1861.
April 25.

LATE SUPREME COURT, PLEA SIDE.

MUCHAMMAD YUSSUB.....*Plaintiff.*

SAYAD AHMED .....*Defendant.*

Kázi of Bombay—Power to appoint Kázi—Disturbance of Office—Fees, Action for Loss of—Muhammadan Law.

Semble—The power to appoint a person to the office of Kázi of Bombay is vested in the Governor of Bombay, and not in the Governor in Council.

When it was shown that the plaintiff had acted as Kázi of Bombay for more than twenty years, and the defendant in an action brought against him for disturbing the plaintiff in his office of Kázi was unable to show that the plaintiff had been illegally appointed, it was held that the plaintiff so acting as Kázi could maintain an action against the defendant who so disturbed him in his office, without proving that he, the plaintiff, had been legally appointed.

According to Muhammadan law, the appointment of Kázi has always been vested in the chief executive officer of the State, and the right to make such appointment has never rested with the Muhammadan community at large.

The sums received by the Kázi of Bombay in respect of his office of Kázi are not mere gratuities, but are fixed and certain payments annexed to the discharge of official duties, and are, therefore, sums in respect of the privation whereof by a wrongful intruder an action, either for money had and received, or for disturbance in the office, will lie.

THIS case, the facts and pleadings in which sufficiently appear from the judgments of the members of the Court, was tried before SAUSSE, C.J., and ARNOULD, J., on the 28th of February, and on the 1st, 2nd, 5th, 7th, and 8th of March 1861.

Westropp and *White* for the plaintiff.

Lewis (Advocate General) and *Connon* for the defendant.

Cur. adv. vult.

April 25th. SAUSSE, C.J.:—This is an action on the case brought by the plaintiff as Kázi of Bombay against the defendant for having disturbed him in the exercise of that office. The plaintiff alleges that he was possessed of this office, and entitled to the fees, &c. belonging to it, and he insists that whilst he was so possessed and entitled, the defendant disturbed him by exercising the office, and taking the fees belonging to it. There is a second count setting out the plaintiff's title under a grant or *sanad* of appointment from the Governor of Bombay in the year 1837. The plaintiff claims substantial damages.

NOTE.—As to the appointment of Kázis by Government see Act XI. of 1864 and Bombay Act IV. of 1864. It is not clear whether these Acts refer to the Kázi of Bombay.

The defendant by his pleading denies the disturbance, and specially pleads that the plaintiff did not hold the office of Kázi, and also that he was not entitled to any fees in respect of his office.

The substantial question between the parties is whether the Kázi of Bombay is entitled to certain fees in connexion with marriage and divorce amongst the Muhammadan inhabitants of Bombay. The nature of this action is described by Sir W. Blackstone in Volume III. of his Commentaries, title "Disturbance." "The action for disturbance is for a wrong done to some incorporeal hereditament by hindering or disquieting the owners in their regular and lawful enjoyment of it.

Disturbance of a franchise happens when a man has the franchise of holding a court, of keeping a fair or market, of taking toll, &c., or in short any other species of franchise whatsoever, and he is disturbed or incommoded in the lawful exercise thereof. As if another by distress, menaces, or persuasions prevails upon the suitors not to appear at my court, or obstructs the passage to my fair or market, or refuses to pay me the accustomed toll, &c.; in every case of this kind, all which it is impossible here to recite or suggest, there is an injury done to the legal owner; his property is damnified, and the profits arising from such his franchise are diminished. To remedy which, as the law has given no other writ, he is entitled to sue for damages by a special action on the case."*

To sustain the action for disturbance to an office the plaintiff must show—(1) that he is the legal owner of the office; (2) that his property in it is of such a nature as to be susceptible of injury; and (3) that it has been injured, and by the act of the defendant.

The title of the plaintiff, as stated in his second count, was traversed by the defendant; but, this being a possessory action, the case of *Peter* v. *Kendal* (*a*) is a clear authority to show that proof of possession of the office is sufficient against a stranger like the defendant; and as that possession was satisfactorily proved to have been in the plaintiff for a period of twenty-four years, I think the plaintiff's title is sufficiently established, and I do not feel called upon to enter upon the question raised by the defendant's first plea to the second count, which in effect is that the Governor of Bombay had no authority in that capacity to grant to

(*a*) 6 B. & C. 703. * 3 Black. Com., p. 236, ed. of 1836.

1861.
MUHAMMAD YUSSUB v. SAYAD AHMED.

the plaintiff the *sanad* of 1837, but that it should have been executed by the Governor in Council. I will only remark that, as the successive *sanads* from the earliest produced (in 1798) were in the same form, I think, in the absence of any counter-evidence, we should, if necessary, have been justified in presuming that the patronage of the office of Kázi was apportioned to the "Governor," apart from the "Governor in Council," under the powers for that purpose conferred upon the late East India Company by the 78th section, 3 & 4 Wm. IV., c. 85, and that thus the plaintiff's appointment was a valid one. It is very clear, upon all the Muhammadan authorities, that it is the "Ruler" or "Sultan" alone who has the power of appointing a Kázi, and that it is his duty to appoint one, and also that when there is such a governing power, any election or nomination to that office by Muhammadan inhabitants, without the sanction of the "Ruler," is void, and contrary to Muhammadan law.

The weight of authority was indeed so great upon these points that the learned Advocate General admitted, on behalf of the defendant, that the law was so; and he did not attempt to show any title in the defendant to the office of Kázi of Bombay.

It was satisfactorily proved, and scarcely controverted, that the defendant assumed to hold a "Court" as "Kázi of Bombay;" that he conducted himself as Kázi in all other respects; that he gave authority and directions for the celebration and registry of marriages; that he authenticated divorces pronounced before him by the parties; and that in every case proved he demanded and received the like fees for each act that had been accustomably taken by the plaintiff as *Kázi*. The books of the defendant proved similar acts in greater number, and the fact of "disturbance" of the plaintiff in his office by the defendant was clearly established. The real ground of the defence set up was that the plaintiff as Kázi had no legal right to those fees; that they were mere voluntary offerings or gratuities, for which no action could be maintained. In stating what is Muhammadan law, I rely principally upon the "Hedaya," a compilation dating from the 12th century of the Christian era, and holding the highest rank, I believe, as an exponent of that law; but in the very full discussion which this case received at the bar, the works of Arabic jurists of great consideration amongst Muhammadans were also referred to in confirmation or extension of the doctrines laid down in the "Hedaya."

The office of Kázi is both judicial and religious; annexed to it is the right and duty of holding a "Court" in which all questions arising upon marriage and divorce, as well as others, are entertained. The sovereign authority can, however, grant the office with the fullest power, or can limit its jurisdiction to particular functions specially designated in the *sanad* of appointment.

It has been recently decided by the Privy Council in England that the Supreme Court established in Bombay has not jurisdiction to adjudicate upon questions falling within the description of what may be designated Pársi ecclesiastical matters (*b*). The principle of the decision would apply with still greater force to such subjects amongst Muhammadans, whose laws and usages are made the subject of special protection and exemption by the words of the Charter creating the Supreme Court.

It would appear, therefore, that the religious and ecclesiastical portion of the ancient jurisdiction of Kázi is still inherent in that office in Bombay; and by the wording of the successive *sanads*, limiting the authority of that office "to administering" all marriages and other religious rites and ceremonies "relating to or belonging to his office," it would further appear that such ecclesiastical powers were intended to be conferred upon the holders of that appointment: the Kázi of Bombay is consequently to that extent an officer connected with the administration of justice.

The office of Kázi is one of the highest antiquity, and of great dignity and estimation amongst Muhammadans. Muhammad appears by the Hedaya to have been himself appointed Kázi of Mecca, and to have subsequently appointed some of his companions to similar offices. As far back as living memory can reach, there appears to have existed a usage in Bombay for all Muhammadans, with very few exceptions, to have the operative words of marriage or divorce uttered in presence of the Kázi or that of his appointed deputy. An entry of that fact, with the names and descriptions of the parties and the witnesses, together with the agreement respecting the amount or release of dower &c., was then immediately made in books kept by the Kázi as records of his Court. It was admitted that such entries were made as far back as the Káziship of Nuruddin in the year 1756.

It is the practice, we believe, of the Muhammadan community amongst themselves to refer to and treat those entries as

(*b*) *Perozeboye* v. *Ardaseer Cursetjee*, 6 Moo. Ind. App. 348.

1861.

MUHAMMAD YUSSUB v. SAYAD AHMED.

proof of the several matters contained in them, and it is obviously of great public benefit to that community to possess the means of perpetuating evidence of matters so essential to the peace of families, and to the regular transmission of property by descent.

For the performance of these services for the public benefit of that community, the Kázi has never received any remuneration from the Government of Bombay. From the evidence before us those services appear to have been solely remunerated by a fixed fee for each.

Fees are defined in *Bacon's Abridgment,* title "Fees," to be perquisites allowed to officers who have to do with the administration of justice as a recompense for their labour and trouble, and they are ascertained by Acts of Parliament, or established by ancient usage, which gives them equal sanction with an Act of Parliament.

And where such fees are established the several officers entitled to them may maintain an action of debt for them, the only restriction being that they be reasonable.

It is a principle of our law that the long enjoyment of tolls, customary dues, and the like, will be held to warrant the presumption of any fact necessary to make them legal; and if distinct evidence of any such payments be given as far back as living memory goes, a jury will be quite justified in presuming, unless evidence to the contrary be shown, that such payments were immemorial, and were referable to a legal origin: Taylor on Evidence, page 131, 3rd ed., and cases in notes.

We have evidence in this case covering a period of over seventy years back to prove the payment of those fees to the Kázis for the time being, and, so far from any contrary evidence having been shown by the defendant, we have the heading of his own account-book kept by him as Kázi in the following terms:—"The account-book of the fees for marriages of the high Muhammadan Court of the town of Bombay has been kept according to the former custom, commencing 25th December 1858." The fees entered under that heading are identical in amount with those proved to have been received by the holders of the office of Kázi as far back as living memory goes. After that statement, and those entries, it would be scarcely open to the defendant to contend that there were not customary fees annexed to the office of Kázi, and of the amount insisted upon by the plaintiff.

But custom and usage amongst Muhammadans also have the force of law, and, independent of the opinions expressed by witnesses examined, it is laid down in "Ushba," a book proved to be of high and recognised authority amongst Muhammadan jurists, "that the custom which is general or predominant is worthy."

There was no authority to show that remuneration to a Kázi, by fixed and well-known fees, for services performed was at variance with Muhammadan law or usage, but, on the contrary, some passages in Muhammadan writers were referred to to sustain the proposition that, under the admitted position of the Kázi of Bombay, devoted solely to the duties of the office, and receiving no support from the State, he was not only authorised, but required by Muhammadan law, to accept of a publicly known and recognised remuneration sufficient to sustain the dignity of his office.

We have thus, upon the facts of this case, a Muhammadan office so ancient as to be coeval with the founder of Muhammadanism, and granted by competent authority to the plaintiff; there was no evidence laid before us to show that there existed any period of time since the Muhammadan conquest at which there was not a Kázi of Bombay, or at which the services performed by that Kázi were either not remunerated at law, or were remunerated in any other manner than that deposed to on behalf of the plaintiff; and we have positive proof, as far back as living memory can well go (in that of the plaintiff, who is eighty-eight years of age, and of others approaching to eighty), that those services were remunerated by fixed fees, paid uninterruptedly and without complaint to the Kázis of Bombay for that long period until this disturbance by the defendant. We think, therefore, that, in the absence of any evidence to the contrary, we are bound to presume that those fees have been immemorially annexed to the office of Kázi, and that the grant of this ancient office, although without mention of fees in the body of the instrument, carries them with it as accessorial to the grant: Bacon's Abridgment, title "Office" G. As a corollary to that finding, it follows that as those fees have been so long established by usage, the Kázi could after performance maintain an action for them against the parties for whom they had been rendered, and the case of *Boyter* v. *Dodsworth* is an authority to show that where the plaintiff could maintain

(c) 6 Term Rep. 681.

1861.

MUHAMMAD YUSSUB v. SAYAD AHMED.

such an action for his services, he would be entitled to recover against the defendant the amount of such fees received by him. That amount has been calculated from the defendant's books, up to the period of action brought, at Rs. 4,713, and our verdict will accordingly be for that amount and the costs of the suit.

Although the fees upon marriage and divorce have been alone mentioned in the preceding observations, our decision and our verdict include the other accustomable fees mentioned in the evidence, namely, those for issuing summons in cases of matrimonial disputes, and for extracts from the records in the Kázi's Court. They appear to us to be reasonable fees, and falling within the principle upon which we have decided this case.

In order to prevent misapprehension as to the effect of our decision, we wish to state distinctly that we do not decide that the presence of the Kázi is essential to give validity to either marriage or divorce. It may be, and, to judge from the prevailing usage amongst Muhammadans in Bombay for so long a period, it would appear to be, a desirable practice; but we simply decide that if Muhammadans choose to obtain, for their marriage or divorce, the authentication of the Kázi of Bombay, they must go to the Kázi appointed by Government for that purpose. They cannot set up a Kázi of their own; if they do, and the unlawful Kázi accepts the office, and assumes the performance of its duties, he will be liable to an action for a disturbance at the suit of the lawful holder, and if he should receive fees belonging to the office, he will be liable to refund the amount with costs of suit upon action brought by the legitimate Kázi.

ARNOULD, J.:—This was an action on the case for disturbing the plaintiff in his office as Kázi of Bombay.

The plaint contains two counts: the first general, the second more special.

The first count alleges that ever since the 6th of June 1837 the plaintiff has held and been entitled to the office of Kázi of Bombay, and, as such, has been and is entitled to take for his own use the fees &c. of such office; that the defendant, on and since the 25th of December 1858, without any right or lawful authority, has exercised the said office, and taken the fees &c. belonging thereto to a large amount, and has thereby disturbed the plaintiff in the exercise of his office, and prevented him from receiving the amount of fees &c. so taken.

The second count alleges that the office of Kázi of Bombay is an ancient office, to which certain fees &c. have always been attached—amongst others, fees for the solemnisation and registration of marriages, for effecting and registering divorces, and for performing divers other civil and religious rites amongst the members of the Muhammadan community; it then alleges that the right of nomination to this office has for some two hundred years been, and still is, vested "in the Governor of Bombay for the time being;" that on the 6th of June 1837 Sir Robert Grant, "then being Governor of Bombay," appointed the plaintiff to fill the office of Kázi; that the plaintiff, by virtue of such appointment, then became, and ever since has been, entitled to hold, and in fact has held and still holds, the office, and has been and still is entitled to all the fees &c. of the office. The second count then alleges (in the same terms as the first) the usurpation of the plaintiff's office by the defendant, and his wrongful receipt, to a large amount, of the fees thereto appertaining.

To this plaint the defendant has pleaded,

1*st*, to both counts, not guilty.

2*nd*, to the first count, denying that the plaintiff has held or holds the office of Kázi of Bombay, as in the first count is alleged.

3*rd*, to the first count, denying that he has been or is entitled to take the fees &c. in the said count mentioned, as is therein alleged.

4*th*, the defendant has pleaded, to the second count, that the right of appointment to the office of Kázi of Bombay has not been, and is not, vested "*in the Government of Bombay*," as in the second count is alleged.

5*th*, to the second count, that the plaintiff did not, or does not, hold the office of Kázi of Bombay, as in the second count is alleged.

6*th*, to the second count, that he was not, nor is, entitled to the fees &c. in the said count mentioned, as therein is alleged.

Upon all these pleas the plaintiff takes issue.

It will be observed that the fourth plea, denying the right of appointment to the office of Kázi to be vested in the "*Government* of Bombay," is no answer in terms to the allegations in the second count which it professes to traverse, and which alleges that right to be vested in the "*Governor* of Bombay."

1861.

MUHAMMAD YUSSUB v. SAYAD AHMED.

In the course of the trial, after some discussion, it was directed that this plea should be amended, and the fourth plea in its amended form denies the right of appointment to be vested "in the *Governor* of Bombay for the time being," as alleged in the second count.

Upon these issues, the questions submitted to the judgment of the Court were substantially these:

Upon the first or general issue the question was, whether the defendant had, or had not, been guilty of disturbing the plaintiff in his office of Kázi, and of wrongfully taking fees appertaining thereto.

Upon the second and third issues the question was whether the plaintiff had, apart from all consideration as to the mode of his appointment, been entitled to hold, and had held, the office of Kázi since the 6th of June 1837, and whether, so holding the office, he was entitled to the fees &c. alleged to belong to it.

Upon the fourth issue the question was raised as to the right of the Governor of Bombay, for the time being, to appoint a Kázi.

Upon the fifth and sixth issues the question was whether by virtue of such appointment the plaintiff has, ever since it was made, been entitled to hold and has held the office of Kázi, and whether, so holding the office under such appointment, he was entitled to the fees &c.

The antiquity of the office, as averred in the second count, and the allegation therein also made, that certain fees &c. had always of right belonged to the office, were not denied by the pleas, and were not, therefore, in question in the cause.

At the trial the principal questions were—1*st*, as to the right of the "*Governor*" *personally* (as distinct from the "*Governor in Council*") to appoint; and 2*nd*, as to the right of the plaintiff as Kázi, assuming him to have been properly appointed, to set up a claim to fees (as fixed lawful payments appertaining to his office), and consequently as to his right to recover damages in an action on the case, for disturbance in his office, in respect of moneys paid to the intruder on performance of the duties of such office.

The other point—whether there had been what amounted in fact to a disturbance of the office—was less seriously contested.

Upon the first point, viz., the validity of the appointment, I substantially agree with the view taken by His Lordship the Chief Justice, viz., that as this was a possessory action, and the defendant a mere wrong-doer, it would be sufficient for the plaintiff to rely on his first count, and rest his right to recover on his twenty-one years' undisputed possession of the office. As, however, the validity of the appointment is expressly at issue on the pleading, and as it was a prominent subject of discussion on the trial, it may be as well to consider the points raised upon it, though not, in my view, essentially necessary to the determination of the plaintiff's rights in this action.

The office of Kázi of Bombay was clearly proved on the evidence to be an ancient office: it was admitted by the Advocate General in the course of the hearing that it had existed from the year 1756; and in all probability it dates back from a very much earlier period.

Ever since the general jurisdiction of British courts has been established over the Muhammadan, in common with other native inhabitants of Bombay, the *judicial* functions, exercised by the Kázi in places under the sole government of Muhammadan rulers, have been considerably curtailed: they appear now to be confined in Bombay almost exclusively to matrimonial causes.

The functions exercised by the Kázis of Bombay have for a long period been principally ministerial, but though principally ministerial they are by no means unimportant.

They are very accurately set forth in the preamble to the Bombay Reg. XXVI. of 1827, which recites that the office of Kázi exists in several towns subordinate to the Presidency of Bombay, "*and is necessary for the purpose of authenticating and recording marriages, attesting divorces,* and assisting in various other religious rites and ceremonies;" the same preamble refers to "the important uses of the office, *more especially in furnishing the means of settling questions of inheritance and succession between Muhammadans.*"

It would be difficult to give more concisely, and at the same time more accurately, than in the above passage, the result of the voluminous evidence taken before us as to the nature and importance of the functions exercised by the Kázi of Bombay. Except in so far as he exercises the powers of a judge in disposing of matrimonial disputes, the principal functions of the Kázi of Bombay are those of an *authorised registrar of marriages and divorces.*

1861.

MUHAMMAD YUSSUB v. SAYAD AHMED.

The result of the evidence taken before the Court appears to be that the marriage ceremony amongst Muhammadans *is valid to all intents and purposes as a binding contract in law and in conscience without the presence of the Kázi;* but if the parties wish to perpetuate the evidence of the marriage, the entry thereof in the Kázi's books is the best, the safest, and the most enduring medium of proof. So it is of divorce: a man by mere words, even without the presence of witnesses, can, according to Muhammadan law, effectually divorce his wife; but if he wishes the fact of the divorce to be legally attested he must go and get it entered on the records of the Kázi.

As one of the witnesses, the Naib Nekwáre, expressed it, "a divorce by a man's own act is a valid divorce as far as God is concerned, but not as far as man is concerned. How can the Kázi (when asked to remarry a divorced man or woman) know of a divorce having been granted unless it is entered in his books?"

Such being the nature of the office in Bombay, it appeared, on the evidence adduced before us, that the appointment to the office had, for a considerable number of years, been made here by a *sanad* running in the name of the Governor of Bombay for the time being.

The immediate predecessors of the plaintiff in the office of Kázi of whom any account was given at the hearing were—(1) Nuruddin; (2) Husen; (3) Muhammad Alí (appointed A.D. 1798 by Governor Jonathan Duncan); (4) Khutbuddin (appointed A.D. 1831 by Lord Clare). All these functionaries appear to have held office during life. At the death of Khutbuddin, in February 1837, a short interval ensued during which the functions of Kázi were exercised by one Ibráhim Nekwáre, the Naib or assistant both of Khutbuddin and of the present Kázi. At the end of this interval the plaintiff was appointed to the office of Kázi. His *sanad* is dated 6th June 1837.

That *sanad* is in this form:—

"I, Robert Grant, Knt., G.C.B., President of and for the affairs of the Honourable East India Company, and Governor of His Majesty's Castle and Island of Bombay, do hereby appoint Mahomed Yoosuf Saheb bin Mahomed Hassan Moorgay to be Cazee and head of all the Mahometans in Bombay, who are hereby required to pay him due obedience in all religious

matters, and the said Mahomed Yoosuf Saheb bin Mahomed Hassan Moorgay is accordingly authorized to administer all marriages and other religious rites and ceremonies relating or belonging to his said office, in which all due reverence and respect are to be shown him. Given at Bombay under my hand and seal this second day of Rubee-ul-Avul, corresponding with the 6th day of June A.D. 1837.

"By order of the Right Honourable Sir R. Grant, Knight, G. C. B., President for the affairs of the Honourable East India Company, and Governor of His Majesty's Castle and Island of Bombay and its dependencies.

(Signed) W. H. WATHEN,
Chief Secretary to Government
in the Judicial Department."

The only other original *sanad* produced before us was that of the 21st of May 1798, by which Jonathan Duncan, the then Governor of Bombay, appointed Muhammad Alí bin Husen to the office of Kázi: the form of this *sanad* is in the body of it (*mutatis mutandis*) identical with that appointing the plaintiff. The signature is different: it is signed by the Governor (which plaintiff's *sanad* is not) and countersigned by the then Persian Translator. The seal on the margin of the *sanad* of 1798 is that of the East India Company: the seal on the margin of the *sanad* of 1837 is too much defaced to be decipherable; but it may be observed that the *sanad* of 1798 has only the words "given *under my hand*" in the attestation clause; whereas the *sanad* of 1837 has the words "given under my hand and *seal*:" the inference, therefore, would probably be that the seal on the latter *sanad* is that of the Governor.

No instance was adduced of any *sanad* appointing a Kázi of Bombay in any form materially varying from the above.

It was pressed on our attention by the learned counsel for the defendant, and is certainly noticeable, that the form of *sanad* given in the Bombay Regulation XXVI. of 1827 (a Regulation passed ten years prior to the appointment of the plaintiff) for the appointment of Kázis in the Mofussil, bears on the face of it that it is the act not of the "*Governor*" personally, but of the "*Governor in Council*," and it is in the Governor in Council that the power of appointment is by the Regulation expressly vested.

1861.

MUHAMMAD YUSSUB v. SAYAD AHMED.

The Regulation form of *sanad* is this:—

"To A B &c. (L. S.)

In conformity with the provisions of Regulation XXVI. A.D. 1827, you, A. B., are hereby appointed to the office of Kázi in the——of———. You will not be liable to be removed from your situation while you discharge your duty with zeal and integrity under the Rules contained in the Regulations which now are or hereafter may be in force.

By order of the Governor in Council,

(Signed) C. D.,

Secretary to Government in the Judicial Department."

It was further observed that in the letter written by Mr. Willoughby, then Secretary to Government, under date of the 15th of February 1837, to Ibráhim Nekwáre, directing him to conduct the office of Kázi of Bombay after Khutbuddin's death, till his successor should be appointed, the style adopted is as follows:—"I am directed to inform you that the *Right Honourable the Governor in Council* has been pleased," &c.; and precisely the same form is adopted in the letter of the 2nd of June 1837, in which Mr. Wathen, the Chief Secretary, writes to the Naib: "I am directed by the *Right Honourable the Governor in Council* to acquaint you" that the present plaintiff had been appointed to the office of Kázi of Bombay.

It was also pressed on the attention of the Court that by the Bengal Regulation No. 39 of A.D. 1793 the appointment of Kázis throughout the districts over which that Regulation is enforced is expressly vested in the *Governor General in Council*.

On the part of the plaintiff various passages, industriously collected from Muhammadan law-books of high authority, were read to the Court, all unanimously concurring in the proposition that the appointment of Kázi vests in the Sultan or Chief of the State, and can never be rightfully exercised by the body of the Muhammadan community, with the single exception of the case, very rare in Muhammadan countries, in which a city or district is under absolute popular government, with no presiding executive magistrate.

These authorities were not contested or met by counter-authorities on the part of the defendant, but it was contended on his behalf that they merely went to show that the power of appointing to the office of Kázi was vested in the exe-

cutive government of the State for the time being, as distinct from the body of the people: it was contended that they did not show that the power of appointment was vested *personally* in the Chief of the State, as distinct from the executive government.

It was further contended that all the *executive* powers over the Town and Island of Bombay vested in the British Crown by the Cession Treaty of the 23rd of June 1661 were granted by the Crown to the East India Company by the Charter of the 27th of March 1678, and that these powers have from a very early period been exercised in Bombay on behalf of the East India Company by a Governor and three councillors. Reference was more particularly made to the 39th section of the Charter-Renewal Act of 1793 (the 33rd of Geo. III., c. 52), which provides "that all *orders and other proceedings* of the Governor and Council of Bombay shall be *expressed to be made by the Governor in Council, and not otherwise,*" and which also provides that such "orders and proceedings, previous to their being published or put in execution, *shall be signed by the Chief Secretary to the Council by the authority of the Governor in Council.*"

In fact the Act prescribes precisely the requirements which the Bombay Regulation of 1827 has strictly followed out in the form of *sanad* which it provides for the appointment of a Kázi in the Mofussil.

It was strongly contended for the defendant that the *sanad* of June 6th, 1837, by which the plaintiff was appointed, is, under the terms of the Act of 1793, insufficient on the face of it, inasmuch as, being "an order or other proceeding" of the Governor and Council of Bombay, it is not expressed to be made by the Governor in Council, nor signed by the Chief Secretary to the Council by the authority of the Governor in Council.

No doubt, if this *sanad* of 6th June 1837 is to be regarded as "an order or proceeding" of the Governor of Bombay in Council, within the meaning of Sec. 39 of Geo. III., c. 52, it would be irregular, for not following the form prescribed in that section of the Act; though even then it would not necessarily follow that the appointment made by virtue of such *sanad* was a void appointment.

But what evidence has been brought before the Court necessarily to lead it to the conclusion that the appointment

1861.
MUHAMMAD YUSSUB v. SAYAD AHMED.

of Kázi of Bombay vests not in the Governor of Bombay personally, but in the Governor of Bombay in Council, and, therefore, that the instrument embodying the appointment is an "order or proceeding" of the Governor of Bombay in Council within the meaning of the 39th section of the Act already referred to?

It is for the defendant to make out this position by clear and indisputable evidence. The general and well-known legal rule as to all those who for a length of time have exercised office unchallenged is that everything will be presumed in favour of the legality of their original appointment; and this presumption is especially strong as against a mere wrong-doer, like the defendant. Those who impeach that legality, especially when they do so on behalf of a mere wrong-doer, must make out a clear and strong case; it does not appear to me that such a case has been made out here.

It is, no doubt, quite true that the Executive Government of Bombay is, and for a lengthened period has been, vested in the Governor in Council; but it does not, therefore, follow that the *distribution of patronage and power of nomination to offices* have been exclusively so vested; the two things are quite distinct: the exercise of the powers of executive government is one thing, the distribution of patronage another.

One of the latest legislative recognitions of this plain distinction is to be found in the 78th section of the 3rd & 4th Wm. IV., c. 85 (A.D. 1833), which provides that the Court of Directors, with the approbation of the Board of Control, "shall from time to time make regulations for the division and distribution of the patronage and power of nomination of and to the offices, commands, and employments in the said territories, and in all or any of the Presidencies thereof among the said Governor General in Council, Governor General, *Governors in Council, Governors*," &c.

Now, how has the defendant shown that the appointment of Kázi of Bombay was a piece of patronage vested not in the Governor, but in the Governor in Council?

If the Kázi of Bombay is to be regarded as a judicial officer —as to some, though a comparatively trifling, extent he still is—the analogy derivable from English law and practice, where judicial appointments vest in the Crown, is undoubtedly in favour of the conclusion that the appointment of Kázi falls within the personal patronage of the Governor. In fact the

old principle of the English common law is that "The King is the fountain of all power and authority, and by his prerogative has the nomination of all officers originally:" Comyn's Digest, Vol. 5, p. 134, Tit. "Officer," 1 A.

The uncontested texts cited from Muhammadan law-books of high authority are all the same way.

Thus in p. 322 of the 2nd ed. of the Arabic work called "Anwari" (or "Lights") it is laid down: "It is incumbent on a *Chief* to appoint a Kazi in every town and the environs thereof, where there is no Kazi."

So at p. 328 of the Arabic work entitled "Tohfah," or "Gift," is this: "The appointer of the Kazi is the Chief or his deputy."

So in the famous Arabic book Fatáwa A'lamgirí ("The Visions of Aurungzebe"): "When *the Sultan* appoints a man to the office of Kázi of a certain town, he does not become the Kázi of the environs unless he is appointed to the office of Kázi of the town and its environs" (p. 337); and the same position is laid down in the "Fatáwa Khaji Khan" (Visions of Khaji Khan), using the same expressions: "When *the Sultan* appoints a man Kázi for a town" &c., and again, "when *the Sultan* appoints a man Kázi for a day" &c. (p. 132).

These passages undoubtedly point rather to a personal exercise of patronage by the Ruler or Governor, than to the corporate exercise of patronage by the Ruler or Governor in Council.

The direct oral testimony of the witnesses who were examined as to the existing mode of appointing Kázis in districts governed by Muhammadan rulers is to the same effect: the most respectable of these witnesses—Hazi Ullá, the Káshmíri, a witness called not for the plaintiff, but for the defendant—deposed distinctly that the appointment of Kázi always rested with the ruler or governor, and that the Kázi of Káshmír, when he left that province thirty years ago, was appointed directly by Runjeet Singh, its then ruler.

The Bombay Regulation of 1827, no doubt, vests the appointment of Kázis for the Mofussil in the *Governor in Council*: but that Regulation, it is admitted, does not apply to the appointment of Kázi of Bombay, from long usage or otherwise: if it is not to be inferred from the limited scope

1861.

MUHAMMAD YUSSUB v. SAYAD AHMED.

of that Regulation, it is at all events quite consistent with it, that the patronage to the office of Kázi of Bombay stood, and was known to stand, on a peculiar footing; that, from long usage or otherwise, the appointment to the office of Kázi of Bombay had become, and was known to have become, vested in the Governor of Bombay for the time being; whereas the appointment of Kázi for the Mofussil, comprising districts many of which in 1827 were recent acquisitions, had never formed, or been regarded as, part of the Governor's personal patronage.

The Bengal Regulations of 1793 obviously furnish no ground for a conclusion either way as to the patronage of the office of Kázi of Bombay.

The two letters written to Ibráhim Nekwáre in 1837, the one by the then Secretary in the Judicial Department, informing Nekwáre of his own temporary appointment as deputy, and the other, by the then Chief Secretary, announcing the permanent appointment of the plaintiff to the office of Kázi, both run *in the name of the Governor in Council*: but it is surely far more probable that a Secretary in penning letters of this kind might inadvertently follow the routine tenor of official communication, than that a formal instrument like a *sanad*, conferring an important office for life, should be erroneously drawn up in the name of the Governor, when it ought to have been in the name of the Governor in Council. It does seem scarcely credible that such an error as this should have been twice deliberately committed after the plain directions of the 39th clause of the Act of 1793 (*d*); that it should have been committed by them who, as the Bombay Regulation of 1827 shows, were clearly aware of what that 39th clause required, and fully competent to prepare adequate forms for carrying these requirements into effect; that no *sanads*, except in this form, should have been adduced before us, and that *sanads* in a form which, if erroneous at all, was so manifestly and flagrantly erroneous, should have been signed, as in one instance was the case, by the Governor, and countersigned, as in another instance was the case, by the Chief Secretary.

Even where no presumption existed either way, it would be very difficult, on this state of facts presented to the Court, not to come to the conclusion that some good reason

(*d*) 33 Geo. III., c. 52.

existed for drawing up the *sanads* appointing to the office of Kázi of Bombay in this peculiar form; but in a case where the plaintiff has been an office-holder for a lengthened period, and the defendant, who is sued as an intruder into that office, has admittedly no valid counter-title to rely on,—is in fact, as regards the plaintiff, a mere wrong-doer,—the Court is bound to presume, till the contrary is shown, that the original appointment to the office was legal and valid. Can it be said that the contrary has been shown here? Can it be said that an appointment to the office of Kázi of Bombay, purporting to be by the Governor of Bombay for the time being, has been satisfactorily shown to be so clearly illegal and invalid as to compel the Court to act counter to the presumption of law in favour of the office-holder, and declare the appointment of the present plaintiff under the *sanad* of June 6th, 1837, to have been a void appointment? I am of opinion that nothing has been adduced before the Court to compel it to come to that conclusion, and I, therefore, think that the plaintiff is not debarred from bringing the present action on the ground of his not having been legally appointed Kázi of Bombay.

The next main question was, whether, assuming the plaintiff to have been legally appointed Kázi of Bombay, he could, as such, maintain such an action as the present for disturbance in his office and privation of the fees and emoluments thereof.

The decision of this question mainly turns upon the point whether it is, or is not, made out by the evidence that the sums paid to the Kázi of Bombay for performing the duties of his office were, properly speaking, fees, that is, fixed and certain sums accustomably paid by way of remuneration for official work done; or whether they were mere gratuities of uncertain obligation and fluctuating amount.

The *sanad* makes no mention of fees, nor, in order to sustain such an action as the present, is it necessary that it should: if the office were, as it is admitted to have been, an ancient office, and if fees were accustomably paid in respect thereof (and whether they were so or not is a question of evidence), then the grant of the office carried the right to take fees, though not mentioned therein (see the authorities collected in Bacon's Abridgment, Tit. "Offices and Officers" G., Vol. VI., p. 28).

1861.

MUHAMMAD YUSSUB v. SAYAD AHMED.

The fees in respect of the privation of which damages are sought in this action are fees claimed, not by grant, but by custom, "long-established usage," which, as the witness Moulvi Muhammad Ismáel said, "has amongst Muhammadans the force of law, if it is in conformity with the law, *i. e.*, if it is not contrary to the Korán or the doctrine laid down by the twelve Imáms." Fees so established by ancient usage are regarded even in England as having an equal sanction to those established by Act of Parliament. I say *even* in England, for the constitutional principle established in England by Magna Charta, that no tax or charge shall be imposed on a man except by the assent of his representative in Parliament, early introduced into the English Common Law a jealousy of new fees attached to any office created by the executive, which could hardly, perhaps, exist in a country like India, wherein even Englishmen lose, or at least waive, the right of objecting to a tax because imposed without the consent of themselves or their representatives. That this was the true ground of objecting to the imposition, except by Act of Parliament, of new fees of office, is clear from the language of Lord Coke, who, after citing the Stat. 34 Ed. I. (one of the numerous confirmations of Magna Charta), proceeds: "Hence no new office can be erected with new fees, or old office with new fees, for that is a tallage (*tallagium*) on the subject which cannot be done without common consent by Act of Parliament:" 2 Inst. 533.

But yet, even in England, it has been held that an office erected *for the public good*, though no fee is annexed to it, is a good office; and that the party, for the labour and pains which he takes in executing it, may maintain a *quantum meruit*, if not as a fee, yet as a competent recompense for his trouble (see authorities collected in Bacon's Abridgment, Tit. "Fees," Sec. A).

The two great tests are these: have the sums claimed as fees been paid in virtue of an established and ancient usage; and have they for a lengthened period been fixed, and certain in their amount, so as to distinguish them from mere fluctuating gratuities. The application of this latter test is well illustrated by the case, referred to in the arguments, of *Boyter* v. *Dodsworth* (*e*). That was an action for money had and received brought to recover back-fees received by the defendant to the use of the plaintiff as sexton of

(*e*) 6 Term Rep. 681.

Canterbury Cathedral. On the trial it appeared that the alleged fees were certain gratuities received by the defendant for showing the cathedral to strangers (the right of so showing the cathedral having been expressly granted to the plaintiff). Mr. Justice Buller, before whom the case was tried, called on the plaintiff's counsel to prove that there *were certain known and accustomed fees annexed to the office*, and that the defendant had received such fees. It being admitted that there were no such regular fees, but that it was usual for different persons to give what sums they pleased, the plaintiff was nonsuited. The plaintiff's counsel having moved to set this nonsuit aside, the Court refused to do so. Lord Kenyon said: "There is no ground on which this action can be supported. *If there had been certain fees annexed to the discharge of certain duties belonging to this office and the defendant had received them*, an assize would have lain; and the action for money had and received to recover fees has always been considered as being substituted in place of an assize. But there is no pretence to say that an assize will lie for a gratuity for money given which the party might have refused to give if he had pleased. If there had been regular fees due for the duties performed and the defendant had intruded into the office, the plaintiff might either have supported an action for money had and received, *or for disturbing him in his office.*"

Sir William Ashurst said: "This is a *damnum sine injuriâ*, for which no action will lie."

Mr. Justice Grose: "If there were any appropriated fees, the case would be different; but the sums of money paid to the defendant were not fees, but gratuities."

I have cited this case at some length, because it seems to lay down very clearly the principles on which such an action as the present can be supported; if the sums claimed as fees, or as compensation for work done, are certain fixed payments annexed to the discharge of official duties, the action for damages will lie in respect of their privation by a wrongful intruder into the office; if they are mere gratuities of uncertain amount and of no legal obligation, their privation is a mere *damnum sine injuriâ*, for which no action will lie.

Now in this case the evidence, as it seems to me, incontestably shows that the sums accustomably taken by the Kázis of Bombay in respect of marriages, remarriages, divorces, summonses, &c., were fixed and certain payments annexed to

the discharge of official duties, and were, therefore, sums in respect of the privation whereof by a wrongful intruder an action either for money had and received, or for disturbance of the office, will lie.

In early times everywhere, and at the present day in most Asiatic countries under Muhammadan rulers, the Kázis, it seems, were supported by State funds, or by land grants. In Mecca and Medina their support has always, it appears, been a charge on the public treasury; under the Peshwás of the Dakhan *ináms* were assigned to them; in Káshmír, at the present day, they are maintained by *jáhágirs*.

In Bombay no grants of this kind for the maintenance of Kázis appear ever to have existed: the Kázis of Bombay throughout the entire period covered by the evidence have been maintained exclusively by fees, or at all events by payments in the nature of fees, *i.e.*, by certain ascertained sums attached by way of remuneration to the performance of official acts.

And for a very lengthened period—from A.D. 1776 downwards—as the plaintiff, by the books of his predecessors, was prepared to prove, and as the defendant, dispensing with the formal proof, admitted, these payments have been on a uniform scale.

The scale is as follows:—

	Rs.	a.
For first marriages.....	2	8
For second and subsequent marriages...	5	0
For divorces	5	0
For summonses (in matrimonial causes).	1	4
For extracts from registers	2	8

So well understood and generally acquiesced in was this scale of payments, that the defendant, as will presently appear, seems never in one instance to have deviated from it throughout the two years and a quarter during which, as the plaintiff alleges, he has disturbed him in the enjoyment of his office.

These fees were not voluntary payments; as one of the witnesses expressed it: "If the Kázi attends, the fee must be paid: if one wants the Kázi he sends for him." "The Kázi's fee," says another witness, "is a remuneration for work done in keeping records, making entries, &c." No instance was recollected of any party being sued for

refusing to pay fees; but it was proved that in point of fact no Muhammadan reasonably well off, who availed himself of the services of the Kázi, ever did refuse to pay these fees. No instance of such refusal was adduced before us, and it is only due to the industry and care with which the defendant's case was got up, to say that had such instances existed they would have been brought before us. Persons in very needy circumstances, or holding offices of peculiar sanctity, were occasionally excused from payment, but these were rare exceptions: as a rule, the customary fees were invariably paid by all Muhammadans who resorted to the Kázi for the purposes of marriage, divorce, settlement of matrimonial disputes, procuring extracts from the registers, &c.

The marriage fee was generally paid beforehand: persons on behalf of the bride and bridegroom attended at the Kázi's office, and informed him of the names of the parties, and a few other particulars, of which the Kázi or his Naib made an entry: the fee was then paid, and the day (generally the next day or the next but one) being fixed for the marriage, the Kázi, if specially invited, or if not, his Naib, attended and assisted in performing the ceremony.

When the Kázi himself was invited, as appears generally to have been the case among the wealthier Muhammadan families, it was almost invariably the custom to make him presents of shawls or piece-goods; these were *gratuities*, as distinct from fees, and as such (though considerable in amount, and capable of being averaged with some degree of certainty, taking one year with another) they were very properly admitted by the learned counsel for the plaintiff not to form an item in estimating the damages, if any, which the plaintiff has sustained by reason of the alleged misconduct of the defendant. These presents were gratuities, which, though generally given, might have been refused, and the privation of which, therefore, according to the principle laid down in the case of *Boyter* v. *Dodsworth*, is *damnum absque injuriâ*, a loss for which there is no legal right of action.

On this second branch of the case, then, I am of opinion, on the evidence, that the plaintiff, as properly appointed Kázi of Bombay (Sanadi Kázi, to use his own expression), was and is entitled to take for his own use certain customary payments as the proper fees appertaining to his office, and is consequently entitled to bring the present action for damages

1861.

MUHAMMAD YUSSUB v. SAYAD AHMED.

against any one who, by wrongfully intruding into his office has deprived him of such his fees, or a portion thereof.

It only remains to inquire whether the defendant is proved to have wrongfully intruded into the office of Kázi, and taken payments from the Muhammadan community as fees appertaining to the exercise of the functions of such office.

It appears that in July 1858 the plaintiff, as Kázi, assisted at a marriage under circumstances which gave considerable offence to certain members of an influential Muhammadan family. An agitation was got up by the active instrumentality of a lawyer's clerk, and petitions were presented to Government for the removal of the plaintiff from his office. Government directed an inquiry, which took place before the Senior Police Magistrate of Bombay, assisted by several Kázis, the result of which was an entire vindication of the plaintiff from all the charges brought against him.

Meanwhile a portion of the Muhammadan community had taken the matter into their own hands, and in December 1858, before the Government inquiry had even been instituted, had elected the defendant to perform the functions of Kázi.

The citations from Arabic text-books, already referred to, clearly show that such popular election could confer no shadow of legal right; it is abundantly clear that the Executive Government, either through its chief in person or in its corporate capacity, can alone lawfully appoint a Kázi: such a functionary, where any executive government, either Muhammadan or non-Muhammadan, exists, can in no case be lawfully elected by the body of the Muhammadan community.

From the 25th of December 1858, down to the commencement of the present action, on the 22nd of November 1866, the defendant is clearly shown by the evidence to have been in the habit of registering and assisting at marriages and divorces, and performing the other functions proper to a Kázi. He is shown to have done this as Kázi. He is shown to have charged precisely the same fees, 2½ rupees for first marriages, 5 rupees for remarriages, 5 rupees for divorces, &c., as for a very lengthened period had been accustomably taken by the lawfully appointed Kázi of Bombay.

His account-books were produced before us; one of the functionaries who had acted as his Naib gave explicit evidence of having demanded and taken regular marriage and

divorce fees on his account and by his direction; two witnesses were produced whose divorces had been registered by him or his Naib, from whom the fee of five rupees had been in his presence demanded, and by whom in his presence such fee had been paid.

The heading of the first account-book of the new functionary showed clearly by what assumed authority and in what assumed character, these fees were taken.

It runs thus: "The account-book of the fees for marriages of *the high Muhammadan Court* of the Town of Bombay has been kept according to the former custom from (a Muhammadan date corresponding with) the 25th of December 1858."

The heading of a subsequent account-book is still more explicit; it runs thus: "By order of all the Mussalmáns, and the whole community of Mussalmáns of the flourishing town, the account-book for the *income from fees for marriages of the whole Muhammadan community* from (a Muhammadan date corresponding with) the 20th of July 1860, has been delivered over to His Excellency Sayd Ahmed Shah" (the defendant).

Arrangements are there made for apportioning the proceeds of the moneys received as fees: so much to the Muhammadan community, so much to servants, and other disbursements, the surplus to the defendant for his own use including therein the rent of "a house necessary for the *Muhammadan Court.*"

The expression "Muhammadan Court," it was proved by oral testimony, could, in Bombay, only apply to the Court of the Kázi.

It seems difficult to imagine more conclusive evidence of intrusion into an office than is supplied by the documentary and oral testimony adduced before the Court on this part of the case.

That being so, it remains, in the last place, to estimate the amount of damages to which, on the evidence, the plaintiff was entitled.

It was clearly shown that since the period of the defendant's intrusion the income of the plaintiff had very considerably fallen off: for the year ending 20th August 1857 the aggregate of his income from fees and gratuities was Rs. 3,917-8-0; for the year ending 20th August 1858 it was Rs. 3,778-12-0; for the first year subsequent to the intrusion it was only Rs. 1,440.

1861.
MUHAMMAD YUSSUB v. SAYAD AHMED.

There is no doubt, therefore, that the plaintiff has sustained substantive pecuniary loss.

As, however, part of his aggregate income arose out of gratuities, the privation whereof gives no right of action, the preferable mode of estimating the damage he has sustained by privation of fees is to ascertain the amount of fees actually taken by the defendant, from the period of his intrusion in the office, down to the time at which the present action was commenced.

Having regard on this point to the evidence of Ibráhim Nekwáre, the Naib, who examined the defendant's books of accounts, it appears that the aggregate of the sums received by the defendant for fees within the period specified is Rs. 4,713, and this, in my opinion, ought to be the measure of the plaintiff's damages, together with all costs of the suit.

1865.
July 26.

Special Appeal No. 127 *of* 1865.

BASVANTRA'V KIDINGA'PPA' ..... *Appellant.*
MANTA'PPA' KIDINGA'PPA' ..... *Respondent.*

Primogeniture—Hindu Law—Custom—Family Custom—Descent of Ancestral Estate.

A custom in the case of a petty Hindu family that the family estate shall descend to the eldest son, the second and other sons being entitled to maintenance only, cannot be supported.

Semble, that a different rule would apply to such a custom prevailing among Thakurs and Chiefs of the Bombay Presidency.

THIS was a Special Appeal from the decision of F. H. Shaw, Acting District Judge of Dhárwár, in Appeal Suit No. 263 of 1862, confirming the decree of the Ṣadr Amín of Bágalkot.

The case was argued before FORBES and NEWTON, J.J.

Reid (with him *Fakirápá Lingápá* and *Dhirajlal Mathurádás*) for the appellant.