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and as to the terms upon which they stood as disclosed in the deeds of gift. We are satisfied upon the same evidence that the acknowledgment, though in express terms only acknowledging sonship, must, in the circumstances now appearing, be taken to have amounted to an acknowledgment of legitimate sonship.

These being the only two points urged on the appellants' behalf and both of them, in our opinion, failing for the reasons stated, we confirm the lower Court's decree and dismiss the appeal with costs.

Appeal dismissed.

R. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice and Mr. Justice Shah.

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July 15.

MAJIDMIAN BANUMIAN (ORIGINAL DEFENDANT 1) APPELLANT *v.* BIBI-SAHEB JAN, WIDOW OF THE DECEASED NANUMIYAN BANUMIAN SHAIKH AND OTHERS (ORIGINAL PLAINTIFFS AND DEFENDANTS 2 AND 3) RESPONDENTS.*

Mahomedan Law—Dower—Right to retain property in lieu of dower—Heritable right.

The right which a Mahomedan widow, having a claim to dower, acquires on obtaining possession of her husband's property is a heritable right.

It is a substantial right and if she is wrongfully dispossessed she can maintain a suit to recover possession.

FIRST appeal against the decision of P. N. Sanjana, Joint First Class Subordinate Judge at Surat, in Suit No. 97 of 1909.

The facts were as follows :—

One Nanumiyan, a Sunni Mahomedan, the owner of the house in suit, died in May 1907. He left him sur-

* First Appeal No. 191 of 1913.

viving his mother Misri Bibi, two widows, Bibi Lalkhatum and Bibi Saheb Jan (plaintiff No. 1), one daughter Bibi Fazl Unnissa (defendant No. 2) and one brother Majidmiyan (defendant No. 1). The mother died a year or two later. The senior widow Lalkhatum died in December 1906. The junior widow Saheb Jan and the heirs of the senior widow joined in bringing the suit against the brother and daughter of Nanumiyan. Their case was that the dower fixed for Lalkhatum at the time of her marriage was Rs. 50,000 and that fixed for Saheb Jan was Rs. 7,500; that Nanumiyan died without paying any part of the said dower, that the widows remained in possession of the house in lieu of the said dower until 1906 and that thereafter the surviving widow and the heirs of the deceased widow had been in peaceful possession of the house until 1908 when the brother disputed their claim to retain possession of the house and tried to disturb them in their possession. They filed the suit on the 13th April 1909 asserting their claim to the house in respect of the whole dower of Rs. 57,500.

The brother, defendant No. 1, contended that the amount of the dower was not fixed as stated by the plaintiffs, that the widows had renounced their claim to the dower at the time of Nanumiyan's death, that the house in suit did not belong to his brother exclusively but to both of them jointly, that the widows had never been in possession of the house in lieu of their dower, and that accordiug to Mahomedan Law they had no right to the house. He also maintained that the two rooms, which were admittedly in his possession, were not held by him with the permission of the widows but in his own right.

The daughter, defendant No. 2, admitted the plaintiff's claim.

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The Subordinate Judge held that the amount of dower due to the two widows was Rs. 50,000 and 7,500, that they had a right to retain possession of the house in lieu of their unpaid dower except the two rooms which were lawfully in possession of defendant No. 1 and that on Lalkhatum's death the right descended to her heirs. He further directed the defendants not to obstruct the plaintiffs in retaining possession of the house which was already in their possession. His reasons were as follows :—

" Under Mahomedan Law the widow's claim for dower is a debt against the husband's estate and it must like other debts be paid before legacies and before distribution of the inheritance. It does not entitle her to a lien on any specific property of her deceased husband so as to enable her to follow that property, as in the case of a mortgage into the hands of a *bona fide* purchaser. (6 Bom. L. R. 54). Where, however, she lawfully and without force or fraud obtains possession of her husband's property, she is entitled to retain possession until her dower debt is satisfied subject to her liability to account for the profits received (14 Moo. I. A. 377).

"In the case of *Amanat-un-nissa* v. *Bashir-un-nissa*, I. L. R. 17 All. 77, it was held that obtaining possession lawfully meant ' obtaining possession by contract with her husband or by putting her into possession or by her being allowed with the consent of the heirs on his death to take possession.' But the case was doubted in the case reported in I. L. R. 32 All. 551 and was expressly dissented from in the case in I. L. R. 32 All. 563 where it was held ' a Mahommedan widow to whom the dower is due, who enters into possession of her husband's property on his death is entitled to hold the estate against the other heirs until her claim to dower is satisfied subject to her liability to account for the property which she may receive while so in possession. *It is not necessary for her to show that the deceased husband or her heirs consented to her getting into possession.*' The above case in I. L. R. 17 All. 77 on which the defendant's pleader relies was also dissented from by the Calcutta High Court in I. L. R. 38 Cal. 475, when their Lordships decided that ' under the Mahomedan Law when a widow is in possession of the undistributed property of her deceased husband such possession having been obtained lawfully and without force or fraud, and her dower or any part of it is due and unpaid, she is entitled as against the other heirs of her husband to retain such possession until her dower debt is paid. *The possession need not necessarily be possession obtained by an agreement with her husband or his heirs.*' These two are the most recent rulings on the point and therein all the previous

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cases have been fully considered and weighty reasons have been given why the view expressed in I. L. R. 17 All. 77 should not be followed. In a case in 9 Bom. L. R. p. 188, the Bombay High Court has held, 'under Mahomedan Law a widow's claim for dower is a debt against the husband's estate. But when the widow obtains actual possession of the estate she is a mortgagee of her husband under a claim to hold it as one of the heirs, and for her dower she is entitled to retain possession until her dower is satisfied the liability to account to those entitled to the property being subject to the claim for the profits received. Her possession cannot be disturbed until her dower debt has been satisfied, and when lawfully in possession of her husband's estate she occupies a position analogous to that of a mortgagee.' The Bombay ruling seems to put her claim on a higher footing. Following these rulings I hold that the consent of the husband or of his heirs is not necessary to make the widow's possession lawful. But even if such a consent be necessary, I find that there was an implied consent on the part of the defendant, because he has not only acquiesced in the widow's taking possession of the property, but admittedly whenever the tenants paid rent to him he has handed over the same to N's widow. * * *

"Relying on the case in I. L. R. 20 All. 262 and I. L. R. 29 All. 640, the defendant contends that the widow's lien for dower is a purely personal right and is not heritable or transferable. But the same High Court has, in a more recent case, refused to follow the ruling in those cases and followed the contrary ruling in an older case in I. L. R. 7 All. 353 and held that 'the right of a Mahomedan widow who has entered into possession of her husband's property peacefully and without fraud in lieu of her dower debt is a heritable right and her heirs are entitled to remain in possession until the debt is satisfied' (I. L. R. 32 All. 551). All these cases bearing on the subject have been very carefully considered in that case and the reasons why the rulings in I. L. R. 20 All. 262 and 29 All. 640 should not be followed and that in I. L. R. 7 All. 353 should be followed have been clearly given. I need not repeat those reasons here but I fully adopt them and for the reasons given therein I think the law as laid down in the most recent case is correct and I refuse to follow the contrary ruling in the older cases. In the case in 9 Bom. L. R. p. 188 cited above, the widow's position is held to be analogous to that of a mortgagee. In any case the claim for a dower is a debt which the widow's heirs inherit. If they inherit this debt, they must also inherit with it the security for that debt. The hypothetical case conceived in the above case in I. L. R. 32 All. at p. 561 is the very case before us, namely, of a widow who has held possession of her husband's property in lieu of dower for many years over and above the period of limitation within which she must sue for her dower debt and has then died without the debt being fully satisfied. If the heirs are not entitled to inherit they lose all means of recovering the

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balance of the debt due. This would cause a real hardship and injustice. I therefore follow the case in I. L. R. 32 All. p. 551 and hold that the right is heritable and so long as the debt remains unpaid the widow's heirs have the right to continue in possession. I accordingly find on the 17th issue in the affirmative."

The defendant No. 1 appealed from the decree. The plaintiffs filed cross-objections.

Manubhai Nanabhai for the appellant :—The lower Court is wrong in holding that the consent of the heirs is not necessary. I rely on *Amanat-un-nissa* v. *Bashir-un-nissa*[1] ; *Mussamut Wahidunnissa* v. *Mussamut Shubrattun*[2] ; *Bibee Mehran* v. *Mussamut Kubiran*[3] ; *Bibee Selamut* v. *Shaikh Mowla Buksh*[4] ; *Mussumat Ameerun* v. *Mussumat Ruheemun*[5] ; *Mussumat Meerun* v. *Mussumat Najeebun*[6]. Macnaghten's Principles and Precedents of Mahomedan Law, p. 291, case XXXVII, p. 407, case No 27 ; Faiz Tyabji's Principles of Mahomedan Law, pp. 109-124.

The original entry into possession by the widow ought to have been under a distinct claim for dower, and not merely as a co-sharer of the inheritance : Faiz Tyabji's Principles of Mahomedan Law, pp. 120, 123, 124 : *Mussumat Bebee Bachun* v. *Sheikh Hamid Hossein*[7].

In this case, it is admitted by the plaintiffs that such entry and claim, if any, took place only in 1901. At that time, the dower debt itself had become time-barred under article 104 of Limitation Act, and no lien could arise for such a debt. The possessory lien of a widow in lieu of her dower is a right personal to the widow. It cannot be assigned nor can it devolve on the heirs. It is a security given to the widow personally by way of facility by the other heirs for retaining her husband's

(1) (1894) 17 All. 77.
(2) (1870) 6 Beng. L. R. 54.
(3) (1870) 6 Beng. L. R. 60 (*f. n.* (2)).
(4) (1866) 5 W. R. 194.
(5) (1867) 2 Agra 362.
(6) (1867) 2 Agra 335.
(7) (1871) 14 Moo. I. A. 377, pp. 382, 383, 384.

property. But the assignees or the widow's heirs would be generally strangers to the family to whom their presence or possession might be objectionable.

I rely on *Hadi Ali* v. *Akbar Ali*[1] which was approved of in *Muzaffar Ali Khan* v. *Parbati*[2]

B. G. Rao for the respondent :—The consent of the heirs is not necessary ; see *Ramzan Ali Khan* v. *Asghari Begam*[3] and *Sahebjan Bewa* v. *Ansaruddin*[4] which do not approve of the decision in *Amanat-un-nissa* v. *Bashir-un-nissa* ;[5] *Bibee Tajim* v. *Syud Wahed Ali.*[6]

The possessory right of the widow is heritable : *Azizullah Khan* v. *Ahmad Ali Khan*[7]; *Ali Bakhsh* v. *Allahdad Khan.*[8]

Manubhai, in reply :—In English Law, lien has always been treated as a personal right and cannot be assigned : Halsbury's Laws of England, Vol. XIX, p. 3. It does not give a right of action but is merely a passive right of defence to *retain* possession once lawfully acquired. If somehow the possession is lost even by fraud, the lien goes with it, and the person dispossessed has no right to recover it back (ibid pp. 3, 25, 28, 29) except perhaps in a suit under section 9 of the Specific Relief Act. This suit, therefore, by the plaintiff to *recover* the possession is not maintainable.

SHAH, J. :—This appeal arises out of a suit for the declaration of a certain lien over a house and for confirmation and recovery of possession of different parts of the same house. The owner of the house was one Nanumiyan, a Sunni Mahomedan, who died in May

(1) (1898) 20 All. 262.
(2) (1907) 29 All. 640 at p. 646.
(3) (1910) 32 All. 563.
(4) (1911) 38 Cal. 475 at pp. 477, 479.
(5) (1894) 17 All. 77.
(6) (1874) 22 W. R. 118.
(7) (1885) 7 All. 353.
(8) (1910) 32 All. 551.

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1897. He left behind him his mother Misri Bibi, two widows Bibi Lalkhatum and Bibi Saheb Jan, one daughter Bibi Fazl-un-nissa and one brother Majidmiyan. The mother died a year or two later. The senior widow Lalkhatum died in December 1906. The widows lived in the house at the time of their husband's death and their case is that they continued to live there until their return to Shikarpur in Sindh to their paternal relations in 1906. The junior widow Saheb Jan and the heirs of the senior widow join in bringing the present suit against the brother and daughter of Nanumiyan. Their case is that the dower fixed for Lalkhatum at the time of her marriage was Rs. 50,000 and that fixed for Saheb Jan was Rs. 7,500, that Nanumiyan died without paying any part of the said dower, that the widows remained in possession of the house in lieu of their dower until 1906 and that thereafter the surviving widow and the heirs of the deceased widow had been in peaceful possession of the house until 1908, when the brother disputed their claim to retain possession of the house and tried to disturb them in their possession. They filed the suit on the 13th April 1909 asserting their claim to the house in respect of the whole dower of Rs. 57,500. The brother disputed the claim on various grounds. He contended that the amount of the dower was not fixed as stated by the plaintiffs, that the widows had renounced their claim to the dower at the time of Nanumian's death, that the house in suit did not belong to his deceased brother exclusively but to both of them jointly, that the widows had never been in possession of the house in lieu of their dower, and that according to the Mahomedan law they had no right to the house. He also maintained that the two rooms, which were admittedly in his possession, were not held by him with the permission of the widows but in his own

right. The daughter, defendant No. 2, admitted the plaintiff's claim.

The trial Court raised several issues of fact and law and decided them in favour of the plaintiffs except as to two rooms. The learned First Class Subordinate Judge held that the dower due to the two widows was Rs. 57,500, that the widows had been in possession of the house except the two rooms, which were found to be lawfully in the possession of defendant No. 1, in lieu of their dower, that the plaintiffs were in possession up to 1908 when the cause of action arose against defendant No. 1 and that they were entitled to the reliefs claimed. He disallowed the plaintiffs' claim as to the two rooms in the possession of defendant No. 1. A decree was passed on the 25th April 1913 giving effect to the findings in favour of the plaintiffs.

The defendant No. 1 has appealed against this decree in respect of the main part of the house, and the plaintiffs have filed cross-objections in respect of the two rooms. The cross-objections, however, are not pressed, and we have only to consider the points urged in support of the appeal. It will be convenient to keep the questions of fact and law distinct and to deal with the former in the first instance.

As regards the amount of dower, it has been urged generally that the evidence is all oral and relates to events which occurred several years ago, and that it is interested and not reliable. It is true that Nanumiyan's marriage with Lalkhatum took place in 1870 and that with Saheb Jan in 1891. But there is a large body of evidence in the case, and it is quite impossible to treat the whole of it as being either interested or unreliable. It is obvious from the agreement, which Nanumiyan passed at the time of his marriage with Lalkhatum, that he valued this connection very highly and was

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prepared to submit to any terms in order to secure it. The position of Lalkhatum's father's family was such that there is no inherent improbability in such a large amount being fixed for her dower. The evidence of Sadak Ali, brother of Lalkhatum, also explains the circumstances under which Nanumiyan's marriage with Saheb Jan was brought about. We see no reason to distrust the oral evidence adduced in support of the plaintiffs' allegations on this point, and we accept the conclusion arrived at by the lower Court, viz., that the dower for Lalkhatum was Rs. 50,000 and that for Saheb Jan was Rs. 7,500.

It is not necessary to consider, and the point was not mentioned in the argument, whether the dower was prompt or deferred. It makes no difference in the result, as it is not suggested that any part of the dower was demanded during the husband's life-time. The plea of remission by the widows of their claim to dower has been wisely abandoned in this appeal.

Next as regards the ownership of the house, the lower Court has found, and in our opinion rightly found, that it belonged exclusively to Nanumiyan. It has been conceded by Mr. Manubhai for the appellant that the whole money spent in building the house belonged to Nanumiyan, and that nothing was proved to have been paid by his client. It was urged, however, that the house-site originally belonged to the ancestors of the two brothers, and that he had an interest in the land over which the house was built. But a careful perusal of the evidence of defendant No. 1 and of his step-brother Shaikh Bahadur on this point shows that this account of the house-site having originally belonged to the ancestors of Nanumiyan is really past history and has nothing to do with the present question. The lower Court seems to us to be quite right in holding that after changing hands it ulti-

mately came in the hands of Nanumiyan as owner from his step-brother Shaikh Bahadur for valuable consideration.

On the question of possession of the house, however, there has been more serious argument. It has been urged by Mr. Manubhai that though the widows obtained possession of the house, they did not obtain it in lieu of dower with the consent of defendant No. 1. The fact of the possession having been with the widows up to 1906 is not disputed; and it cannot be disputed in view of the clear admission of defendant No. 1 in his cross-examination that "they (*i. e.*, the widows) lived in the house after Nanumiyan's death till the death of Lalkhatum in 1906." There is nothing to show that their possession was not peaceful. Defendant No. 1 knew about their possession, and was himself in possession of a part of the upper story, viz., the two rooms already mentioned. There was no protest from him, and no dispute at the time. The matter, however, does not rest there. He says he "used to let out the hall on the ground floor of the premises in suit, but the rent used to be accumulated with the Bibis." It seems to us to be futile to suggest under these circumstances that the widows' possession was without the consent of the heirs. The mother of Nanumiyan died in 1898 or 1899 and never disputed the widows' claim. The daughter does not dispute it. The only heir who disputes the fact of their having been in possession with the consent of the heirs is defendant No. 1. The evidence clearly shows that the defendant No. 1 not only acquiesced in but accepted the fact of the possession of the house (two rooms of course excepted) being with the widows.

It was further urged that though they might have been in possession with the consent of defendant No. 1

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they never asserted that they held the property in lieu of dower. This contention has no force. All the assets of Nanumiyan were exhausted in discharging his debts, which (debts) amounted to about Rs. 10,000. The house and furniture were the only assets left; and the widows were in possession of the house from the time of Nanumiyan's death. Under the circumstances it would be a fair inference to hold that they were in possession in lieu of dower. It is common ground that the widows were helped by Sadak Ali, brother of Lalkhatum; and it is difficult to understand why they should have stayed at Surat up to the year 1906 instead of returning to their parental house in Sindh, if it were not for the purpose of asserting their right to the only substantial property which was left after paying off Nanumiyan's debts. In connection with this point Mr. Manubhai relied upon the circumstance that the estate of Nanumiyan was jointly administered by all the heirs, as the two sale-deeds and the succession certificate in the names of the widows and defendant No. 1 would show, and that the widows really took possession of the house in lieu of dower after the debts were discharged. The fact that defendant No. 1 joined the widows in selling certain properties and recovering certain outstandings of Nanumiyan is not inconsistent with the widows having been in possession of the house in lieu of their dower. It seems to us on the evidence that the widows really discharged the debts, and defendant No. 1 simply helped them in conveying the properties and in recovering the few outstandings of Nanumiyan. Besides in view of the fact that they were in possession of the house from the beginning, it is difficult to see how their possession in lieu of dower can, in point of fact, be treated as commencing from the date when all the debts were discharged. Here we are speaking only

of the fact, and do not mean to suggest that as a matter of law it would make any difference whether they purported to hold in lieu of dower or not and whether their possession in lieu of dower commenced in 1897 after Nanumiyan's death or somewhere in 1901 when all the debts are said to have been satisfied. We, therefore, agree with the lower Court that the widows were in possession of the house with the consent of the other heirs in-lieu of their dower.

It has been urged, however, that even if the widows were in possession in 1906 there is nothing to show that the heirs of Lalkhatum had possession since 1906, when both the widows returned to Shikarpur leaving the house in charge of their servant Khan Mahomed. It is clear that Saheb Jan continued in possession through her servant Khan Mahomed even after 1906. But it is urged that the heirs were never in possession. It seems to us that there is no substance in this contention. In the first place it was never suggested in the lower Court that the heirs of Lalkhatum were not in possession since 1906 though Saheb Jan was. All along the defendant pleaded that he was in possession and not the widows. Having failed to substantiate that plea, he now contends that Lalkhatum's heirs were not in possession. But it is common ground that Sadak Ali, who is one of the heirs of Lalkhatum and the principal man among her paternal relations, has throughout helped the two widows after Nanumiyan's death. It is established that Sadak Ali had been to Surat after Lalkhatum's death in 1907, when he occupied the house in suit. It is clear from the evidence of Sadak Ali, Saheb Jan and Khan Mahomed that all the Municipal taxes for the house have been paid by Sadak Ali after 1906 up to the date of this suit. Defendant No. 1 also admits the fact in his evidence. Khan Mahomed looked to Sadakali for instructions

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when there was any occasion for it, and Sadak Ali says distinctly that Khan Mahomed had charge of the house on behalf of the heirs of Lalkhatum and on behalf of Bibi Saheb Jan. This definite statement is met by defendant No. 1 by no specific denial but by the assertion that "he (Khan Mahomed) is still in service either of Saheb Jan or Sadak Ali." Surely defendant No. 1 is expected to know the position of the servant. Sadak Ali in fact took defendant No 1 with him in 1907 to Khairpur for some employment and his equivocal statement under the circumstances seems to us to be virtually an admission that the servant was in possession of the house on behalf of all the plaintiffs and not only on behalf of Saheb Jan. In 1907 Sadak Ali took certain articles from the house, which he could do only if he was in possession; and it is in evidence that he had the keys with him when he went there. We are, therefore, of opinion that the present plaintiffs continued to have possession of the house after Lalkhatum's death until the disputes arose between the parties in 1908, that the possession of the ground floor of the house has been throughout with them, and that their possession of the upper story excepting the two rooms in the possession of defendant No: 1, was disturbed after the plaint was filed as stated in the amended plaint.

Before dealing with the points of law argued in this case, we desire to state generally that the evidence of the plaintiffs No. 1 and 2 in this case appears to us to be much more reliable than that of defendant No. 1. The readiness with which he has committed himself to altogether untenable positions, particularly with reference to the questions of the ownership of the house, and of the amount and remission of dower, is sufficient to shake one's confidence in his case generally.

It is urged by Mr. Manubhai on his behalf that the widows would have no right to retain possession of the house in respect of dower, unless they obtained it with the consent of the other heirs in lieu of dower, that in any case this right to retain possession is entirely personal and does not descend to the heirs of Lalkhatum, and that the right which is in the nature of a lien is a right of defence and not a right of action and that therefore the claim to recover possession which is in fact lost by the plaintiffs is not good.

As regards the first of these contentions it is enough to say that it does not arise, as it is found that the widows had obtained possession in lieu of dower with the consent of the other heirs of Nanumiyan. Mr. B. G. Rao has urged in support of the plaintiffs' case that even if the consent of the heirs were not proved and even if it were not established that the possession was in lieu of dower, the widows would still have a right to hold the property of their husband until their claim to dower was satisfied, provided they had obtained possession lawfully and without force or fraud. He has relied upon *Ramzan Ali Khan* v. *Asghari Begam*[1] and *Sahebjan Bewa* v. *Ansaruddin*[2]. These decisions are in conflict with the case of *Amanat-un-nissa* v. *Bashir-un-nissa*[3]. It is not necessary to decide this question in view of the finding that in this case the widows obtained possession of the property with the consent of the heirs in lieu of their dower.

The second contention is that so far as the heirs of Lalkhatum are concerned they have no claim, as the right of Lalkhatum was personal and could not devolve upon her heirs on her death. There is a conflict of decisions of the Allahabad High Court on this point. The right is held to be heritable in *Azizullah Khan* v.

[1] (1910) 32 All. 563. [2] (1911) 38 Cal. 475.

[3] (1894) 17 All. 77.

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Ahmad Ali Khan[1] and *Ali Baksh* v. *Allahdad Khan.*[2] A different view is taken in *Hadi Ali* v. *Akbar Ali*[3] and *Muzaffar Ali Khan* v. *Parbati*[4]. There is no decision directly on this point which is binding upon us. It is necessary, therefore, to consider the nature of the right, which the widow, having a claim to dower, acquires on obtaining possession of her husband's property. This right has been described by their Lordships of the Privy Council in *Mussumat Bebee Bachun* v. *Sheikh Hamid Hossein*[5] as follows:—"It is not necessary to say, whether this right of the widow in possession is a lien in the strict sense of the term, although no doubt the right is so stated in a judgment of the High Court in a case of *Ahmed Hossein* v. *Mussamut Khodeja*[6]. Whatever the right may be called, it appears to be founded on the power of the widow, as a creditor for her dower, to hold the property of her husband, of which she has lawfully, and without force or fraud, obtained possession until her debt is satisfied, with the liability to account to those entitled to the property, subject to the claim for the profits received." This is, in our opinion, a substantial right and under certain circumstances it would practically be a right in substitution of the claim for dower. Where the amount of dower is large and far in excess of the value of the property, of which the widow has obtained possession and where there is no other property of the husband, as in the present case, the right of the widow to hold the property in lieu of her dower is the only right left, and in our opinion as substantial a right as her claim to dower. It is not disputed and cannot be disputed that the claim to dower is heritable and would devolve on her heirs.

(1) (1885) 7 All. 353.
(2) (1910) 32 All. 551.
(3) (1898) 20 All. 262.
(4) (1907) 29 All. 640.
(5) (1871) 14 Moo. I. A. 377 at p. 384.
(6) (1868) 10 W. R. 369.

It is difficult to understand why the right, which is an incident of the claim to dower, and is capable of being enjoyed as a substantive right in substitution of the claim to dower under certain circumstances should be treated as a merely personal right, when the principal right of which it is an incident, is not so treated according to the Mahomedan law. It may be, as in this case, that after the widow has had possession for several years, her claim to dower may be time-barred; and she would care only for the right to hold the property in lieu of dower. The heirs would not care to have any accounts taken when it is clear that the proceeds fall far short of the amount due to the widow. The right to the possession of property appears to be quite a substantive right, and we see no reason to treat it as personal, when the claim to dower is a heritable right. For instance if a widow does not obtain possession of her husband's property, and sues the heirs in respect of her dower she can obtain a decree and bring the property to sale. She would obtain the proceeds of the sale, and these proceeds would devolve on her heirs. There is no reason why the alternative right, which a Mahomedan widow has of holding the property of her husband, with the liability to account, in lieu of her dower, should not devolve on her heirs on her death. This contention must, therefore, be disallowed.

It remains to consider the last contention that the plaintiffs having been dispossessed of the portion of the upper story other than the two rooms, which were already in the possession of defendant No. 1, they cannot maintain an action to recover it, though they may be able to retain possession, which they have already got. This contention is based upon the analogy of lien. It seems to be unnecessary to determine whether it is a lien or the position is more analogous

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to that of a mortgagee. Taking the right as described in the passage already quoted from the judgment in *Mussumat Bebee Bachun's* case,[1] and treating it as a matter of substance and not of words, it seems to us that if the right is to be a real one the widow should have the right to claim back the possession, if it has been wrongfully disturbed by any body. In this case the plaintiffs are found to have been in peaceful possession for a long time, and the wrongful dispossession by defendant No. 1 is no answer to their right to possession. No doubt in most of the cases cited before us the widow was in possession and was resisting the claim to oust her. But it is no ground for holding that after having peaceful possession for a long time if she were wrongfully dispossessed she could not sue to recover the possession. In the case of *Azizullah Khan* v. *Ahmad Ali Khan*[2] to which we have referred in connection with another point, it has been held by Oldfield and Mahmood JJ. that the heirs of the widow, who were held to be entitled to succeed her in possession, have a right to maintain a suit for the recovery of the possession, if wrongfully deprived thereof. All the points urged in support of the appeal fail.

We, therefore, affirm the decree of the lower Court and dismiss the appeal and cross objections with costs.

Decree confirmed.

J. G. R.

[1] (1871) 14 Moo. I. A. 377 at p. 384.

[2] (1885) 7 All. 353.