Privy Council Appeal No. 73 of 1914.

Bengal Appeal No. 36 of 1911.

Imambandi and Others - - - - *Appellants,*

v.

Sheikh Haji Mutsaddi and Others - - - *Respondents,*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM, IN BENGAL.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 28TH FEBRUARY, 1918.

Present at the Hearing:

LORD SHAW.
SIR JOHN EDGE.
MR. AMEER ALI.
SIR WALTER PHILLIMORE, BART.
SIR LAWRENCE JENKINS.

[*Delivered by* MR. AMEER ALI.]

This is an appeal from a judgment and decree of the High Court of Calcutta, dated the 30th August, 1911, which affirmed the decree of the Subordinate Judge of Saran awarding to the plaintiffs possession of a share in certain landed property situated in that district.

The property in suit belonged originally to one Ismail Ali Khan, a wealthy Mahommedan inhabitant of the Sub-Division of Siwan in the Saran District. The plaintiffs allege that on his death in March 1906 he left him surviving three widows and several children, and that from one of these widows, named Enayet-uz-Zohra, acting for herself and for her two minor children, they purchased the share in suit for the possession of which they brought the present action.

It appears that shortly after Ismail Ali Khan's death the contesting defendants 1 to 7 applied to the Revenue Courts for mutation of names (as proprietors) in the Collector's records, and, as usually happens in these cases in India, especially in Mahommedan families, immediately this application was made, a claim was put forward on behalf of Enayet-uz-Zohra and her children that they were equally entitled with the other

heirs of Ismail Ali Khan to have their names entered as co-sharers in the estate by right of inheritance, the allegation being that Zohra was one of his lawfully wedded wives and that her children were his legitimate issue. The Revenue Courts rejected her claim, holding that it was not established to their satisfaction that she was Ismail Ali Khan's married wife or that the children were his lawful issue. They accordingly made an order directing the registration of the contesting defendants' names in succession to Ismail Ali Khan.

It should be mentioned here that the defendants 1 and 5 are admittedly Ismail Ali Khan's married wives, defendants 2, 3, and 4 are his issue by defendant 1, and defendants 6 and 7 his daughters by defendant 5.

The plaintiffs are dealers in hide and live also at Siwan. There seems to have been litigation between them and Ismail Ali Khan in his lifetime, and since his death they seem to have espoused Zohra's cause. The deed executed by Zohra bears date the 10th June, 1906, and purports to convey to the plaintiffs the shares of both herself and her minor children, and in the suit they are included as defendants 8 to 10. The reliefs sought are of a twofold character: *first*, a declaration of the title and status of the plaintiffs' vendors; and, *secondly*, a decree in favour of the plaintiffs for possession of the shares covered by the deed of sale.

The contesting defendants denied, as they had done in the Revenue Courts, that Zohra was one of Ismail Ali Khan's married wives or that her children were his legitimate issue, and they further contended that the shares the plaintiffs claimed to recover did not pass under the sale The sixth issue framed by the Subordinate Judge seems to relate to this point.

The plaint was filed on the 25th March, 1909, but it does not appear to have been admitted until the 2nd April. The contesting defendants filed their written statements in July 1909; after that the case dragged its slow length along until the 18th June, 1910, when the actual trial began. In the interim, however, various interlocutory orders were made, including an order for the appointment of Zohra as guardian *ad litem* for her children (though her interest in the suit was clearly adverse to theirs). Admittedly she was never appointed under the Guardian and Wards Act (VIII of 1890) a guardian of their property.

The examination in Court of the plaintiffs' witnesses commenced on the 16th June, 1910; on the 18th June (the date given in the judgment of the High Court does not appear to agree with the date in the order sheet) they applied for a summons against the defendants for the production of certain *bahis*, or account books, belonging to Ismail Ali Khan for the Fasli years 1294 to 1313 (1887—1906). The order on this application was as follows: "I decline to issue summons at this stage." And there, so far as the plaintiffs were concerned, the matter was allowedto rest.

As a large part of the judgments of both the Courts in India is occupied with an examination of these *bahis*, viz., whether they are reliable or not, it is necessary to mention that these very books had been produced and filed in Ismail Ali Khan's lifetime on his behalf in the litigation between him and the plaintiffs; after his death they were returned to the contesting defendants' pleader, when it was discovered that a large number of leaves were abstracted from several of the books. This was represented to the presiding officer of the Court where the books were filed, but there is nothing to show the result of the representation. The plaintiffs' case appears to have closed on the 26th June, and on the following day the defendants commenced to examine their witnesses. On the same day they produced the *bahis*. The Subordinate Judge's order on their petition is in these terms: "On the defendants' application filing therewith the *bahis* from 1294 to 1311 Fasli, it is ordered that they be kept with the records, and that the plaintiffs' pleader be informed accordingly." About this time the missing leaves turned up mysteriously. The trial Judge says he received them by post from some unknown source; and apparently after receipt he handed them to the proper officer. Upon becoming aware of this fact the defendants applied to the Court that the torn-out leaves thus rediscovered might be admitted in evidence; and on the 29th June, whilst the trial was proceeding and evidently in the presence of the pleader for the opposite party, the Subordinate Judge ordered that the leaves in question should be used as evidence, and marked them as Exhibits F 1 to F 5.

It is hardly likely that the leaves were originally abstracted by the defendants and that this roundabout way was adopted for the purpose of getting the books admitted as evidence. On the face of it, the suggestion appears to be absurd.

The use the contending defendants wished to make of the account books was of a negative character. These books contain regular entries of payments by Ismail Ali Khan to his admitted wives, defendants 1 and 5, under the honorific designation of *Haveli Kalan* ("senior mansion") and *Haveli Khurd* ("junior mansion"), being euphemisms for wives. There is no entry, however, of any payment to Zohra. The defendants accordingly asked the Court to draw from the absence of any such entry in her name the inference that she was not Ismail Ali Khan's wife and did not hold the same position as the other ladies. Counsel for the plaintiffs seems to have been greatly impressed by this argument; in fact, he appears to have conceded that, if the books were to be relied upon, Zohra's claim must fail. He was thus driven to challenge their genuineness. The Subordinate Judge appears to have taken the same view; he thought that the books must be first eliminated before the direct evidence could be properly appraised, and this reasoning runs through the judgments of both the Courts in India. The trial Judge on certain

grounds came to the conclusion that the *bahis* must be put aside from consideration as unreliable. He then proceeded to discuss the oral testimony; and in the result found that Zohra was, in fact, a wife of Ismail Ali Khan, and that the defendants 9 and 10 were his children by her. He accordingly decreed the plaintiffs' claim. And his decree has been affirmed by the High Court of Calcutta. The learned Judges of the High Court also felt impressed with the absence of entries in the *bahis* in Zohra's name, and therefore proceeded to deal with them first. This mode of treatment has been strongly assailed, not without reason, before this Board. It seems to their Lordships that the true criterion for the determination of the question at issue was missed by both the Courts. The onus of establishing the title of their vendors lay primarily on the plaintiffs; the evidence furnished by the books was negative and inferential, and in substance directed to the corroboration of the defendants' witnesses, who denied that Zohra was one of Ismail Ali Khan's wives. Rule 1, Order XIII of the Civil Procedure Code requires the parties or their pleaders to produce at the first hearing of the suit all the documentary evidence of every description in their possession or power "on which they intend to rely." But it does not exclude the discretion of the Court to receive any such documentary evidence at any subsequent stage. In the present case the books had been filed previously in another Court, and when produced on the 27th June they were in fact received and ordered to be placed with the records. There seems to have been no objection to their reception for non-compliance with the provisions of the Code. If the plaintiffs had taken notes of certain entries in the books, as is alleged they had done when the *bahis* were in the other Court, they could surely have cross-examined the defendants' witnesses, who were called to prove the books, as to the discrepancies. Their Lordships are not satisfied that the books are not the genuine account-books of Ismail Ali Khan. What effect the absence in them of entries in Zohra's name may have in the consideration of the general evidence is another matter.

In the absence of any statutory provision making compulsory the registration of Mahommedan marriages, the Indian Courts, in case of a dispute as to the *factum* of a marriage, are usually left to discover, or attempt to discover, the truth from a mass of conflicting and often very unsatisfactory evidence of witnesses. Such has been the burden cast on the Courts in the present instance. The plaintiffs have endeavoured to prove in two ways that Zohra was one of Ismail Ali Khan's wives, viz., *first*, by direct evidence of an actual marriage, and, *secondly*, by the acknowledgment by him of her children as his legitimate issue, and by the presumption of marriage arising from such acknowledgment. The defendants, on the other hand, tried to show that Zohra was a woman of loose character, with the object apparently of establishing that it was

most unlikely a man in Ismail Ali Khan's position would marry such a person. They also called a number of witnesses, who are said to have been on terms of intimacy with him, to state that they never heard him speak of Zohra as his wife. Including the inference from the account books, all the evidence on the defendants' side is purely and naturally negative. In their Lordships' opinion, the oral testimony regarding the solemnisation of a marriage accompanied by ostentatious ceremonies and high dower is by no means satisfactory, and if the case had stood there, the absence of Zohra's name in Ismail Ali Khan's account books might have weighed heavily against her. But their Lordships find clear evidence of a reliable character regarding his acknowledgment of her children. Her case, therefore, comes within the rule of Mahommedan law to which Garth, C. J., and Wilson, J. (afterwards Sir Arthur Wilson), gave expression in *Mahatala Bibee* v. *Prince Ahmed Holeem-ooz-Zaman* (10 Cal. L.R., 293).

In their Lordships' opinion, the legal presumption arising in favour of Zohra from the acknowledgment of the children is not displaced by the mere inference the defendants seek to draw from the absence of entries in her favour in Ismail Ali Khan's account books. Such absence is capable of explanation, and it is possible she could have explained it had her attention been called to the matter. One explanation, however, is on the surface: on the facts proved in the case it is quite clear that this lady's father, though belonging to the same clan as Ismail Ali Khan, was a man considerably inferior in social status; it is not at all unlikely that the deceased was not particularly proud of his connection with the daughter. This would explain both the absence of the entries and his reticence about her to ordinary acquaintances and even friends. On the whole, their Lordships are of opinion that both Zohra and her children are entitled to their legal shares in the inheritance of Ismail Ali Khan. But the Courts in India have awarded to the plaintiffs, on the basis of the deed of purchase from Zohra, a decree for possession of her share and the shares of defendants 9 and 10. And the question is whether they have acquired any title to the infants' shares under the sale by the mother. The defendants objected in the High Court to the decree of the Subordinate Judge on the ground that she had no power to convey her children's interest to the plaintiffs. The learned Judges overruled the objection on the ground that the question did not arise in the present case. Their Lordships regret to have to differ from this view. This is an action in ejectment; the defendants are in possession; the plaintiffs, if they are to obtain possession of the minors' shares, must do so on the strength of their own title. It is essential, therefore, to consider whether the title they allege to have acquired under the conveyance by Zohra is well-founded.

The question how far, or under what circumstances according to Mahommedan law, a mother's dealings with her minor child's property are binding on the infant has

been frequently before the Courts in India. The decisions, however, are by no means uniform, and betray two varying tendencies: one set of decisions purports to give such dealings a qualified force; the other declares them wholly void and ineffective. In the former class of cases, the main test for determining the validity of the particular transaction has been the benefit resulting from it to the minor; in the latter, the admitted absence of authority or power on the part of the mother to alienate or encumber the minor's property.

In this conflict of opinion, their Lordships think it desirable that a definite rule should, if possible, be laid down; and with this object they propose to review briefly the provisions and principles of the Mahommedan law, as they apprehend it, governing the subject.

It is perfectly clear that under the Mahommedan law the mother is entitled only to the custody of the person of her minor child up to a certain age according to the sex of the child. But she is not the natural guardian; the father alone, or, if he be dead, his executor (under the Sunni law), is the legal guardian. The mother has no larger powers to deal with her minor child's property than any outsider or non-relative who happens to have charge for the time being of the infant. The term "*de facto* guardian" that has been applied to these persons is misleading: it connotes the idea that people in charge of a child are by virtue of that fact invested with certain powers over the infant's property. This idea is quite erroneous; and the judgment of the Board in *Matadin* v. *Ahmed Ali* (L.R. 39, I.A., p. 49) clearly indicated it. There, an infant's share was sold by the elder brother, in whose charge the child was, along with his own share, to pay a joint ancestral debt. The vendee at the time of the sale was in possession of the whole property under a mortgage executed by the ancestor. On attaining majority the younger brother, ignoring the sale, brought a suit against the vendee-mortgagee for the redemption of his own share. The defence set up was that the sale by the infant's *de facto* guardian, made for a valid necessity, was binding on the infant. The Lower Courts decreed the plaintiff's claim; on appeal to this Board the arguments proceeded on the same lines as in the present case, though in reverse order.

Lord Robson, in delivering the judgment of the Board, observed as follows:—

"It is urged on behalf of the appellant that the elder brothers were *de facto* guardians of the respondent, and, as such, were entitled to sell his property, provided that the sale was in order to pay his debts and was therefore necessary in his interest. It is difficult to see how the situation of an unauthorised guardian is bettered by describing him as a '*de facto*' guardian. He may, by his *de facto* guardianship, assume important responsibilities in relation to the minor's property, but he cannot thereby clothe himself with legal power to sell it."

And he went on to add:—

"There has been much argument in this case in the Courts below, and before their Lordships, as to whether, according to Mahommedan law,

a sale by a *de facto* guardian, if made of necessity, or for the payment of an ancestral debt affecting the minor's property, and if beneficial to the minor, is altogether void or merely voidable. It is not necessary to decide that question in this case."

And he then proceeded to state the reasons why that was not considered necessary.

This latter passage in Lord Robson's judgment has created the impression that their Lordships' decision was confined to the special facts of that case and left open the general question regarding the validity of alienations by unauthorised guardians of the property of minors.

As already observed, in the absence of the father, under the Sunni law, the guardianship vests in his executor. If the father dies without appointing an executor (*wasi*) and his father is alive, the guardianship of his minor children devolves on their grandfather. Should he also be dead, and have left an executor, it vests in him. In default of these *de jure* guardians, the duty of appointing a guardian for the protection and preservation of the infants' property devolves on the Judge as the representative of the Sovereign (Baillie's "Digest," ed. 1875, p. 689; Hamilton's *Hedâya*, Vol. IV, p. 555). No one else has any right or power to intermeddle with the property of a minor, except for certain specified purposes, the nature of which is clearly defined. But the powers of even the *de jure* guardians are confined within legal limits. For example, whilst an executor-guardian (*wasi*) may "sell or purchase movables on account of the orphan under his charge either for an equivalent or at such a rate as to occasion an inconsiderable loss," dealings with his immovable property are subjected to strict conditions (Baillie's "Digest," p. 687). The reason for the restrictions is thus given in the *Hedâya* (Vol. IV, p. 553):—

"The ground of this" (the difference in the power of dealing with the two kinds of property) "is that the sale of movable property is a species of conservation, as articles of that description are liable to decay, and the price is much more easily preserved than the article itself. With respect, on the contrary, to immovable property, it is in a state of conservation in its own nature whence it is unlawful to sell it—unless, however, it be evident that it will otherwise perish or be lost, in which case the sale of it is allowed."

In fact, the Mussulman law appears to draw a sharp distinction between movable and immovable property (*a'kâr*) in respect of the powers of guardians, as will be seen from the following passage in Baillie's "Digest," p. 689:—

"With regard to the executor of a mother or brother,—when a mother has died leaving property and a minor son, and having appointed an executor, or a brother has died leaving property and a minor brother, and having appointed an executor, the executor may lawfully sell anything but *akar** belonging to the estate of the deceased, but can neither sell the *akar*, nor lawfully buy anything for the minor but food and clothing, which are necessary for his preservation. The executor of a mother has no power to sell anything that a minor has inherited from his father,

* *Akâr* is immovable property, and includes houses, groves, orchards, &c.

whether movable or immovable, and whether the property be involved in debt or free from it. But what he has inherited from herself when it is free from debts and legacies, the executor may sell what is movable, but he cannot sell *akar*. If the estate is involved in debt or legacies, and the debt is such as to absorb the whole, he may sell the whole, the sale of *akar* coming within his power: and if the debt does not absorb the whole, he may sell as much of it as is necessary to defray the debts, and as to his power to sell the surplus there is the same difference of opinion as has been stated above."

When the mother is the father's executrix, or is appointed by the Judge as guardian of the minors, she has all the powers of a *de jure* guardian. Without such derivative authority, if she assumes charge of their property of whatever description and purports to deal with it, she does so at her own risk, and her acts are like those of any other person who arrogates an authority which he does not legally possess. She may incur responsibilities, but can impose no obligations on the infant. This rule, however, is subject to certain exceptions provided for the protection of a minor child who has no *de jure* guardian. A fatherless child is designated in the law-books an "infant-orphan" (*yeteem saghir*). The *Hedâya* classifies the acts that may have to be done for an infant under three heads. It says:—

"Acts in regard to infant-orphans are of three descriptions, viz.: (1) Acts of guardianship, such as contracting an infant in marriage, or selling or buying goods for him, a power which belongs solely to the *walee*, or natural guardian, whom the law has constituted the infant's substitute in those points; (2) acts arising from the wants of an infant, such as buying or selling for him on occasions of need, or hiring a nurse for him, or the like, which power belongs to the maintainer of the infant, whether he be the brother, uncle, or (in the case of a foundling) the *mooltakit**, or *taker-up*, or the mother, provided she be the maintainer of the infant; and as *these* are empowered with respect to such acts, the *walee*, or natural guardian, is also empowered with respect to them in a still superior degree; nor is it requisite, with respect to the *guardian*, that the infant be in his immediate protection; (3) acts which are *purely advantageous*† to the infant, such as accepting presents or gifts, and keeping them for him, a power which may be exercised either by a *mooltakit*, a brother, or an uncle, and also by the infant himself, provided he be possessed of discretion, the intention being only to open a door to the infants' receiving benefactions of an advantageous nature." (Vol. IV, p. 124, Bk. XLIV.)

The examples given under the second head indicate the class of cases in which the acts of an unauthorised person who happens to have charge of a child are held to be binding on the infant's property. They also help to explain and illustrate the extent of such "*de facto* guardian's" powers. The permissibility of these acts depends on the emergency which gives rise to the imperative necessity for incurring liabilities without which the life of the child or his perishable goods and chattels may run the risk of destruction. For instance, he may stand in imme-

* A *mooltakit* is a person who undertakes to bring up a foundling or an orphan-child.

† In the original the words are *nafa' mahaz*, which mean "unmixed benefit."

diate need of aliment, clothing, or nursing; these wants must be supplied forthwith. He may own "slaves" or live-stock: food and fodder must be immediately procured. And these imperative wants may recur from time to time. Under such circumstances power is given to the lawful guardian to incur debts or to raise money on the pledge of the minor's goods and chattels (*matâ'*)* (*Majma'-ul-Anhar*, Vol. II, p. 571). And this power, in the absence of a *de jure* guardian, the law extends to the person who happens to have charge of the child and of the child's property, though not a constituted or authorised guardian.

There is no reference to the pledge or sale of immovable property (*a'kâr*), as the power of dealing with that class of property is confined to the *de jure* guardians, and is treated in the *Fatâwai-Alamgiri* in a separate chapter (Baillie's "Mahommedan Law of Sale," Chapter XVI).

It is to be observed that under the third "description" of acts that may be needful for an infant, a person in charge of a child, although not a *de jure* guardian, may validly accept on behalf of his ward an unburdened bounty, it being an act "purely advantageous" to the child, to use the expression of the *Hedâya*.

The reasoning on which it is sought to give to persons who happen to have charge of the person and property of a child, and are, therefore, called "*de facto* guardians," the same powers as are possessed by *de jure* guardians, is purely inferential. It proceeds on the analogy of a dealing by an outsider who purports to sell another's property without any authority from the real owner. Such a person in the Hanafi law is called a *fazûli*, or, as Mr. Hamilton spells it, *fazoolee*, which expression is defined by Richardson to mean a person "busying himself in things not belonging to him, or acting without authority." With the effect of the acts of a *fazûli* their Lordships will deal presently. Before doing so, they wish to refer briefly to the state of the decisions in the Indian Courts.

The Calcutta High Court, in sustaining transactions entered into by *de facto* guardians, has proceeded mainly on considerations of necessity for and benefit to the infant. The other High Courts, generally speaking, have cut the Gordian knot by holding that all such dealings with a minor's property were void.

Their Lordships do not feel called upon to examine in detail either set of decisions. But the last case on the subject in the Madras High Court requires their careful and respectful consideration; (*Ayderman Kutti* v. *Syed Ali*, I.L. R. 37, Mad. 514). In their judgment in this case the learned Judges have examined the law at considerable length, and their decision appears to divide itself into three broad propositions: *first*, that as regards the

* Mr. Hamilton translates *matâ'* as meaning "personal chattels."

powers of guardians, *de jure* as well as *de facto*, the Mahommedan law recognises no distinction as to the nature or kind of property, viz., whether it is immovable or movable; *secondly*, that in substance the powers of an unauthorised person who has charge of an infant are co-extensive with those of a lawfully constituted guardian, except in so far that the acts of the former are subject to considerations of necessity or benefit to the infant; and, *thirdly* (and this seems to form the essence of the judgment), that dealings by "a *de facto* guardian" are neither void nor voidable, but are "suspended" until the minor on attaining majority exercises his option of either ratifying the transaction or disavowing it.

With regard to the first of the above propositions, their Lordships have already indicated their views. In their opinion, the Mahommedan law, for obvious reasons, makes a distinction, and a sharp distinction, between "goods and chattels" (*mata'*) and immovable property (*a'kâr*) with regard to the powers of dealing by guardians.

The second proposition, speaking with respect, appears to their Lordships to lose sight of the fact that the acts of *de jure* guardians also are subject to the conditions of necessity for or benefit to the infant. So that upon the reasoning of the Madras judgment, the powers of "a *de facto* guardian" would, to all intents and purposes, be co-extensive with those of a *de jure* guardian. This conclusion would wipe out one of the most important safeguards provided by the Mahommedan law for the protection of the interests of infants. The learned Judges say that:—

> "The law as regards the effect of dealings with a minor's property by a *de facto* guardian otherwise than in a case of absolute necessity or clear advantage to the minor is but a corollary of the general rule relating to *salisly* [*sic*], a person professing to deal with another's property, but without having legal authority to do so, *i.e.*, by a *fazuli*, as he is technically called; such sales generally are treated as *mauquf*, or dependent."

Then, after referring to various authorities, they continue as follows:—

> "The result of the above discussion is that, according to Muhammadan jurists, in cases of urgent and imperative necessity, such as those mentioned, the *de facto* guardian can alienate the property of the minor, no distinction being made between movable and immovable property."

It would have been an advantage to their Lordships if they had been placed in a position to judge for themselves, on the actual texts, the meaning of the Arabian text-writers and commentators. However, the *Hedâyah* and the *Fatâwai-Alamgiri* are recognised as standard authorities in India on the Hanafi branch of the Sunni Law. Of the *Hedâyah* there is a rendering in English made by Mr. Hamilton under the orders of Warren Hastings; and a large part of the *Fatâwai-Alamgiri* has been paraphrased into English by Mr. Neil Baillie,

which is commonly known as Baillie's "Digest" (Hanafia Law). Both Mr. Hamilton and Mr. Neil Baillie in their renderings have, with the object of elucidation, occasionally added phrases which do not exist in the original, but on the whole the English versions of the *Hedâyah* and of the *Fatâwai-Alamgiri* are valuable works on Mahommedan Law.

The subject of sales by unauthorised persons is treated in the *Hedâyah* in a separate section entitled "of Fazoolee Beea,* or the sale of the property of another without his consent" (Book XVI, Vol. II, p. 508). It says :—

"If a person were to sell the property of another without his order the contract is complete, but it remains with the proprietor either to confirm or dissolve the sale as he pleases. Shâfei is of opinion that the contract, in this case, is not complete, because it has not issued from a lawful authority, for that is constituted only by property or permission, neither of which exist in this case."

It then proceeds to give the arguments of the Hanafi doctors in support of their view that the unauthorised contract is "complete." And then it adds :—

"If the proprietor should die, then the consent of the heirs is of no efficacy in the confirmation of the Fazoolee sale, in either case, that is, whether the price have been stipulated in *money* or in *goods*; because the contract rested entirely on the personal assent of the deceased."

In other words, the so-called sale remains wholly ineffective until it receives the "confirmation" of the owner, to whom alone belongs the power of "confirming" it. If he dies before he has "confirmed" it, the transaction falls to the ground, as the right to adopt the *fazûli's* act does not pass to his heirs.

In the *Fatâwai Alamgiri*† the subject is treated under the designation of "dependent sales" (Vol. III, p. 245; Baillie's "Mahommedan Law of Sale," pp. 218–219) :—

"When a person sells the property of another, the sale is suspended, according to us [*i.e.*, the Hanafis], for the sanction or ratification of the proprietor; and the existence of both the parties to the contract, and of the subject of sale, is a necessary condition to the validity of his sanction . . . . .

"If the owner should die before sanctioning the sale, sanction by his heir would not suffice to give it operation. Sanction by an owner himself renders a sale operative."

The word in the above passage translated as "suspended" is derived from the same root as the word that has been translated in the heading as "dependant," and in this connection really means "is dependent upon"; also the words "or ratification" have been introduced by Mr. Baillie by way of explanation. The word *ijâzat* in the original is rightly rendered into "sanction."

* Correctly, Bai'.

† The "Book on Sale" in the *Fatâwai Alamgiri* has been rendered into English by Mr. Baillie under the name of the "Mahommedan Law of Sale."

The *Majma'-ul-Anhar* states the rule relating to a sale by a *fazûli* in similar terms; it says in substance that such a sale is "established" (takes effect) on the sanction of the *mâlik* (owner), subject to four conditions, which it specifies. And then it adds significantly that according to Shâfei (the founder of the second great Sunni school of law) all dealings by an unauthorised person are absolutely void (*bâtil*); Vol. II, p. 88.

In their Lordships' opinion, the Hanafi doctrine relating to a sale by an unauthorised person remaining dependent on the sanction of the owner refers to a case where such owner is *sui juris*, possessed of the capacity to give the necessary sanction and to make the transaction operative. They do not find any reference in these doctrines relating to *fazûli* sales, so far as they appear in the *Hedâya* or the *Fatâwai Alamgiri*, to dealings with the property of minors by persons who happen to have charge of the infants and their property—in other words, the "*de facto* guardians."

The Hanafi doctrine about *fazûli* sales appears clearly to be based on the analogy of an agent who acts in a particular matter without authority, but whose act is subsequently adopted or ratified by the principal which has the effect of validating it from its inception. The idea of agency in relation to an infant is as foreign, their Lordships conceive, to Mahommedan Law as to every other system.

In this connection it should be noted, that whilst Chapter XII deals exclusively with the effect of "dependent sales," in Chapter XVI the rules relating to the powers of guardians are discussed at considerable length (Baillie's "Mahommedan Law of Sale," p. 243; *Fatâwai Alamgiri*, Vol. III, p. 229). The following rule lays down the conditions governing sales by the executor (*i.e.*, the appointed guardian) of the immovable property of an infant:—

"And, according to modern decisions, the sale of immovable estate by an executor is lawful only in one of the three cases following: that is, where there is a purchaser willing to give double its value, or the sale is necessary to meet the minor's emergencies, or there are debts of the deceased, and no other means of paying them." (Baillie's "Mahommedan Law of Sale," p. 247; *Fatâwai Alamgiri*, Vol. III, p. 233.)

Having regard to the object in view, this dictum appears to their Lordships to apply to all forms of property which, like *a'kâr*, combine both security and permanency. But it does not exclude the discretion of the Judge to sanction any alteration of investment in the interests of the infant.

The following case affords a further illustration of the limitations on the powers of "*de facto* guardians":—

"A woman after the death of her husband sells property that belonged to him, supposing herself to be his executrix, and her husband having left minor children: she after some time declares that she was not the executrix, her assertion, however, is not to be credited as against the

purchaser, but the sale remains in suspense till her children arrive at puberty. If they should admit that she was the executrix, the sale by her is lawful: but if they deny the fact, the sale is void; and though the purchaser should have manured the purchased land, he has no recourse for reimbursement against the woman. What has been said is on the supposition that the woman sues for a cancellation of the sale, on the ground that she was not the executrix; but if the *minor* sue on that ground, his claim is to be heard." (Baillie, p. 249; *Alamgiri*, Vol. III, p. 234.)

The rest of the passage is immaterial for the purposes of this judgment.

The above case shows that even where the mother believes she is vested with authority as her husband's executrix, and in that belief purports to deal with the minor's property, a purchaser let into possession by her is liable to be ejected at the instance of the minor. Her own subsequent denial of authority does not affect the purchaser's position; but if the transaction is impugned by the rightful owner—viz., the infant—the onus is on the vendee to establish the foundation of his title, that is, that his vendor possessed in fact the authority under which she purported to act.

A further rule, which is given in the "Book on Pledges" (Mortgages) (*Kitâb-ur-Rahn*) of the *Fatâwai Alamgiri*, which does not appear to have been translated by Mr. Baillie, is equally explicit After stating the principle applicable to the powers of the father to pledge or mortgage his minor child's property, it goes on to say: "the mother: if she pledges (mortgages) the property of her infant child, it is not lawful, unless she be the executrix [of the father] or be authorised therefor by the guardian of the minor; or the Judge should grant her permission to pledge the infant's property. Then it is lawful; and the right to possession and user is established in the *murtahin* (pledgee or mortgagee) without power of sale;" (*Fatâwai Alamgiri*, Vol. V, p. 638).

It seems to their Lordships that the power to sell cannot be wider than the power to mortgage.

For the foregoing considerations their Lordships are of opinion that under the Mahommedan law a person who has charge of the person or property of a minor without being his legal guardian, and who may, therefore, be conveniently called a "*de facto* guardian," has no power to convey to another any right or interest in immovable property which the transferee can enforce against the infant; nor can such transferee, if let into possession of the property under such unauthorised transfer, resist an action in ejectment on behalf of the infant as a trespasser. It follows that, being himself without title, he cannot seek to recover property in the possession of another equally without title.

Their Lordships are accordingly of opinion that the decree of the High Court, in so far as it awards to the plaintiffs possession of the shares of the defendants 9 and 10, should be discharged,

and, subject to this variation, it should be affirmed and the appeal be dismissed with costs. And their Lordships will humbly advise His Majesty accordingly.

Their Lordships cannot help deprecating the practice which seems to be growing in some of the Indian Courts of referring largely to foreign decisions. However useful in the scientific study of comparative jurisprudence, judgments of foreign Courts, to which Indian practitioners cannot be expected to have access, based often on considerations and conditions totally differing from those applicable to or prevailing in India, are only likely to confuse the administration of justice.

In the Privy Council.

IMAMBANDI AND OTHERS

v.

SHEIKH HAJI MUTSADDI AND OTHERS.

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