendant is a house at Chhilgawan, which had been built by and belonged to the Plaintiff, in which he and his wife resided before and at the time of the execution of the deed. The Plaintiff did not, as contemplated, go to Mecca soon after that time, being prevented at first by an accident, and afterwards by the illness of himself and his wife. When the Defendant married, the Plaintiff invited him and his wife to come and live with him at the house in question; and they did so, and were maintained by him there until 1894, when the Plaintiff and his wife made the long contemplated pilgrimage to Mecca, on which they were absent about six months. During their absence the Defendant and his wife continued to live in the house; but on their return the Plaintiff and his wife went back to their home and have continued to reside there ever since. The

Defendant also remained there for a short time till his wife died; after her death the Defendant married again, and differences having arisen between him and the Plaintiff, the Defendant went away and lived in Nidura, while the Plaintiff remained in the house as before. Each party says he was in possession of that house; but upon the above facts, which are not in dispute, their Lordships have no difficulty in coming to the conclusion that this house was all along in the possession of the Plaintiff.

Next, with reference to the village of Chhilgawan, it was at the date of the deed held by the official assignee of the mortgagees, and the Plaintiff was in actual possession under a lease from him. On its subsequent redemption the co-sharers Mehdi Hasan, Hadi Hasan, Abdus-Sattar and Abdul Ghaffar entered into possession and divided the profits in equal shares. The Defendant admitted that the Plaintiff had always received his one-third share of these profits, but says that he did so with his permission for his expenses—a statement which is not corroborated. But it is not necessary on this point to do more than refer to certain proceedings early in the year 1897. In that year the Plaintiff and Defendant had disputes about the collections in Chhilgawan, and while the proprietors were fighting the cultivators suffered; and some of them took criminal proceedings for assault against the Plaintiff and others. Shortly afterwards the Plaintiff and Defendant made an amicable arrangement before the Court under which Parmeshur Din was appointed to receive the rents of Chhilgawan, and after payment of the Government dues to divide the surplus into three equal shares and pay them to the Plaintiff, Hadi Hasan, and Abdus-Sattar and Abdul Ghaffar; and thereupon the proceedings were stayed. The Plaintiff and Defendant each made a deposition

in support of that Order, and the Defendant's deposition contained this passage :—

" The money realized from village Chhilgawan every year " used to be distributed among Hadi Hasan, Abdus-Sattar " and Abdul Ghaffar, sons of Chaudhri Abdul Razzak, and " Chaudhri Mehdi Hasan, each getting a one-third share " ;

and the Defendant agreed that the rents should be received thenceforth by Parmeshur Din, and divided by him among the same persons as before. The Plaintiff's deposition contained a statement to the like effect.

With reference to Akbarpur, there is no doubt that it was left in possession of the Plaintiff.

With regard to Sarawan and Raushanabad the facts stand thus: In 1889 a new mortgage was made upon Udaria; part of the money raised was applied in paying off the prior mortgage thereon, and out of the balance the existing mortgage on Raushanabad was paid off. About the same time the mortgage existing on Sarawan was satisfied by the sale of one half of that property, and the remaining one half of Sarawan was redeemed. Abdus-Sattar, one of the co-sharers (whose evidence no one has impeached), says that the Plaintiff and Hadi Hasan, and he and his brother handed over Sarawan and Raushanabad to the Defendant to manage and make collections, pay Government revenue, and keep the balance in deposit with him for the purpose of redeeming the mortgage on Udaria from Abdul Kasim. The Plaintiff confirms this statement; and Ram Parshad (who was employed by the Defendant to collect the rents of Raushanabad) and Mubarak Ali and Din Dayal all depose that the Defendant made statements to them to the same effect. Moreover, the Plaintiff in his deposition made to support the consent order above referred to, said :

" As to the collections of the remaining villages Sarawan " and Raushanabad, Chaudhri Muhammad Hasan shall " continue to make them in order to pay off the mortgage

" money on village Udaria while I shall make collections in " Akbarpur."

The Defendant was not so explicit, his deposition is:

" As to the collections of the remaining villages, Sarawan " and Raushanabad, I shall continue to make them hereafter " as I have been doing hitherto."

But he did not contradict or dispute the Plaintiff's statement as to what was the object and purpose of his doing so. It must be remembered also that the Defendant was receiving the entirety, and not one-third only, of the profits of these villages; and as to two-thirds they clearly must have been received for some specific purpose; and according to the Defendant's statement the whole was to be received and applied for the same object. Under these circumstances the Defendant did no doubt collect considerable sums in respect of the Sarawan-Raushanabad properties; but this does not prove that he had possession of one-third against the Plaintiff, any more than it proves that he had possession of the other two-thirds against the co-sharers.

The learned Judicial Commissioner stated that although the Defendant did not admit that there was any arrangement that the profits of Sarawan and Raushanabad should be retained by him towards the redemption of the mortgage of Udaria, the fact that the accounts of those villages were kept separate from the accounts of Chhilgawan, and that the profits of those villages had not been divided, did lend support to the view that these profits were set apart to redeem that mortgage. He held, however, that this was insufficient to show that as between the Plaintiff and Defendant the latter was trustee of the Plaintiff's one-third as well as of the two-thirds of the other co-sharers. But their Lordships do not concur in this view. It seems to them improbable that the passages above

referred to as to the application of the rents of those villages should have been introduced into the depositions of the Plaintiff and Defendant as above mentioned, if the Plaintiff had no interest in those villages or the rents thereof, or in the application of the collections therefrom. Again, the undated letter from the Defendant to the Plaintiff (set out at page 21 of the Record) in which he offers to account to the Plaintiff or to any other person he may name in respect of Abul Kasim's mortgage and the collections of Sarawan and Raushanabad, is quite inconsistent with the Defendant's contention that the Plaintiff had no interest in those properties respectively. It is plain therefore that the Defendant had not possession of these villages under the deed in question, but as a trustee by arrangement for all the co-sharers, including the Plaintiff.

With respect to the other small properties, shares, dues, and duties, their Lordships do not think it necessary to trace out the details of possession in each case; it has been done very carefully by the Subordinate Judge, and their Lordships adopt his reasons and conclusions. They merely desire to add two remarks—one is that the Defendant's father Hadi Hasan is entitled to a one-third share of the properties in question, and, naturally enough, the Defendant (as his witness Angad Singh, Zemindar of Raipur, states) made collections of Hadi Hasan's share also; yet no attempt has been made by the Defendant to show on whose account the various payments to him have been made; and Hadi Hasan was not called as a witness, though his evidence might have been useful on this point; and unless the payments made to the Defendant could be shown to have been made on account of the Plaintiff's share the evidence is valueless. The other is that they do not attach the slightest weight to the

evidence of the Defendant, and looking at the mode in which the evidence as to the Rs. 2,000 was fabricated by him, they regard with great distrust much of the other evidence adduced on his behalf.

Their Lordships are therefore of opinion that the Defendant's contention that possession of the properties comprised in the deed was given to him has wholly failed.

The circumstances connected with the mortgages to Abdul Kasim and Mata Din do not seem to their Lordships very material, having regard to the fact that the mutation of names had already been effected.

Their Lordships are of opinion that the deed which purported to be a conveyance for value was a transaction in which no consideration passed or was intended to pass; that in executing that deed the Plaintiff did not intend to give the property to the Defendant except subject to a reservation of the possession and enjoyment to himself and his wife during their lives, to which the Defendant pledged himself; and that the deed was not followed by delivery of possession, but was a fictitious and benami deed and was invalid and void.

Under these circumstances their Lordships are of opinion that the decision of the Subordinate Judge was right and should be affirmed; and they will humby advise His Majesty that this Appeal should be allowed; that the Order of the Court of the Judicial Commissioner of Oudh should be reversed, and the Appeal to that Court should be dismissed with costs; and that the Order of the officiating Subordinate Judge of Barabanki should be restored.

On the 5th of July 1905 the Appellants applied that this Appeal, which was at that time set down, should stand over until the November sittings. Their Lordships assented to this course, but ordered the Appellants to pay in any

event the Respondent's costs of that application, and of the case orders which the Respondent had been compelled to take out. The Respondent must pay the costs of this Appeal, but must be allowed to set off against them the costs mentioned above.