1888
SEP. 13

APPELLATE CIVIL.

13 B. 555.

13 B. 555.

[555] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice and Mr. Justice Parsons.

SAYAD ABDULA EDRUS (*Original Plaintiff*), *Appellant v.* SAYAD ZAIN SAYAD HASAN EDRUS AND OTHERS (*Original Defendants*), *Respondents.** [13th September, 1888.]

Mahomedan law—Sajjadanishin, khilafat *and* mutavalli, *offices of—Primogeniture—Custom—Eldest son's right to hold the offices*—Wakf, *inheritance to—Predecessor in the office to appoint his successor, right of—Construction.*

About three hundred and fifty years ago one Sayad Shaikhu, the ancestor of the parties to the suit, came to Surat and settled there and became the *pirmashid* religious (preceptor) of the Mahomedan community at that place. During his lifetime, as well as after his death, moveable and immoveable property was from time to time dedicated to the religious office he and, after his decease, one or other of his descendants successively occupied. The plaintiff was the eldest, and the first defendant the second son of Sayad Hassan, the last incumbent of the said office.

In 1865 Sayad Hassan, being ill, executed a *tauliyatnama* appointing the plaintiff his executor and successor. Subsequently, Sayad, having recovered, cancelled the same and appointed the first defendant his successor by three successive *tauliyatnamas*, the last being dated 3rd September, 1881, a few days before Sayad's death. The first defendant accordingly entered into possession and management of the office of *sajjadanishin* (or priest) and *khilafat* (deputy) and assumed the position of *mutavalli* (or manager) of the *wakf* property of the family. In 1882 the plaintiff brought the present suit to have it declared that on him, as the eldest son, had devolved the office of *sajadanishin* and *khilafat* held by the family, and not on his younger brother, the defendant, and that he alone was entitled, as *mutavalli*, to take possession of and manage the *wakf* property.

The plaintiff relied, firstly, on the appointment made by his father in 1865, and, secondly, on the fact of his being the eldest son of the last incumbent, to whom, he maintained, both by law and custom belonged the succession to the offices in question, so long, at least, as such eldest son was in other respects a fit and proper person to succeed, which in his own case was not contested. The defendant denied that either by law or custom was the eldest son, as such, entitled to succeed, and relied on the fact of his appointment by his father.

Held, that the plaintiff had made out no case of a right to succeed his father in the offices in question. Not under the deed of appointment, because that was made by his father when he believed he was dying, and was subsequently on recovery cancelled, and was, therefore, inoperative, on similar principles to those which apply to the case of a *donatio mortis causa*; nor, secondly, under the general Mahomedan law, because that law is strongly against attaching any right of inheritance to an endowment; nor, thirdly, by reason of any custom, because no such custom, as that contended for, was established on the evidence. [556] The evidence went to show that the eldest son did not uniformly succeed, and that even when he succeeded, he did so by right of appointment and not by right of primogeniture.

[R., 36 B. 308=14 Bom. L.R. 120=14 Ind Cas. 469; 11 C. W. N 297 (299).]

APPEAL from a decision of Khan Bahadur B. E. Modi, First Class Subordinate Judge of Surat.

This was a suit by the plaintiff to have it declared that the offices of *sajjadanishin* and *khilafat* held by the family of the parties to the suit devolved on the plaintiff as the eldest son, and that, as such eldest son, he was entitled, as *mutavalli*, to take possession of and manage the whole *wakf* property.

* Appeal, No. 107 of 1885.

The plaint stated as follows :—

"About three hundred and fifty years ago our ancestor Sayad Shaikhu Shaikh, a Sayad of the El Edrus family, came from the town of Hazramaut, in Arabia, and settled in Surat. He and his descendants carried on the office of *pirmushid*, (religious preceptor or guide), during which the immoveable and moveable *wakf* property (endowments), shown in list B attached to the plaint, came from time to time into the possession and management of the family.

"2. The *sajjadanishini* (priesthood or office of priest; literally sitting on a piece of carpet to pray) and *khilafat* (succession or deputyship) of this Edrus family and the *mutavalli*-ship (management and superintendence) of all the *wakf* property, shown in list B, devolved from generation to generation upon the eldest son for the time being and upon my father Sayad Hasan on the death of my grandfather Sayad Sharif Shaikh in about 1852.

"3. That when Sayad Hasan became ill, he publicly established me in his place of *sajjadanishin*, *khilafat* and *mutavalli* according to the prevailing custom of the family, on or about the 15th June, 1865.

"4. That Sayad Hasan died on the 17th September, 1881, and according to the custom of the country, *shareh* (Mahomedan law), and the family usage, and also the deed of *tauliyat* (deed relating to the superintendence or managment of the affairs of an endowment) given by my grandfather to my father, and by my father to me, the *sajjadanishini*, *khilafit* and *mutavalli*-ship devolved upon me alone as the eldest, son, and, therefore, it is my sole right [557] to take possession of and manage the *rozas* (tombs or shrines) and the *wakf* property shown in list B, and take the *firmans* (mandates or diplomas), *parvanas* (patents or diplomas from the ruling authority), and *tauliyats*.

"5. That defendant No. 1, Sayad Zain, has wrongfully taken possession of them, and does not allow me to take possession or management.

"6. That the ancestral and self-acquired private moveable and immoveable property of the deceased Sayad Hassan has devolved on both parties. I have a share therein of four annas and eight pies in the rupee. Defendant No. 1 has taken possession of the whole, and does not give me my share.

"7. That defendants Nos. 2, 3 and 4 act wrongfully in combination with defendant No. 1 against my right and interest."

The plaintiff's prayer, therefore, was as follows :—

"1. That it be declared that the office of *sajjadanishin* and *khilafat* of the Edrus family devolved upon the plaintiff, who, and not defendant No. 1, is entitled to conduct the duties connected with that office, and that a perpetual injunction, prohibiting defendant No. 1 from making any obstruction in the matter, should issue.

"2. That it be declared that plaintiff alone is entitled, as *mutavalli*, to take possession of and manage the entire *wakf* property shown in list B; and the whole of that property, together with the *firmans*, *parvanas* &c., relating thereto and shown in list K, be given into his possession, and the mesne profits be awarded until possession is recovered.

"3. That it be declared that plaintiff is entitled to a four anna and eight-pie share in the property shown in list D.

"4. Any other relief that the plaintiff may be entitled to in this case should also be granted."

1888
SEP. 13.

APPELLATE CIVIL.

13 B. 555.

The claim was filed and registered as a pauper suit on the 17th November, 1882.

Defendant No. 1 denied that the plaintiff was entitled, either by law, or custom, or family usage, or otherwise, to be *mutavalli* of the *wakf* property, and contended (*inter alia*) that he was the **[558]** sole *mutavalli* of the *wakf* property under the *tauliyatnama* of the 14th June, 1876; and that the original appointment of the plaintiff as *mutavalli* was cancelled by their father Sayad Hassan, and the plaintiff had subsequently resigned the office of *mutavalli*.

The other defendants supported the first defendant in his contentions.

The Court of first instance held the *tauliyatnama* set up by the first defendant proved, and found that the plaintiff was not entitled, either by law, or custom, or family usage, or otherwise, to be the *mutavalli* of the *wakf* property, and rejected the plaintiff's claim, except as to the private property of his father.

The plaintiff appealed to the High Court.

Shantaram Narayan (*Bomanji* with him), for the appellant:—As the eldest son the plaintiff is entitled to succeed to the offices of *mutavalli*, *sajjadanishin*, and *khilafat*, and the *wakf* property attached to the same. In most instances it has been the eldest son that has succeeded. The plaintiff's father was the eldest son. He had no power to appoint the defendant his successor. It is by inheritance that the offices go. If there was a power to appoint the plaintiff, the plaintiff himself was appointed to succeed his father. The power of appointment, if any, extends to endowments. Mahomedan law favours the custom of primogeniture. The words *aslah* and *aurah* (the most pious and the most qualified) used in the three deeds of appointment are mere surplusage. No misconduct or disqualification is found against the plaintiff. He, therefore, in every respect, is qualified to hold the offices.

Budrudin Tyabji (*Motilal M. Munshi* with him), for the respondents:—The appointment of the plaintiff by his father was subsequently cancelled. It was a death-bed appointment, being made when the father thought he was dying, and, therefore, on recovery, like a *donatio mortis causa*, becomes inoperative. The plaintiff, by virtue of being the eldest son alone, cannot succeed. The devolution of *wakf* property by inheritance is opposed to the Mahomedan law. Looking to the history of the family, it will be seen that there always has been an appointment by the *mutavalli* of his successor, and every such appointment has been recognized **[559]** by the ruling power. Such appointments were based, not on seniority, but on personal qualification. The words "the most pious" and "the most qualified" are essential. The *mutavallis* in the family have always chosen for their successors the most qualified and deserving persons who, in some cases, happened to be the eldest sons. If all the sons are equally qualified, it may be the eldest should be chosen. If a *mutavalli* appoints an unfit successor, such person is liable to be removed. He cited Baillie's Digest of Mahomedan Law, p. 592; Ameer Ali's Lectures, pp. 256 and 257.

Shantaram in reply:—Under the royal grant to this family the eldest son was appointed the *mutavalli*. Where there is an absolute *mutavalli* he can appoint one successor only and not two, and that one should be the eldest. An executor cannot appoint his successor unless he is authorized by the testator—Tagore Law Lectures for 1884, p. 593, and the rule by analogy is applicable to the case of a *mutavalli*—Macnaghten's Principles

and Precedents of Mahomedan Law, Ch. X, prin. 6, p. 70 ; *Phatesaheb Bibi* v. *Damodar Premji* (1). The appointment rests with the *kazi*, and does not go from *mutavalli* to *mutavalli*. The plaintiff fulfils the definition of *aslah* and *aurah*. The plaintiff was appointed *sajjadanishin* by his father, and being once appointed the appointment could not be set aside.

JUDGMENT.

The judgment of the Court was delivered by

PARSONS, J.—The plaintiff sues for a declaration that the office of *shjjadknishin* and *khilafat* held by the Edrus family has devolved on him, and not on his younger brother, the defendant No. 1, and that he alone is entitled, as *mutavalli*, to take possession of and manage the whole *wakf* property, the value of which is stated to be over two *lakhs* of rupees. The basis of his claim is the fact that he is the eldest son. He says clearly in his plaint that according to the custom of the country, *shareh* (Musulman law), and family usage, and according to the deed of appointment given by his grandfather to his father, and by his father to him, the offices of *sajjadanishin*, *khilafat* and *mutavalli* devolved on him alone as the eldest son, and, therefore, that it is his sole [560] right to take possession of and manage the shrines and the *wakf* property.

So far as the claim is made to rest on a deed of appointment, we may at once dismiss it, for it is proved that that appointment was made at a time when his father was attacked with cholera and thought he was dying, and that it was cancelled a few days afterwards when the father recovered, and that that cancellation was assented to by the plaintiff, who withdrew all rights he might have had under it. That such an appointment can legally be cancelled on recovery, is shown by an extract from the Tankih Hul Hamadia, p. 185. Indeed, such an appointment may be compared to a *donatio mortis causa*, and may be treated on the same principles.

The claim on custom rests on a much larger basis, and must be considered at length. No doubt the right which the plaintiff sets up in his plaint is the right of primogeniture pure and simple, the right of the eldest son to succeed, whether major or minor, fit or unfit, pious or impious, learned or unlearned. In his deposition he states this :—"In our family none but the eldest son can sit on the *gadi*, nor can any one but the eldest son be appointed to sit on the *gadi*. The right of the eldest son accrues as soon as he is born without any appointment. The eldest son, even if he is absolutely ignorant, will succeed to the *gadi* to the exclusion of the younger, although the latter may be *aslah* and *aurah* (pious and God-fearing)." He also makes no distinction between the right of succession to the office of *sajjadanishin*, or that of *mutavalli*, but places both upon the same footing, and claims both on the same title. This is assented to in this Court, but his pleader has slightly changed the nature of the claim based on title, and wishes to restrict it to a claim to succeed on the custom, which, he alleges, is proved, namely, that the eldest son, if fit, cannot be passed over, but is entitled to be appointed to succeed ;—in other words, he contends that the father is bound to appoint the eldest son to succeed him, if that eldest son is fit, and that he cannot appoint any one else. Practically, however, this makes no material difference in the case, because here the father passed over the plaintiff, on the

(1) 3 B. 84 (87).

1888
SEP. 13.
APPELLATE CIVIL.
13 B. 555.

ground that he was not fit, and appointed his second son, the defendant No. 1, because he was, in his opinion, [561] the most fit, the most pious, the most God-fearing, &c., &c., as is described at length in the *tauliyatnamas*, or deeds of appointment. It is not alleged that the father in making this appointment was actuated by any *mala fides*, or by any corrupt motives, or by any undue influence or by fraud, and this being so, it is patent that the Court would not in any particular case examine into the qualifications of the children and pronounce upon the question whether the eldest son is qualified for the office by reason of being the most pious and the most God-fearing. The plaintiff himself admits this. "The person," he says, "who makes the appointment is to decide who is *aslah* and *aurah*," and the same has been admitted throughout the hearing in this Court. The point, therefore, for determination is whether the plaintiff has proved the right that he claims, *viz.*, to succeed to these offices by virtue of being the eldest son.

There can be no doubt that the general Mahomedan law is opposed to his contention. It is said, over and over again in the law books, that no right of inheritance can attach to an endowment. It is by appointment that one officer succeeds to another, appointment either by the original appropriator, or by his successor or executor, or by the superintendent for the time being, or, failing all these, by the ruling power. This is laid down distinctly by Macnaghten in his chapter on Endowments, paras. 5 and 6; in his Precedents of Endowments, cases IX and X, and in appendix No. 52. It is also so stated in books of authority. It is written in the *Alamgiri* at p. 127: "It is the *mutavalli's* right at his death to appoint another as his successor and to give him charge." Again in the Tankih Hul Hamadia, at p. 183, it is written: "If a *mutavalli* dies and has made a will in favour of a certain person, then the *vasi* of the *mutavalli* is in the place of the *mutavalli*, because certainly the *mutavalli* is in the place of *vasi*, and a *vasi* is entitled to appoint another *vasi*." The Fatawa Kazi-khan, p. 145, is to the same effect; and Kazi Mohammad Ismail, the witness called as an expert, says: "There is no book which throws the least doubt upon the power of the *mutavalli* to appoint a person to succeed to him." So also another expert Nural Hussain Shahbuddin, says: "The [562] *sajjadanishin* for the time being is entitled to appoint in his place any one of his sons, and in the same manner the *mutavalli* of a *wakf* can appoint a *mutavalli*." The custom therefore claimed, that the eldest son succeeds by virtue of inheritance, being opposed to the general law, must be supported by strict proof.

Now, if we examine the past history of this *sajjadanishin*-ship, we find that there have been from the founder to the father of the parties no less than twenty-seven holders of the office: eight of these were only sons, fourteen were eldest sons, and five were other than eldest sons. Such a course of devolution does not, in our opinion, sustain the contention that there was any right in the eldest son to succeed as such. Moreover, in many cases, there is direct evidence that the successor was appointed by his predecessor. The very fact that an appointment was made at all shows that there could have been no right of succesession. We must, therefore, decide that no custom is proved under which the eldest son succeeds by right.

We have next to deal with the custom alleged, that the eldest son alone has the right to be appointed. In considering the evidence of this custom we must bear in mind the principles of the Mahomedan law as laid down in the Dural Mukhtan to the effect that "so long as there is a fit person among the relatives of the endower, an outsider should not be

appointed *matavalli*;" and as stated by Macnaghten (Principles and Precedents of Mahomedan Law, 4th ed., p. 344): "It is usual to prefer the late incumbent's family to persons who are entirely strangers;" and "in conferring the trust, regard should be had to superiority of qualifications, and, supposing all the sons to be equal in this respect should be paid to seniority." Thus, Mahomedan law appears decidedly to favour the appointment of a son and of an eldest son as a successor, and as the Subordinate Judge remarks, it is in accordance with human nature that each *mutavalli* will select and appoint his own eldest son to succeed him in the office. It will be necessary, therefore, to examine the appointments and see on what grounds they were made. If in any of them the absolute right of the eldest son to be appointed is admitted, it will go a long way to establish the [563] plaintiff's case. If, on the other hand, it is found that the appointments were made on other grounds than those of seniority, and especially if in any case a younger son or brother is found to be appointed for precisely the same reasons as an elder son is appointed, it will not be too much to say that the plaintiff's case entirely fails. Now, the earliest appointment, of which we have evidence, is that of Sayad Ali who "was clad in the religious habiliments by the hand of his father and who obtained the office by the order of his glorious father" (p. 192 of the Tazal Urus). The next instance is that of Abu Bakar Sakran, who also is said to have obtained the office by order of his glorious father, being selected from among his children (p. 225). Then we come to the case of Abdulla I from whom the family derives its name of Edrus. He lived in the fifteenth century. The former *mutavalli* had died without making any appointment, and Abdulla was appointed by the people, on the ground that "all the miracles and supernatural powers which were exhibited by his predecessors showed themselves in him." Indeed, so far was Abdulla from claiming any right on the ground of inheritance that we read (pp. 337 and 338) that at first he declined on account of tender age (he was twenty-three years old) and the existence of paternal uncles, and he only accepted the office after much pressure and hesitation. He appointed his own son Abu Bakar to succeed him (p. 342) by investiture, because he fully possessed the abilities qualifying him for the office. There is some confusion as to who succeeded Abu Bakar, probably owing to the *gadis* at Tarim and Aden being separated. That Ahmad, the eldest son of Abu Bakar, did not immediately succeed is clear. Shekh I probably first succeeded, and then Ahmad, and then Abdulla II. There is, however, no doubt that the latter appointed his younger son, Shekh II, to succeed him, although his eldest son, Abu Bakar, was then alive. This fact is distinctly stated in the Tazul Urus, at p. 438, and the grounds of the appointment are also plainly given, *viz.*, superiority in saintly virtues; (see also p. 447). Shekh II was succeeded at Surat by his eldest son Mahomed I. The Tazul Urus shows that Shekh II appointed his second son Zainulabedin to the more ancient and honourable office at [564] Tarim, while he appointed Mahomed to the office at Surat, and this is relied upon by the defendants as showing that eldest sons could be superseded at the will of their fathers. Passing on through four generations of only sons, we come to Abdulla V. A.D. 1717—1784. Inasmuch as these *mutavallis* lived in Arabia and managed the endowments at Surat and Broach by deputies, there is no direct evidence as to how the offices were handed down. The *parvana* of the Emperor, granted during this time, contains nothing which supports the claim of the plaintiff; it rather negatives it, since if such a right existed,

1888
SEP. 13.
APPELLATE CIVIL.
13 B. 555.

we should have expected that it would have been distinctly asserted and relied upon by Zainulabedin. Abdulla V made a regular *tauliyatnama* (Ex. 285), in which, after reciting how his father had been nominated, appointed and installed by his father Zainulabedin in the same manner as Zainulabedin himself had received possession from his ancestors, he appoints his eldest son, Mahomed III, to be his own successor. It is expressly to be noticed that the ground of the appointment is not because Mahomed is his eldest son, the appointor does not even here say that the appointee is his eldest son; he says only that he appoints him, because "he is possessed of learning and acts accordingly, and is adorned with holiness and piety, and is decorated with the garb of honesty and trustworthiness." By the same document Abdulla appoints his second son Zainulabedin to be *nazir* or supervisor, in order that his first son, the *mutavalli*, may perform his duties with the advice of, and consultation with, his said second son. A dispute arose in consequence of this dual appointment. Zainulabedin, it appears, on the strength of the appointment as *nazir*, claimed partnership with his brother in the *mutavalli*-ship, and the parties took the dispute before the Government of the day. The decision was given against Zainulabedin (see Ex. 309). It is, however, essential to note that, throughout this dispute, Mahomed III never made any claim on the ground of seniority, for he says only that he is adorned with holiness and piety, and is deserving of the office of *tauliyat* and of *sajjadanishin*, and is, according to the grants, the general and permanent *mutavalli*. His claim and the decision were both founded on the allegation that it was the custom that **[565]** one person alone should be appointed *mutavalli*, and that one person alone should be the *mutavalli*. It is impossible to suppose that, had there been any right in the eldest son alone, that right would not have been put forward. The decision is noteworthy in other respects also, because in it the leading principles of Mahomedan law are cited, and among them one to the effect that "hereditary right has no particular claim for the acquirement of gain or of offices," and it is expressly stated that "the offices of *tauliyat* and *sajjadanishin* are not the same as an estate in respect of which any family claim could be sustained."

It is, however, argued that this *tauliyatnama*, by which Mahomed was appointed, and the two later *tauliyatnamas*, by which Sheriff Shekh and Hasan were appointed, lay down a rule of appointment under which the eldest son must be appointed. The words relied on are "and after him (that is, the newly-appointed *mutavalli*), any one of his male sons and his son's sons, son's son's sons, progeny after progeny, generation after generation, and ages after ages, for ever, who may be the eldest, and more pious, and more God-fearing, shall be the *mutavalli*., and *sajjadanishin*, and successor, in the same way and manner as described, without any partner and sharer, the foremost shall be the foremost, and the eldest shall be the eldest, and the nearest shall be the nearest, and the distant shall be the distant." With regard to this argument it is almost sufficient to say that no *mutavalli* can prescribe any rule of appointment which will bind his successor. However, the above words appear to us to express no more than the general rule of Mahomedan law which we have already quoted, for it is impossible to ignore the words "pious and God-fearing," which upon the obvious construction of the passage are as much a part of the necessary qualification as the word "eldest," and, indeed, in two out of the three *tauliyatnamas*, the correct translation of the expression used is not "the eldest," but "of full age."

1888 SEP. 13. APPELLATE CIVIL. 13 B. 555.

Considering, then, that the history of this family shows that, whereas appointments have been made in numerous instances—so numerous indeed that we are almost justified in inferring that they were made in every case—no single appointment is shown to [566] have been made on the ground of seniority alone: considering also, that eldest sons have not invariably been appointed, but that, on the contrary, in no less than five cases, eldest sons have been passed over: and seeing that no claim to succeed, or to be appointed, on the ground of being the eldest son, has ever before been raised, even in cases of dispute in which we should certainly have expected that it would have been raised had the right or custom existed, we are unable to hold that the custom that the plaintiff contends for is proved. We concur, therefore, with the Subordinate Judge in rejecting the plaintiff's claim to the religious offices and to the management of the *wakf* property.

There is no dispute at present existing as to the private property. The prayer, however, of the plaintiff for mesne profits of the immoveable property was rejected, having apparently been overlooked by the lower Court, and this rejection has been made one of the grounds of appeal. We think that he ought to obtain such mesne profits, subject to a deduction on account of debts and such funeral expenses as may have been defrayed by the executors, and we amend the decree by awarding them to him from the 17th September, 1881, (the date of the father's death) to delivery of possession, or until the expiration of three years from the date of this decree, whichever event first occurs, the net amount to be determined in execution. It has also been made a ground of appeal that the lower Court did not observe the provisions of s. 208 of the Code and state the amount of money to be paid, as an alternative, if delivery of the moveables awarded could not be had. There is no evidence on the record as to the value of these moveables, although such evidence ought to have been furnished by the plaintiff. We need not, however, order that evidence to be taken, as the parties agree that the amount so to be paid shall be Rs. 70; we, therefore, amend the decree by inserting that provision. In all other respects we confirm the decree, and we order that the plaintiff-appellant bear all the costs of this appeal. We also order, under s 412 of the Code that the plaintiff-appellant pay the Court-fess that would have been paid by him if he had not been permitted to appeal as a pauper.

Decree confirmed.

---

13 B. 567.

[567] APPELLATE CIVIL.

Before Mr. Justice Birdwood and Mr. Justice Jardine.

MALOJI (*Original Plaintiff*), *Appellant* v. SAGAJI AND ANOTHER (*Original Defendants*), *Respondents*.* [3rd December, 1888.]

Mortgagor and mortgagee—Redemption suit—Decree for redemption without proviso for foreclosure or payment within a fixed time—Limitation—Subsequent suit by mortgagee for sale—Res judicata—Civil Procedure Code (Act XIV of 1882), s. 13, expl. II.

A decree for redemption which does not provide for payment of the mortgage-debt within a fixed time, or for foreclosure in case of default, operates of itself as

* Second Appeal, No. 146 of 1887.