1869
Oct. 8.

Appeal No. 153.

Kazi Gulam Alli bin Kasi Ismail. ... *Appellant.*

H. H. Aga Khan. ... ... *Respondent.*

Evidence—Contradiction of witness on collateral question.

The rule limiting the right to call evidence to contradict witnesses on collateral question excludes all evidence of facts which are incapable of affording any reasonable presumption or inference as to the principal matter in dispute; the test being whether the fact is one which the party proposing to contradict would have been allowed himself to prove in evidence.

The plaintiff in this suit, who was a Suni Mussalman, claimed to be entitled, as hereditary trustee or *motiwallah*, to the possession and superintendence of a piece of ground which he alleged had been appropriated by his great-grandfather about 125 years before suit brought as a burial-ground for himself and the members of his family, and for such Suni Mussalmans as he might give permission to use the same. The piece of ground claimed was situated to the north of a burial-ground of the Khoja Muhammadans, from which at the time of suit it was not divided, and through which the plaintiff claimed a right of way for himself and all Suni Mussalmans when he permitted to use the ground in question. The plaintiff alleged that this piece of ground had been, up to the year 1863, separated from the Khoja burial-ground by a low stone boundary wall, and that in the same year the ground had been covered with about 50 tombs of chunam and about 200 tombs of loose stones, all being the tombs of members of his own family and of other Suni Mussalmans; that in the year 1863 the defendant had removed the low stone boundary wall and the Suni tombs, and had excluded the plaintiff from the ground in question, and had possessed himself of it. The plaintiff prayed, as *motiwalah* to be declared entitled: 1, to the possession and superintendence of the ground in dispute; 2, to the right of way claimed by him; and, 3 to damages.

The defendant denied that the piece of ground claimed had ever belonged to the plaintiff or his ancestors, and on the

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other hand alleged that it formed portion of the Khoja burial-ground. He denied that there ever had been any such tombs upon it as the plaintiff alleged, and also denied the existence of the low stone boundary wall.

The case was tried by Arnould, J., in the First Division Court in July and August 1868.

White, *Dunbar*, and *McCulloch* for the plaintiff.

The Honourable L. H. Bayley (Advocate General), *Pigot*, and *Cooper* for the defendant.

The oral evidence given for the plaintiff and defendant respectively was very contradictory. No title-deeds were produced on either side, and Allarakhia Sumar, the Mukki of the Jamat property, having charge of the Khoja burial ground, who was called as a witness for the defendant, stated that there were no title-deeds of the Khoja burial-ground, except of a small piece recently purchased in 1856. In cross-examination by Mr. Dunbar, this witness said ("We have not any title-deeds of the *kabarasthan*, nor have we ever had. I have never seen any since I became Mukki. The property stands in the name of Ibrahim Kassam and Karimalli Jivraj. Some few years ago I attended in person, for the purpose of getting this burial-ground registered under the Municipal Act; I believe in 1865. I applied to have it registered in the names of myself and Kaka Paddamsi. It was registered in our names afterwards. We got notice from the Municipal Commissioner to attend his office about the registry. We found the Suni Khojas, Ahmad Habbib and Rahim Hansraj, there.*** Previously it stood in no one's name, as far as I know. On applying to the Municipal Commissioner we took no title-deeds of the ground. I produced no title-deeds relating to this *kabarasthan*, because we had not got any.

Dunbar appiled to be allowed to call Ahmed Habbib and one Fazul Nur, to show that, before the Muncipal Commissioner, Allarakhia Sumar produced title-deeds of this burial-ground.

The application was refused by Arnould, J., on the ground that it was an application to be allowed to contradict

Allarakhaia Summar on a matter not involved in any of the issues. 1869

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Dunbar also applied to be allowed to call certain Ghatis who it was alleged were present at the destruction of the tombs of the defendants, and had thrown the bones taken from them into a large quarry-hole on the ground which had been subsequently filled up.

This application was also refused.

The court took time to consider its judgment, which eventually, on the 10th November 1868, was given in favour of the defendant.

From this judgment the plaintiff appealed generally upon the evidence, and specially upon the ground of the refusal of ARNOULD J., to receive the evidence of Ahmad Habbib and Fazul Nur, in contradiction of Allarakhia Sumar, and of his refusal to allow the Ghatis to be called.

The appeal was argued before Couch, C.J., and MELVILL, J., on the 2nd, 3rd, 4th, 10th, and 11th September 1869.

McCulloch (with him *White*, Advocate General) for the appellant.

Ferguson and *Latham* for the respondent.

Cur adv. vult.

8th October 1869—COUCH, C.J. (After stating that the substantial questions raised by the issues were, whether the plaintiff was entitled as trustee and *motiwallah* to the burial-ground described in the plaint, and whether the defendant had done any wrongful acts for which the plaintiff was entitled to sue, and after commenting upon the oral and documentary evidence which in the opinion of the Court established the case of the defendant, continued):—It only remains to notice the objection that the learned Judge refused to receive evidence which was tendered. In the course of the cross-examination of Allarakhia Sumar, who had been Mukhi of the Khoja Jamat for about 14 years, and had had the management as part of the Jamat property of the Khoja burial-ground, he said, "We have not any title-deeds of the *kabarasthan*, nor have we ever had. I have

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never seen any since I became Mukhi"; and that on his applying to the Municipal Commissioner after the judgment in the suit between the Advocate General and the present defendant to have the burial-ground registered in the names of himself and Kaki Padamsi, he produced no title-deeds relating to this *kabarasthan*, because they had not got any; and at the end of his cross-examination, "I am quite sure no title-deeds relating to the *kabarasthan* were produced." Mr. Dunbar, the plaintiff's counsel, applied to be allowed to call Ahmedbhai Habibbhai and Fazal Nur Muhamad to show that before the Municipal Commissioner Allarakhia Sumer produced the title-deed of this burial-ground, which was refused by the Court as being "an application to contradict Allarakhia Sumar on a matter not involved in any of the issues named." It is frequently a nice question whether a particular matter is one upon which a witness may be contradicted by other witnesses. The reason of the rule which restricts the right is to do so that is an object of great importance to confine the attention of the jury as much as possible to the specific issues. Without some rule, many collateral questions of fact might be raised in the course of a long trial; and the specific questions to be determined be lost sight of. At the same time it is desirable that any evidence should be admitted which may assist in determining the respective value of conflicting testimony. And where the trial is by a Judge and not by a jury, there is probably less reason for the rule. We think the rule is well stated in Greenleaf on Evidence, Sec. 52, as excluding all evidence of facts which are incapable of affording any reasonable presumption or inference as to the principal fact or matter in dispute. According to Pollock, C. B., the test is whether the matter is one which the party proposing to contradict would have been allowed himself to prove in evidence. *Attorney General* v. *Hitchcock* (*a*). Now to apply that test in the present case. If the defendants had any title-deeds relating to this burial-ground, they might be expected to contain some description of it, and if they did, the title-deeds supported by the acts

(*a*) 1 Exch. 91. 99.

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of ownership sought to be proved would have been material evidence. A claim resting upon mere acts of ownership is very different from one resting upon title-deeds supported by acts of ownership. And in determining upon the value of evidence of acts of ownership, and the inference to be drawn from them, it is important to know whether the title deeds have been lost, or there are none, or whether they are purposely kept back. We think, therefore, that the learned Judge ought not to have refused to receive the evidence. But then we have to consider whether if the evidence is received, it ought to vary the decision. If it ought not, its rejection is not a ground for reversing the decree; and it would be useless for us to exercise our power, and take it. Now, the plaintiff not having in the course of his case called for the production of the title-deeds, or suggested that, if proved, they would afford evidence in his favour, cannot now be allowed to make that suggestion. We must simply consider that the title-deeds, if there are any, would not assist the defendant; and in the view which we take of this case, we are of opinion that the existence of title-deeds, if the witnesses should prove it to our satisfaction (and they would be open to the observation that they have a strong bias against the defendant), would not affect the ground upon which we have come to a conclusion in the defendant's favour. Then as to the evidence of the Ghatis, we think that little, if any, reliance could be placed upon it. As new matter, discovered after the plaintiff's case was closed, it ought not to be admitted, unless it is such as might probably have occasioned a different determination. In our opinion this cannot be said of it.

Decree confirmed with costs.

Attorney for the plaintiff—*Khanderao Moroji.*

Attorneys for the defendant—*Dallas and Co.*