1865.
Feb. 6.

Special Appeal No. 889 *of* 1864.

SHEK MUHAMMAD.....*Appellant.*
SHEK IMA'MUDDIN.....*Respondent.*

Muhammadan Law—Bequest—Assent of Heirs.

Held that the bequest by a married woman of the whole of her estate to her brother, without the assent of her husband, was invalid according to the Muhammadan law.

THIS was a special appeal from the decision of C. B. Izon, Acting Assistant Judge of the Puná District, in Appeal Suit No. 45 of 1864, reversing the decree of the Principal Ṣadr Amín in Original Suit No. 106 of 1863.

The facts of the case were as follows:—A sister of the plaintiff (special respondent) had inherited certain property from a former husband, after which she married the defendant. A short time before her death she made a writing leaving that property to her brother the plaintiff, who, after her death, sued the defendant to recover possession thereof. The instrument was filed No. 3 in the suit.

The Principal Ṣadr Amín threw out the claim, on the 12th of December 1863, on the ground: that at the time the writing was made the deceased was not in possession of her faculties; that it was opposed to the Muhammadan law, inasmuch as the particulars of the property were not described in it; that the deceased had no authority to make it while her husband was alive; and that there was no evidence that any particular property belonged to the deceased.

In appeal against this decision, the Acting Assistant Judge held, that the property claimed belonged to the deceased; and that she was entitled to leave it to her brother, as she had done by exhibit No. 3, although her husband was alive. He also held that the deceased was in possession of her faculties when the instrument was made. He, therefore, allowed a portion of the plaintiff's claim, the rest having been abandoned.

The case was heard before COUCH, NEWTON, and WARDEN, JJ.

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SHEK MUHAMMAD v. SHEK IMA'MUDDIN.

Vishvanáth Náráyaṇ Mandlik (with him *Kivámuddin Miyánji*), for the special appellant, the defendant:—The instrument relied upon by the plaintiff is either a gift or a will. If a gift, it is invalid by the Muhammadan law; because it was not followed by possession: 3 Hidayah, 291; Macnaghten, M. L., Chap. v. § 4. If a will, it is equally invalid; because only one-third of the estate can be disposed of by will, where there are heirs: 4 Hidayah, 468; "and a legacy cannot be left to one of the heirs, without the consent of the rest:" Macnaghten, Chap. VI., § 3. In this case the husband, who was an heir, did not consent.

No one appeared for the respondent.

COUCH, J.:—The instrument No. 3 is in reality a will, as it contains the words: "the ownership of the property is to be in me whilst I am alive." That being so, we hold it to be invalid, according to the Muhammadan law; as it is a bequest by the testatrix of the whole of her property, which it was not lawful for her to make.

We, therefore, reverse the decree of the Assistant Judge, and confirm the decree of the Principal Ṣadr Amín: costs upon the respondent throughout.

Appeal allowed.

NOTE.—"A bequest to a stranger is valid without the consent of the heirs, but not beyond a third of the estate, unless assented to by them after the testator's death. * * * When a man bequeaths his whole estate, having no heirs, the bequest takes effect, and there is no occasion for any assent on the part of the *beit-ool-mal*, or public treasury (though it is the *ultimus hæres*)."

"A bequest to an heir is not lawful, according to 'us,' without the assent of the other heirs. If it be made to an heir and a stranger, it is valid as to the share of the stranger, and dependent as to the share of the heir on the permission of the other heirs. If permitted by them, it is lawful; and if not permitted by them, it is void,—no regard being had to a permission granted in the lifetime of the testator; so that they may afterwards retract."

"There are three different kinds of heirs: *ashab-ool-furaiz*, or sharers; *usubát*, or agnates; and *zuvool arham*, or uterine relatives. The last two have been termed, from their position in the inheritance, residuaries and distant kindred (by Sir W. Jones in his translation of the *Sirajiyyah*)."

"The two sharers who are entitled for special cause" (as distinguished from those whose rights are founded on *nusub*, or kindred) "are the husband and wife." Baillie, Dig. M. L., Lond. 1865, pp. 614, 615, 685, 689.—ED