committed" regarding it, when such order as appears right for the disposal of the property may be made. It is clear that the 2nd Class Magistrate did not consider that any offence had been committed in respect of the property in question: therefore, Section 419 gave the District Magistrate no jurisdiction to interfere. On this ground the Court will cancel his order. Whatever may have been the merits of the case, the Magistrate of the District had no sort of right to assume to himself the functions of a Civil Court.

It is to be regretted that the Court is unable to afford to the applicant any adequate remedy for the wrong done her.

Order cancelled.

[APPELLATE CIVIL JURISDICTION.]

Before Sir M. R. Westropp, Knt., Chief Justice, and Mr. Justice Melvill.

April 5.

JAMAL WALAD AHMED (PLAINTIFF AND APPELLANT) *v.* JAMAL WALAD JALLA'L AND OTHERS (DEFENDANTS AND RESPONDENTS.)*

Muhammadan Law—Appointment of a Kazi—Qualification for that office—Regulation XXVI. of 1827—*Act XI. of* 1864.

The enactment of Bombay Regulation XXVI. of 1827 was adverse to any supposition that the office of Kazi could be hereditary. The repeal of that Regulation by Act XI. of 1864 left the Muhammadan Law as it stood before the passing of that Regulation; and that law sanctioned no grant of such an office to a man and his heirs.

The appointment of Kazi lies exclusively with the sovereign, or other chief executive officer of the State, and ought to be made with the greatest circumspection with regard to the fitness of the individual appointed; and though the sovereign may have full power to make the *vatan* attached to the office of Kazi hereditary, yet he has, under the Muhammadan Law, no power to make the office itself so.

In the absence of an established local custom to that effect, the office of Kazi is not hereditary. *Quære*—Whether such a custom would be valid?

Special Appeal No. 343 of 1876.

1877.

JAMA'L WALAD AHMED v. JAMA'L WALAD JALLA'L.

THIS was a special appeal from the decision of G. Druitt, Assistant Judge at Dharwad, affirming the decree of Shrinivasrao Krishna, 2nd Class Subordinate Judge of Hávri. The plaintiff, claiming through the original grantees of two *sanads* of 1639 and 1663, sued to establish his hereditary right to officiate as Kazi of Hávri, in which he alleged he had been disturbed by the defendants. Both the Lower Courts dismissed the suit, the Subordinate Judge being of opinion that it was barred by the Law of Limitation, and the Assistant Judge, in appeal, being of opinion that the suit was not maintainable, for the reasons given in the following extract from his judgment:—

"I am in doubt whether such an action as this can be maintained after the repeal of Regulation XXVI. of 1827 by Act XI. of 1864. No cases have been decided by the High Court since the passing of that Act. In this district such claims have been awarded as a matter of course, but in the case of the Kazi of Bombay, *Muhammad Yussub* v. *Sayad Ahmed*,[1] I find that Sausse, C.J., decided that appointment by the Government was an essential condition of holding the office of Kazi, and he further stated distinctly that he did not decide that the presence of the Kazi was necessary for the legality of marriages among Mussalmans. Considering these opinions, I should hesitate to decide that this claim would lie."

Shámráv Vithal for the appellant:—The Lower Court was wrong in holding that the suit was not maintainable because Regulation No. XXVI. of 1827 was repealed. On the contrary, if that Regulation had not been repealed, it would have barred the present action on the ground that the plaintiff or his predecessor in title did not hold a *sanad* from Government as required by Section 1, Clauses 1 and 2 of that Regulation. But the repeal of that enactment has dispensed with the necessity of such a *sanad*. The law relating to the office and appointment of a Kazi is fully discussed in *Muhammad Yussub* v. *Sayad Ahmed.* [2]

The plaintiff bases his claim upon two *sanads*, which were granted by the then ruling sovereign to persons under whom the

(1) 1 Bom. H. C. Rep., Appx. xviii. (2) 1 Bom. H. C. Rep., Appx. xviii.

plaintiff claims. These *sanads* were granted, respectively, in A.D 1639 and 1663. They clearly show that the office of Kazi was granted hereditarily.

Shántárám Náráyan for the respondent:—Regulation XXVI. of 1827 was based upon the principle of Muhammadan Law regarding the appointment of a Kazi. It is a matter of regret that that enactment is repealed, as observed in *Sayad Abdul* v. *Sayad Hasham.*(1) What was awarded in that case was inám land attached to the office of Kazi, and not the office itself.

WESTROPP, C.J.:—This suit is brought for a declaration of the right of the plaintiff to be Kazi of the taluka of Hávri in Dharwad, and to recover certain fees appertaining to that office received by the first defendant from the second and third defendants, and to restrain the first defendant from disturbing the plaintiff in that office.

The plaintiff claims under *sanads* of 1049 Hijri (A. D. 1639) and 1074 Hijri (A. D. 1663), purporting to be granted by the Bijápur Government to persons whom he alleges to have been his ancestors. Those *sanads* rather treat the grantees as Kazis already than assume to create them Kazis, and confer land and other benefits upon them in respect of a *musjid* established, or to be established by them, and for lighting the same, and for the reading of prayers and sacred books, as well as performing the usual duties of Kazis, and would appear to contemplate the maintenance of the *musjid* and the reading of prayers, and performance of the duties of Kazis, as well by the descendants of the grantees as by the grantees themselves.

Sayad Abdul v. *Sayad Hasham,*(2) decided on the 4th October 1876, has been mentioned to us, but that suit was for the recovery of land in the taluka of Gadag and district of Dharwad granted by *sanad* of A. D. 1660 in inám to Sayad Kale Mula, who combined the offices of Khatib (preacher) and Kazi, and was not such a suit as we have here, viz., for a declaration of the plaintiff's exclusive right to the office of Kazi in the taluka of Hávri, and for fees paid by the second and third defendants to the first

(1) Sp. Ap. 56 of 1873; *vide* note *infra*. (2) Sp. Ap. 56 of 1873; *vide* note *infra.*

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defendant for duties performed by him as a Kazi in the taluka of Hávri, and for an injunction against his disturbance of the plaintiff in his alleged office. In the Gadag case, moreover, proof of custom, that the office of Kazi had been enjoyed hereditarily for 200 years together with the inám, was given. It was not, however, in that case decided that the descendant of the *sanadi* Kazi could have maintained an action for fees against an alleged intruder, or that the sovereign could grant such an office so as to be held hereditarily. It was only decided there that the plaintiff was, as the heir of the grantee named in the *sanad* of A. D. 1660, entitled to recover the land. Possibly, a local custom to enjoy such an office hereditarily might be established. Whether it could be so or not, it is unnecessary for us now to decide, and we do not express any opinion upon that point. The Muhammadan Law does not seem to regard the office of Kazi as hereditary. No authority has been cited to us to show that the creation of an hereditary Kaziship can be sustained. In the Hidaya, Vol. II., Book XX., Chapter I., it is said "It is incumbent on the Sultan to select for the office of Kazi a person who is capable of discharging the duties of it and passing decrees; and who is also in a superlative degree just and virtuous; for the prophet has said: 'Whoever appoints a person to the discharge of any office whilst there is another amongst his subjects more qualified for the same than the person so appointed, does surely commit an injury with respect to the rights of God, the Prophet, and the Mussalmans.'" This shows that high personal qualifications are to be carefully sought for by the appointing power,— a moral injunction which would be frequently defeated if the office were made hereditary. There is not a hint, in the chapter on Kazis in the Hidaya, that the office can be made hereditary. The enactment of Bombay Regulation XXVI. of 1827 seems to have been adverse to any supposition that the office of Kazi could be hereditary. That enactment was repealed by Act XI. of 1864; but that repeal leaves the law as it stood before Regulation XXVI. of 1827 was passed, and we have not any reason for thinking that the Muhammadan Law sanctioned a grant of such an office to a man and his heirs. It is quite clear from the Hidaya, and the very carefully considered

case of *Muhammad Yussub* v. *Sayad Ahmed*,[1] and the authorities there cited, that the appointment of Kazi lay exclusively with the sovereign or other chief executive officer of the State, and, as we have already said, it was to be exercised with the greatest circumspection with reference to the fitness of the individual appointed

The present plaintiff has neither proved, nor alleged any local custom in Hávri, that the office of Kazi should be hereditary. Nay, more, he failed in 1855 in an attempt by suit, grounded on the *sanads* upon which he relies here, to prevent Imam Saheb, a near relative of the first defendant, from disturbing the plaintiff in his alleged office of Kazi. In referring to that circumstance we are not to be understood as giving any opinion whether Imam Saheb, or the first defendant, or their kinsman Badrudin, mentioned in the first defendant's written statement, has any valid title to officiate as Kazi. Our decision simply is that the ordinary Muhammadan Law does not recognize hereditary Kazis, and that there are not any circumstances in this case which lead us to think that there is a local custom in Hávri opposed or constituting an exception to the ordinary rule of Muhammadan Law as to Kazis. It is unnecessary for us to say whether, if this had been a suit for the *vatan* granted by the *sanads* of A.D. 1639 and A.D. 1663, we might not have adopted the same course which the Court in the Gadag case did. The sovereign may have had full power to make the *vatan* hereditary, though he may not have such power to make the office of Kazi so. It is sufficient for us to say that, this not being a suit for land, but in respect of a disturbance in an alleged hereditary and exclusive office, we see no reason for holding that the plaintiff has established his right to hold that office hereditarily and in opposition to the ordinary law of his co-religionists. On these grounds we affirm the decrees of the Courts below, and with costs of suit and both appeals. This Court concurs in the observation of the Division Bench which decided the Gadag case, that it is to be regretted that the Government should, by the repeal of Regulation XXVI. of 1827, have abnegated their function of appointing a Kazi, and so quieting the dissensions frequently prevalent amongst Mussalmans as

(1) 1 Bom. H. C. Rep., Appx. xviii.

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to the validity of the title of persons assuming the office of Kazi— an office which, the Mussalman Law itself ordains, can only be conferred by the State.

Decrees affirmed.

NOTE.—The following is the judgment of the High Court (MELVILL and KEMBALL, JJ.) in the case of *Sayad Abdul* v. *Sayad Hasham* above referred to :—

The District Judge has found, as a fact, that Bibi Shah held the lands during her life and appointed persons to perform the duties of Kazi; but that she did this with the consent of the plaintiff's father, and by virtue of a custom which allows to the widows of Kazis a life interest in the office. Under these circumstances, we think that the District Judge has rightly held that Bibi Shah's possession was not adverse to the plaintiff, and that his cause of action did not arise till her death.

A decision on the merits is rendered difficult by the very incomplete character of the evidence. A grant of a certain inám (including the field in dispute) was made in 1660 to Sayad Kali Mula, who combined the offices of Khatib, or preacher, and Kazi. The grant directs that the inám shall be continued to the children of the grantee, and to his grand-children or family (for that appears to be the meaning of the somewhat vague word "Ahfád"). There is no distinct provision for the creation of an hereditary office or offices; but there can hardly be any doubt that the inám was for the maintenance of the office or offices, and that the intention of the grantor was that the office or offices, with the inám, should continue in the grantee's family. It is not denied that such has been the case for the last two hundred years. There is nothing to show how during that time the Khatibs and Kazis have been selected ; but they have always been chosen from two branches of Sayad Kali Mula's family. The plaintiff is already Khatib, and in possession of the greater part of the inám. The last male holder of the Kaziship was Mira Bibi Shah's husband, and on Bibi Shah's death there is no one in that branch of the family capable of holding the appointment. There is, as appears from the pedigree, no male descendant of Sayad Kali Mula surviving, except the plaintiff and a younger brother, who does not appear to dispute his title. The District Judge has found, as a fact, that the defendant is not a member of the family. Under these circumstances we think that plaintiff has a better right than any one else to perform the duties of Kazi, and to enjoy the inam attached to the office. He is the principal surviving member of the grantee's family. He is already Khatib. He is recognized as officiating Kazi by a portion of the Muhammadan community, though some of them seem to adhere to the defendant. It is, we think, to be regretted that the Government should, by the repeal of Regulation XXVI. of 1827, have abnegated their function of appointing a Kazi, and so quieting the dissensions always prevalent among Mussalman communities ; but, in the absence of any appointment by the Government, we think that the plaintiff has, for the reasons we have stated, the best title to the office and to the emoluments attached to it.

We confirm the decree of the District Judge with costs.