BOMBAY HIGH COURT

Rasoolbibi

Vs

Yusuf Ajam Piperdi

(John Beaumont, Kt., C.J. Rangnekar, J.)

14.03.1933

JUDGMENT

Rangnekar, J

1. [His Lordship after dealing with the facts of the case, proceeded]. Mr. Tyabji has contended that the interest given to Hafizabibi in the immoveably property is in the nature of a usufructuary bequest; that the devise of the property is to Haji Ajam, the usufruct being bequeathed to Hafizabibi. In that way the devise and the bequest took effect simultaneously on the death of the testatrix. For this contention he has relied upon the Hedaya, Vol. IV, Ch. 5, p. 527, where it is stated:-

If a person bequeath the service of his slave, or the use of his house, either for a definite or an indefinite period, such bequest is valid ; because as an endowment with usufruct, either gratuitous or for an equivalent, is valid during life, it is consequently so after death ; and also, because men have occasion to make bequests of this nature as well as bequests of actual property. So likewise, if a person bequeath the wages of his slave, or the rent of his house, for a definite or indefinite term, it is valid, for the same reason. In both cases, moreover, it is necessary to consign over the house or the slave to the legatee, provided they do not exceed the third of the property, in order that he may enjoy the wages or service of the slave, or the rent or use of the house during the terra prescribed, and afterwards restore it to the heirs.Reliance has also been placed on a further passage at p. 531 which is as follows :-If a man bequeath the parson of his slave to Zeyd, and the service of him to Omar, and the slave exceed not a third of the testator's estate, his person belongs to Zeyd, and his service to Omar ; for as the testator has bequeathed a specific thing to each legatee respectively, each is therefore entitled to his own right. As, moreover, (the bequest to the usufructuary legatee being at any rate valid) if the slave's person has not been bequeathed, that would have belonged to the heirs, at the same time that his services would have belonged to the legatee ; so in the same manner his services belong to the legatee of usufruct where the testator has bequeathed his person to another; for bequest resembles

inheritance, inasmuch as the right of property to the article is established after death in both instances.Reliance is also placed in this connection on Baillie's Digest of Moohummudan Law, Vol. I, p. 663, where it is stated :-It should be known that a bequest of the service of a slave, or the occupation of a mansion, or the produce (ghullut) of both, or of lands and gardens, is lawful. And it is lawful for a time or in perpetuity ; for, as the profits of a thing may be transferred by a person during his lifetime, with or without a consideration, so they may, in like manner, be transferred after his death ; the thing itself being, in a manner' detained in his ownership, that the legatee may enjoy its profits, in the same way as a person in whose favour a wakf, or appropriation, has been made, enjoys its profits, by virtue of the ownership of the appropriator. A further passage relied on is at p. 664 :-When the service of a slave is bequeathed to one legatee, and his person to another, and the slave is within a third, each legatee is entitled to what has been bequeathed to him respectively. And if the bequest be absolute, the legatee of the service is entitled to it till his death; after which it is to bo transferred to the legatee of the person, if he bo alive, and if not, then it is to bo transferred to the heirs of the testator. A further passage relied on is at page 668 :-If a person should bequeath 'this slave to such an one, and his service to such another,' or 'this mansion to such an one, and its occupancy to such another' or 'this tree to such an one, and its fruit to another,' or 'this sheep to such an one 'and its wool to another,' each legatee would have what was mentioned for him without any difference of opinion, whether the bequests are connected together or are se parate. But if a beginning is made in these oases with the accessory and the principal is then bequeathed, as for instance, if the service of the slave is first bequeathed to one person, and the slave to another, or the occupancy of this man sion to one person, and the mansion itself to another, or the fruit to one and the tree to another, it is only when the bequests are made connectedly that each legatee is entitled to what has boon named for him specially; for if they are mentioned separately, the legatee of the principal is exclusively entitled to the principal and the accessory belongs to them both in halves. And if a mansion is bequeathed to one person, and a particular apartment in it to another, the apartment is to both in shares.

2. It is clear from the texts both of the Hedaya and Futawa Alumgiri (Baillie) that a simultaneous bequest may be made of the thing itself in favor of one person and its produce or use in favor of another. In such cases the ownership of the thing would be in the person to whom the thing itself is bequeathed and the person entitled to the use or produce would have such limited interest only in the thing. Baillie, at p. 669, makes the point clear. The passage is :-

When the service of a young slave has been bequeathed to one person, and the slave himself to another, the latter is bound to maintain him until ha is fit for service ; but after that, the former is liable for his maintenance.It also clearly appears from a passage in Baillie, at p. 665, that usufructuary bequests are strictly construed in the Mahomedan law. The passage is:-When one

has bequeathed the produce of his mansion or slave), and the legatee wishes to occupy the mansion himself, or make use of the service of the slave, can he lawfully do so ? There is nothing on the subject in the Asul ; and 'our' sheikhs differ, but Aboobekr has said that he cannot; and this is valid.

3. Mr. Tyabji has relied upon the following passage in Clause 7 of the will as constituting a usufructuary bequest only :-My daughter Hafizabibi is to enjoy the abovementioned oart and the furniture etc. therein as long as she is alive and she is to enjoy the income thereof...However, she cannot alienate the same to any one for any reason whatsoever by way of sale, mortgage, gift, etc. I appoint her to he entitled to enjoy the same and take the income thereof as long as she is alive.This passage, however, is followed by a sentence which is :-As long as my daughter is alive, so long she is the owner of the said oart.Reading the clause as a whole, the intention of the testatrix seems clearly to be that Hafizabibi is to have all the right in this property which we associate with the term "life-estate." The testatrix has not devised the property to Ajam and bequeathed to Hafizabibi during her lifetime the enjoyment of its produce as in the case of a usufructuary bequest, but Hafizabibi is to enjoy the property itself-both corpus and income-during her life. The right given to Ajam under this clause is':-

And after her (Hafizabibi s) death 1 appoint the aforesaid boy Ajam, the son of Goolam Hoosein, as the owner of the said oart and the furniture etc. therein. therefore after the death of Hafizabibi the aforesaid Ajam and his descendants whoever may be, shall take into their possession the aforesaid oart; together with the articles and things therein and they are duly the absolute owners thereof.

The right of ownership conferred on Haji Ajam and his descendants is postponed until after the death of Hafizabibi. There is no evidence before me that during the lifetime of Hafizabibi anybody but Hafizabibi paid the taxes in respect of this property or spent on its repairs and upkeep. It is not shown that Haji Ajam in his lifetime or his heirs since his death have exercised any act of ownership in respect of this property. I am unable to accept Mr. Tyabji's contention that the clause in the will should be construed as conferring a usufruct only on Hafizabibi or as giving the ownership of the property to Ajam.

4. In Wharton's Law Lexicon, page 883 (13th Edn.) a "usufructuary" is described as one who enjoys the usufruct; and "usufruct" is defined as "the right of reaping the fruit (fructus) of things belonging to others, without destroying or wasting the subject over which such right extends." There is nothing to show that the Mahomedan law of usufruct materially differs from the English law in this respect.

5. The argument based upon the bequest being a usufructuary bequest to Hafizabibi seems to be

an afterthought. This argument does not seem to have been relied on before the learned Commissioner. In the exceptions filed here, the Commissioner's finding is challenged on the sole ground that:-

the learned Commissioner ought to have hold that Hafizabibi took the interest given to her by the said will in the said property which was by way of 'Ariat' and which determined on her death and that after her death the deceased Ajam Gulam Hosein Piperdi and his heirs became absolutely entitled to the said property.

In the argument Mr. Tyabji first addressed before me he seemed to rely upon the bequest in the will as being an 'ariat' or 'loan' of the property for her life to Hafizabibi. I had great difficulty in following this argument, as, so far as I was aware, there was nothing in the Mahomedan law texts relating to bequests by way of 'ariat' or loans apart from usufructuary bequests. Mr. Faizee, who appeared in the same interest as Mr. Tyabji, frankly admitted that there was no such thing as a testamentary 'ariat' under the Mahomedan law. Mr. Tyabji has later on admitted that by 'ariat' in the exceptions to the Commissioner's report he does not intend to put the plaintiff's case higher than on the footing of a usufruct, and that the term 'ariat' in the exceptions should have been 'usufruct' and not 'ariat'. Having regard to this admission I do not propose to sot out and deal with certain texts on 'ariat', which were cited by Mr. Tyabji. They can have but a remote analogy on the subject of usufructuary bequests, and where direct texts are available in respect of usufructuary bequests, no useful purpose, in my opinion, can be served by applying to this case texts which relate to the subject of 'ariat'. In any case, even if the devise or bequest in this case were to be treated as a transaction inter vivos, it would not be possible for me to construe the clause in the will as constituting an 'ariat' or loan of the house to Hafizabibi for her life.

6. If this will were the will of a Christian or a parsee, I would have no hesitation in construing Clause 7 as creating a life estate in Hafizabibi with ft gift over or vested remainder in Ajam, so that on the death of Hafizabibi the heirs of Ajam would be the absolute owners of the property. But the will being governed by the Mahomedan law it must be considered whether life-estates and/or vested remainders can be created under that law. Ajam predeceased Hafizabibi. The property, which is now claimed as belonging to his estate, never came to him during his life. In Abdul Wahid Khan v. Mussumat Nuran Bibi (1885) L.R. 12 I.A. 91 the Privy Council have held that the Mahomedan law does not recognise vested estates in remainder. Under the will Ajam would take the property only if he survived Hafizabibi. I do not see how the property could be claimed in the present suit, which is for the administration of the estate of Ajam and has no reference to any property which may be held to belong in their own right to the heirs of Ajam.

7. Mr. Tyabji has invited me to construe the clause in the will of Aishabai in accordance with the rules of construction under the English law. For these rules he has referred me to Halsbury's

Laws of England, Vol. XXVIII, pp. 626 to 628; and Jarman on Wills, Vol. I, p. 561. He has referred me also to the rulings in Langston v. Langston (1834) 2 Cl. & Fin. 194, 243 and Wright v. Cartwright (1757) 1 Burr. 282. The canons of construction, on which reliance is placed in these English cases, have been incorporated in Chapter II of the Transfer of Property Act; but by Section 2 of that Act the provisions of Chapter II are excluded from operating in cases where the Mahomedan law applies. As the present case is governed by the Mahomedan law the clause in the will must be construed in accordance with that law irrespective of what its proper construction may be according to the rules of construction governing cases under the English law.

8. If the natural construction to be put on the clause in the will is that it was the intention of the testatrix to give only a life-estate in the property to Hafizabibi, the question which arises is whether under the provisions of the Mahomedan law such a life-estate does not operate as an absolute estate. A property given under an instrument would operate as an absolute estate both under the Mahomedan law and the English law, if on reading the document as a whole it appears that the intention of the donor or testator, as the case may be, was to give an absolute estate in fee ; if the gift or devise is coupled with conditions of a nature repugnant to the absolute estate, then the conditions would be held void and the gift would be absolute. Jarman on Wills, Vol. I, p. 561, gives instances of provisions which would be regarded as being inconsistent with ownership and which would be held, therefore, to be void for repugnancy. There is no such repugnancy in the present devise. The question here is whether life-estates are to be regarded as absolute estates under the Mahomedan law or whether they are to be treated as life-estates; and if the latter, whether the donor or testator can validly give or devise the vested remainder simultaneously with the life-estate.

9. The parties to this case are Sunni Mahomedans to whom the Hanafi law applies. Subject to the general law of wills the same principle would apply in the case of a devise or bequest as in that of a gift inter vivos. A "hiba" or gift is defined in the Hedaya as being "a transfer of property, made immediately, and without any exchange" (Hedaya, Vol. Ill, Book 30, p. 290). The Hedaya proceeds (Vol. Ill, Book 30, Ch. 1, p. 291):-

Gifts are rendered valid by tender, acceptance, and seisin.-Tender and acceptance are necessary, because a gift is a contract, and tender and acceptance are requisite in the formation of all contracts : and seisin is necessary in order to establish a right of property in the gift, because ft right of property, according to our doctors, is not established in the thing given, merely by means of the contract, without seisin.

The Hedaya proceeds (p. 308) :-

...neither gifts nor charities are affected by being accompanied with an invalid condition, because the prophet approved of Amrees [gifts for life,] but held the condition annexed to them by the grantor to be void. -The author's note to this is, "the condition of restoration upon the demise of the grantee.

The Hedaya continues (p. 309) :-

An Amree, or life-grant, is lawful to the grantee during his life, and descends to his heirs, because of the tradition before quoted.-Besides, the meaning of Amree is a gift of a house (for example) during the life" of the donee, on condition of its being returned upon his death.-The conveyance of the house, therefore, is valid without any return ; and the condition annexed is null, because the prophet has sanctioned the gift, in this instance, and annulled the condition, as before mentioned. An Amree, moreover, is nothing but a gift and a condition ; and the condition is invalid ; but a gift is not rendered null by involving an invalid condition, as has been already demonstrated.

If one person say to another, 'my house is yours by way of Rikba', it is null, according to Haneefa, and Mohammed. Aboo Yoosaf has said that it is valid, because his declaration 'my house is yours,' is a conveyance of the house : and the condition of Rikba is invalid; because the meaning of this phrase is 'if I die before you then my house is yours,-that is to say, he waits in expectation of the other's death, that the house may revert to himself :-Rikba therefore, resembles Amree.-The arguments of Haneefa and Mohammed upon this point are two fold.-FIRST, the prophet has legalised Amree and annulled Rikba.-SECONDLY, the meaning of 'my house is yours by way of Rikba is, 'if I die before you, my house is yours', which is a suspension of the conveyance of property upon the decease of the donor previous to that of the donee ; and this is a matter of doubt and uncertainty, and consequently null.-It is to be observed that Rikba is derived from Irtikab, which means expectation ; for the donor is, as it were, an expectant of the death of the donee.

On the strength of these passages, English text writers generally have regarded a life-estate under the Sunni Mahomedan law to be equivalent to an absolute estate.

10. Sir Dinshah Mulla in his Mahomedan law, 9th Edn., page 29, states the proposition thus :-

According to the Sunni law, when property is given or bequeathed to a person for life, and on his death to another person, the first donee is entitled to an absolute estate, and the second donee is not entitled to any interest in the property. The reason is that, according to the Sunni law, a life-grant (amree or umra) is nothing but a gift and a condition, and the condition being repugnant to the gift, the gift is absolute, but the condition is void.

Again at p. 122 :-

When a gift is made subject to a, condition which derogates from the completeness of the grant, the condition is void and the gift will take effect as if no condition were attached to it. Note.- Under the Hanafi law a grantee of a life-estate takes an absolute estate. The same rule applies to a testamentary gift; thus a bequest to A for life operates as an absolute estate of the property to A. (Abdul Karim Khan v. Abdul Qayum Khan (1906) I.L.R. 28 All. 342).

The learned counsel Mr. Tyabji, in his work on Muhammadan law, 2nd Edn., page 497, states the proposition thus :

According to Hanafi law, where a person. purports to make a 'hiba,' and to restrict the donee's rights in the subject of 'hiba' for his life [or for any other limited period] the donee takes an absolute interest, and the subject of 'hiba' devolves upon the heirs of the donee after his death. Quaere, whether under the law applicable to Hanafi Muslims in British India, it is not possible for a life-interest or other limited estate to be transferred without consideration, whore the transferor is entitled to a larger interest in the property than he purports to transfer by way of gift. It is generally assumed that it is not possible, but, semble, the question is not free from doubt.

Wilson in his Mahomedan Law at p. 337 states :-

If a gift of tangible property is made subject to a condition inconsistent with full ownership on the part of the donee of the thing given, the gift is valid, but the condition void.

Exception.-If the condition is that the thing given shall belong absolutely to the donee in the event of his surviving the donor, but shall return to the donor on his surviving the donee, the better opinion seems to bo that the gift is void altogether.

In Ameer Ali on Mahomedan. Law, Vol. I, page 134, it is stated:-

Under the Hanafi Law when it is clear that the intention is to make to A a gift of the corpus of a thing, and it is conditioned that ho should take a limited interest in it or take it only for his life the condition would be void, and the gift would take effect absolutely.

Sircar, Vol. II, p. 23, states :-

An Umra, or life grant, is lawful to the grantee during his life, and descends to his heirs.- Hidayah, vol. iii, p. 309.

Again at p. 24 it is stated :-

If he (the grantor) said, 'this mansion is to thee Umra (for thy age), or hayati (for thy life), and

when thou art dead it reverts to me', in which the gift is lawful, and the condition void. (Fatwa Alamgiri, vol. iv. pp. 520 and 521.-Baillie's Digest, pp. 508 and 509.) In Baillie's Digest, Vol. I, p. 516, it is stated :-

[A gift by way of Rookba is null according to Hanifah and Muhammad.] Hence Rookba is void ; as when one person says to another, 'my mansion is thine Rookba'; meaning, 'if thou diest, it is mine ; if I die, it is thine.' (Fatwa Alamgiri, Vol. iv. pp. 520 and 521; Bail. Dig., pp. 508 and 509).

11. The principles above referred to have been set out and followed in a series of decisions to some of which a brief reference may be made in view of Mr. Tyabji's contention that the latest decision of the Privy Council in Amjad Khan v. Ashraf Khan (1929) L.R. 50 I.A. 213, s.c. 31 Bom, L.R. 809 has impliedly overruled some of them and has affirmed the principle that the gift of a lifeestate under the Hanafi law should not be construed as conferring an absolute estate apart from the intention to give an absolute estate although that intention may be coupled with conditions which are void for repugnancy under the rules of construction applicable to English cases.

12. The earliest decision is the case of Mussamut Humeeda v. Mussamut Budlun (1872) 17 W.R. 525. In that case the terms of the grant were not reduced to writing, and the condition set out was that the donor who was the son had given the property to the donee his mother in lieu of her unpaid dower by his father, the gift having been made for the life of the donee only with a reversion to the donor and his heirs on the donee's death. The Privy Council observe (p. 527) :-

The ease made is that the son relinquished his share in his father's possession in satisfaction of the claim for dower. Such a relinquishment would be prima fade absolute ; and, if it wore absolute, the widow Would take the whole property, subject to the claims of other creditors....Upon what grounds then ought it to be held that what the son gave up, he gave up for only the life of his mother, retaining the legal reversion in himself ? The creation of such a life-estate does not seem to be consistent with Mahomedan usage, and there ought to be very clear proof of so unusual a transaction.

It was held by the Privy Council that the gift was an absolute gift and not merely for the life of the donee. It may be noted that in this case the original texts from the Hedaya and Fatwa Alamgiri were not cited or considered. The judgment of the Privy Council as it stands seems to imply that the creation of a life-estate may be established if there were very clear proof of so unusual a transaction among Mahomedans. That statement was in the nature of an obiter dictum.

13. The next case to which attention may be drawn is that of Haji Mahommed Faiz Ahmed Khan v. Haji Ghulam Ahmed Khan (1881) L.R. 8 I.A. 25. The terms of the deed of gift there were (p.

35):-

I do declare and record that the aforesaid sister-in-law (i. e. the donee) may manage the said villages for herself, and apply their income to meet her necessary expenses and to pay the Government revenue.

On the construction of these words the Privy Council held that under the Mahomedan law these words did not necessarily cut down or limit the operation of the absolute gift otherwise effected either to a gift for life, or an 'ariat' or resumable loan, and that in this case they were descriptive of the motive of the donor, and ineffectual to control the operation of the technical words of gift. The judgment of the Subordinate Judge set out passages from the original texts relating to gifts of this nature. The Privy Council, concurring with the judgments of both the lower Courts, found that the gift was an absolute one and did not confer merely a life-estate.

14. In Nizamudin Gulam v. Abdul Gafur (1888) I.L.R. 13 Bom, 264 our Appeal Court, consisting of Birdwood and Parsons JJ., held a that a grant of life-estate is invalid under the Mahomedan law and that the grantee in such a case would take an absolute estate. This ease was confirmed in appeal by the Privy Council : see Abdul Gafur v. Nizamudin (1892) I.L.R. 17 Bom. 1, P.C. In the judgment of the Board the following observations are to be found (p. 5):-

Their Lordships do not think the appellants would take any benefit from the document of 1838 if it were construed as the will of Karimuddin. It was plainly not his intention to create a series of life-rents, a kind of estate which does not appear to be known to Mahomedan law (see Humeeda and others v. Budlun and the Government (1872) 17 W.R. 525), but to make the fee devolve from one generation of his descendants to another without its being alienable by them, or liable to be taken in execution for their debts. Even if Tahirabibi had expressly consented to accept the will, she would not have been the owner of a life estate, but a full owner, with prohibition against alienation, which, being void in law, could not affect either herself or her creditors.

It is clear from the observations of their Lordships of the Privy Council in this judgment, that they do not dissent from the view of this High Court that the first life-estate to be found in the instrument should be construed as an absolute estate on the ground that under the Mahomedan law a life-estate in itself is to be regarded as an absolute estate being a gift with a condition, the condition being void. Mr. Tyabji has argued that the passage in the judgment of the Privy Council which I have quoted, really means that, upon construction of the instrument, the Board came to the conclusion that the intention of the testator was to give to each successive life tenant an absolute estate in fee, but subject to a repugnant condition against alienation of the property during each such life. The Privy Council have clearly stated in this passage their reason for so construing the will as being that a life-rent is unknown to the Mahomedan law, and should,

therefore, be construed as a fee simple.

15. The next case to which attention may be called is Umes Chunder Sircar v. Mussummat Zahoor Fatima (1890) L.R. 17 I.A. 201 The parties there were Sunnis. The question which was being litigated was whether a certain interest created under a deed of settlement was capable of being attached. Under the deed of settlement a Mahomedan husband had granted the lands in suit to his wife on condition that if she had a child by him the grant should be taken as a perpetual mokurruri, and in case of no child being bom, as a life mokurruri with remainder to the settlor's two sons. The settlor died, no son having been born. It was held that the two sons took definite interest under the deed, similar to vested remainders, though liable to be displaced, and that such interest was liable to attachment, not being mere expectancies within the meaning of the Civil Procedure Code of 1882, Section 266. Mr. Tyabji, in his learned work on the Muhammadan Law, second edition, page 394, has the following useful footnote on this case :-

I am indebted to Mr. J.D. Inverarity of the Bombay Ear for drawing my attention to the fact that in this case both parties contended that the vested remainder was good : and the only question at issue was whether it was capable of attachment.

Sir Dinshah Mulla, in his Mahomedan Law, 9th Edn., p. 31, comments on this case as follows :-

It is submitted that this case does not support the view that a vested remainder is recognised by the Sunni law, as seems to have been thought by the High Court of Bombay in Banoo Begum v. Mir Abed Ali (1907) I.L.R. 32 Bom. 172, s.c. 9 Bom. L.R. 1152...All that the Privy Council held was that the interest taken by the son was not a mere expectancy which could neither be attached nor sold, but a definite interest which was attachable and saleable. The question whether a vested remainder is recognised by the Sunni law was not before the Privy Council in that case.

It is to be noted that no original texts or other authorities relating to gifts, life-estates or vested remainders were cited before or considered by the Board in this case.

16. In Cassamally Jairajbhai v. Sir Currimbhoy Ebrahim (1911) I.L.R. 36 Bom. 214, s.c. 13 Bom. L.R. 717, which was a Shia case, Beaman J. has distinguished Umes Chunder Sircar v. Mussummat Zahoor Fatima (1890) L.R. 17 I.A. 201. He observes (p. 251):-

In the Privy Council case (Umes Chunder Sircar v. Mussumat Zahoor Fatima), it was only those persona who were interested in the gifts over on failure of issue to the donee with the life estate who came before the Court and the question really seemed to bo in their Lordships' opinion whether a postponed estate of that kind could be validly transferred or as I prefer to say trafficked in, I have never been able to understand how in that case it was held that the gifts over to the two sons were more than contingencies, although apparently their Lordships thought they were

something less than vested remainders. For they are very careful to say that they are something like vested remainders. The facts were that these gifts over were only to take effect in the event of the lady whose life estate was interposed not having a son. Now, in the case of a child-bearing woman married, I cannot conceive of a more uncertain event than that of her having or not having a male child. And whatever nice refinement of meaning the law may place upon such a condition, I am quite certain that any person waiting upon it would have to regard it as contingency, and a very uncertain contingency indeed. I can quite understand that if their Lordships of the Privy Council had :had their minds upon that point and if it had been really a case of vested remainders, they might have come to the conclusion, though I do not think they ever did, that such a vested remainder could properly be made the object of a gift inter vivos. But I cannot conceive how it ever could have been held, as I am sure it never hag yet been held, that a gift in futuro contingent upon the happening of uncertain events, could be given consistently with the requirements of the Mahomedan Law of gift inter vivos, nor do I see how in the particular case the vested remainders could have been any more made the object of such a gift because they were called vested remainders (liable to bo displaced by the happening of an uncertain event than if they had been called simply contingent interests or contingent remainders.)

17. In Abdoola v. Mahomed (1905) 7 Bom. L.R. 306 Mr. Justice Batchelor has held that the creation of a life-estate is inconsistent with the Mahomedan law ; and where a life-estate is attempted to be created, the donee would take an absolute estate.

18. In Abdul Karim Khan v. Abdul Qayum Khan (1906) I.L.R. 28 All. 342 the testator had devised certain villages to each one of his three sons with a provision that none of his sons should have a right to alienate the property devised to him, and that on the death of one of the devisees without issue his share should go to his surviving brother or brothers or his or their heirs. The will was assented to by the heirs of the testator and the three sons had entered into possession of their shares. One of the sons having died his full brother took possession of his share. The half brother brought a suit for possession of his share. The High Court of Allahabad held that according to Mahomedan law the three devisees took absolutely and the plaintiff's claim could not be maintained.

19. Nawab Umjad Ally Khan v. Mussumat Mohumdee Begum (1867) 11 M.I.A. 517 was a Shia case, but the judgment of the Privy Council was given with reference to the Hedaya which governs the Hanafi sect. The ratio decidendi of that case is given by Sir Dinshah Mulla in his work on Mahomedan Law, 9th Edn., p. 123, as follows :-

Where property is transferred by way of gift, and the donor does not reserve dominion over the corpus of the property nor any share of dominion over the corpus, but stipulates simply for and

obtains a right to the recurring income during his life, the gift and the stipulation are both valid. Such a stipulation is not void, as it does not provide for a return of any part of the corpus... The stipulation may also be enforced as an agreement raising a trust, and constituting a valid obligation to make a return of the proceeds during the time stipulated.

In that case the donor had made a gift of Government promissory notes to his son with a stipulation that the. interest accruing should be applied in the donor's lifetime to certain religious charitable purposes. The observations of the Privy Council in this case are as follows (p. 547) :-

It remains to be considered whether a real transfer of property by a Donor in his lifetime under the Mahomedan Law, reserving not the dominion over the corpus of the property, nor any share of dominion over she corpus, but simply stipulating for and obtaining a right to the recurring produce during his lifetime, is an incomplete gift by the Mahomedan Law. The text of the Hedaya seems to include the very proposition and to negative it. The thing to be returned is not identical, but somethingdifferent. See Hedaya, tit. 'Gifts,' Vol. Ill, Book XXX, p. 294, where the objection being raised that a participation of property in the thing given invalidates a gift, the answer is, 'The Donor is subjected to a participation in a thing which is not the subject of his grant, namely, the use (of the whole indivisible article) for his gift related to the substance of the article, not to the use of it.' Again, if the agreement for the reservation of the interest to the father for his life be treated as a repugnant condition, repugnant, to the whole enjoyment by the donee, here the Mahomedan Law defeats not the grant, but the condition. Hedaya, tit. 'Gifts', Vol. Ill, Book XXX, p. 307. But as this arrangement between the Father and the Son is founded on a valid consideration, the son's undertaking is valid, and could be enforced against him in the Courts of India as an agreement raising a trust, and constituting a valid obligation to make a return of the proceeds during the time stipulated.

To the same effect is the judgment in Mohammad Abdul Ghani v. Fakhr Jahan Begam (1922) L.R. 49 I.A. 195, 208-210, where the parties were Sunnis. In that case the widow of a deceased Sunni Mahomedan had by a deed (head-note):-

made gift of the entire zamindari and lambardari estate [to the brother of her deceased husband], with the exception of the villages and sir lands [of the estates] specified below, which shall, during my lifetime, remain in my and my relation's possession, free of rent and without payment of Government revenue ; and I do hereby invest the donee with the power to have the mutation of names effected in his favour. Now I have nothing to do with the gifted property and estate. I shall keep the villages and sir lauds which have been exempted hereunder for my lifetime without the power of alienation by mortgage, sale and gift; and after me the donee shall also be the owner of the said exempted property. The donee shall pay the Government revenue of the exempted estate from the ilaqa.

On the execution of the deed the donee took possession of the estate with the exception of the specified villages and sir lands. He thereafter paid the Government revenue upon the excepted villages and sir lands, but there was no mutation of names as to them, nor did he take possession, until the death of the donor in 1906, Their Lordships of the Privy Council observe (p. 208):-

The reservation of the usufruct did not by itself make the gift of the property now in question void under Mahomedan law. So far as that is concerned there is the authority of the Board in Umjad Ally Khan v. Mohumdee Begum (1867) 11 M.I.A. 517.

20. The principle to be deduced from the original texts and some of the above cases seems to be this: that what is contemplated under the Mahomedan law is a gift of the corpus itself. Where there is such a gift any stipulation for the return of the corpus or a part of it will be deemed to be void and the gift will be considered to be absolute. It is open to the donor, however, to stipulate for a return which may be in the nature of a usufruct of the property which is the subject-matter of the gift. Thus, in Nawab Umjad Ally Khan v. Mussumat Mohumdee Begum (1867) 11 M.I.A. 517 certain promissory notes were, transferred absolutely to the donee, and the stipulation was that the interest on the promissory notes accruing during the lifetime of the donor was to be expended for charity. Similarly in Mohammad Abdul Ghani v. Fakhr Jahan Begum (1922) L.R. 49 I.A. 195, s. c. 24 Bom. L.R. 1268 the donor had made a gift absolutely of the corpus and was held to have given delivery of possession, some actual and some constructive, of the corpus including certain lands which were reserved for the life of the donor thus completing the gift; what the donor had reserved to herself was merely a usufruct in certain villages in respect of which the donee was liable to pay and did pay all Government dues.

21. Great reliance has been placed by Mr. Tyabji on the decision of the Privy Council in Amjad Khan v. Ashraf Khan (1929) L.R. 56 I.A. 213, s.c. 31 Bom. L.R. 809, where, upon the consideration of the terms of the deed of gift in the case, the Board held that the subject-matter of the gift was a life-estate in the whole property together with a power to alienate a third part. They left it an open question whether the gift of a life-estate was valid under the Mahomedan law. The relevant clause in the deed was as follows (p. 217):-

...I, therefore, by means of this document, have made a gift without consideration of my entire property detailed below with all external and internal rights and without the exception of any right or part, to my wife Musammat Waziran...subject to the condition that, out of the entire property mentioned in the deed of gift she shall remain in possession of shares worth Rs. 5000 with power to make at her pleasure any sort of alienation like mortgage, sale or gift in respect thereof and that, as to the rest, worth Rs. 10,000, she shall not possess any power of alienation but she shall remain in possession thereof for lifetime. After the death of the donee the entire property gifted away by this document shall revert to the donor's collaterals...and their heirs, in

equal shares, and those heirs of mine shall become owners with full proprietary powers, and the own heirs of the donee lady shall not inherit the same and the donee and my aforesaid heirs have accordingly agreed and consented to this. I have put the lady donee in possession of the property gifted to her, and therefore from to-day I have ceased to possess any right or claim in respect of the gifted property, and my wife, Musammat Waziran, from to-day became owner and possessor of the aforesaid property in accordance with the terms of this deed.

The Board observe (p. 220):-

The material question then is what is the true construction of the deed. The intention of the donor is to be ascertained by reading the terms of the deed as a whole, and giving to thorn the natural meaning of the language used.

Their Lordships, basing their decision on the terms of the deed, are of opinion that the conclusion arrived at by the learned Judicial Commissioner, Mr. Wazir Hasan, on this part of the case is correct, and that Mussammat Waziran acquired merely a life interest in the property under the deed of January 17, 1905, together with a power of alienation over one-third of the property.

(Page 221):-

Reading the deed of January 17, 1905, as a whole and giving effect to all the terms thereof, their Lordships are of opinion that it does afford clear proof that the donor intended to make a gift to his wife of a life interest only in the entire property comprised in the deed together with the abovementioned power of alienation in respect of one-third of the property.

It was, however, further argued on behalf of the plaintiff that under Mahomedan law, which is applicable to this case, a transfer of a life estate could not be made by means of a gift: in other words, it was argued that under the said law there could not bo a transfer of any interest in property by way of gift inter vivos except an absolute interest.

In their Lordships' opinion, it is not necessary to express any opinion on the last mentioned argument, because in view of the construction of the deed which their Lordships have adopted, the plaintiff appellant is on the horns of a dilemma. If the interest acquired by Mussammat Waziran was a life estate only, and if such an interest can be acquired under Mahomedan law by way of gift, that interest came to an end on the death of Mussammat Waziran, and the plaintiff claiming as her heir has no title to the property. On the other hand if, as argued on behalf of the plaintiff, under the Hanafi law such a limited interest as a life estate could not be transferred to Musammat Waziran by way of gift inter vivos, then Musammat Waziran acquired no interest in the property under the deed of January 17, 1905, and the plaintiff, claiming as her heir, can have no title to the property.

For the above mentioned reasons their Lordships are of opinion that the plaintiff appellant has no title to the property which is now in dispute in this appeal.

22. There is considerable force in Mr. Tyabji's argument that by this judgment the Privy Council have applied the English canons of construction to the terms of a Mahomedan deed of gift and have come to the conclusion that the intention disclosed was to create a life-estate only and not an absolute estate. The Privy Council have not applied the principle of the Hanafi Mahomedan law that a life-estate under such circumstances should be regarded as creating an absolute estate. Mr. Shavaksha has attempted to distinguish this case on the ground that it would come within the ratio decidendi of Nawab Umjad Ally Khan v. Mussumat Mohumdee Begum (1867) 11 M.I.A. 517 and Mohammad Abdul Ghani v. Fakhr Jahan Begam (1922) L.R. 49 I.A. 195, s.c. 24 Bom. L.R. 1268, as the deed recites that the arrangement by which the donee was to remain in possession and exercise certain rights over the property during her life was arrived at by the consent of the donor and the donee; it does not appear, however, from the terms of the deed that what was reserved to the donee was merely a usufruct in the property during her lifetime. The consent of the donee is necessary and will be implied in every case of gift under the Mahomedan law. The consent of the donee seems to be immaterial in this case unless an independent contract could be deduced by which the donor became entitled to a return from the donee of some object or interest other than the corpus which was the subject-matter of the gift. With great respect, although I am unable to agree with the decision of their Lordships of the .Privy Council on this point, I am bound by it and must hold that in the present case the life-estate given to Hafizabibi is not to be regarded as an absolute estate.

23. The plaintiff has further to establish, that the gift over or vested remainder in favour of Haji Ajam is valid under the Mahomedan law. In Abdul Wahid Khan v. Mussumat Nuran Bibi (1885) L.R. 12 I.A. 91 the Privy Council have held that the Mahomedan law does not recognise vested estates in remainder. In that case a deed of compromise between a widow and her deceased husband's sons had stipulated that the widow should remain proprietor and the sons should be entitled to succeed to her after her death. It was held that the title to succeed was contingent upon the sons surviving the widow, and that it would be opposed to Mahomedan law to hold that the deed created in them vested interest which passed to their heirs on their death in the lifetime of the widow. The principle of this case would seem to apply to the present case. Ajam died in the lifetime of Hafizabibi. The estate given to him under the will was contingent upon his surviving Hafizabibi and there could be no vested interest which passed on his death to his heirs. Apart from this consideration an interest of the kind contemplated in the will seems to be in the nature of a gift in futuro. It is to take place at a future time on the contingency of Hafizabibi's death taking place. A gift in futuro is void under the Mahomedan law.

24. In Mahomed Shah v. Official Trustee of Bengal (1909) I.L.R. 36 Cal. 431 Stephen J. has held that a deed creating a life-interest with remainder over is void under the Mahomedan law.

25. Mr. Shavaksha's clients are the common heirs of both Hafizabibi and Ajam. It is contended by Mr, Tyabji that their possession is as heirs of Ajam and not as heirs of Hafizabibi. It is clear from the conduct of the parties in not having originally included the property in dispute as belonging to the estate of Ajam either in the present administration suit or in the one which preceded it and was dismissed for Don-prosecution, that they did not, until recently, consider that this property belonged to the estate of Ajam. When they first came to Court on the plaintiff's notice of motion the plaintiff was admittedly under the wrong impression that Ajam had inherited a part of this property from his father Gulam Hussein along with his step-sister Hafizabibi, who was entitled to the remaining portion as an heir. They discovered the will at a late stage and then made their claim under the will. The onus clearly is on the heirs of Ajam to prove their title to the property as such heirs against the heirs of Hafizabibi. In my opinion they have failed to prove such title. The report of the Commissioner stating that the property does not belong to the estate of Ajam is, in my judgment, correct, although the reason for that opinion cannot now be sustained in view of the Privy Council decision in Amjad Khan v. Ashraf Khan (1929) L.R. 56 I.A. 213, s.c. 31 Bom. L.R. 809.

26. In the view which I have taken, as the heirs of Hafizabibi are in possession of this property and the heirs of Ajam have failed to make out a title to the property, the claim of Ajam's heirs fails, and it is not necessary to find in what right the heirs of Hafizabibi are now in possession. But as the matter has been argued before me at some length, I may briefly state my own opinion on the points which have been raised by Mr. Tyabji. It has been argued that the Sunni Mahomedan law does not preclude the creation of life-estates and the intention of the donor or testator is the primary factor to which attention must be directed. It is argued that the life-estate in favour of Hafizabibi is valid under the Sunni Mahomedan law. Reliance has been placed on the decision in Amjad Khan v. Ashraf Khan, where the Privy Council at page 220 of their judgment have adopted the conclusion arrived at by the learned Commissioner Mr. Wazir Hasan in the lower Court with regard to the document which was before them, the conclusion being that the deed created merely a life-estate in the property in favour of the donee. On this point of construction, the two learned Commissioners in the lower Court had differed from each other. Mr. Ash worth, who was the other Commissioner, had held that the deed was to be construed not merely as conferring a life-estate but as conferring an absolute estate in the property. It must be noted, however, that although the Privy Council in this case have agreed with the construction put upon the deed by the learned Commissioner Mr. Wazir Hasan, they did not go as far as the learned Commissioner Mr. Wazir Hasan in holding that the life-estate so created was valid under the Mahomedan law. They expressly left that point open as in their opinion a decision on it was

not called for. Mr. Tyabji has adopted the judgment of the learned Commissoner Mr. Wazir Hasan in Amjad Khan v. Ashraf Khan (1924) 2 O.W.N. 83 as part of his argument in support of the contention that life-estates in property by way of gifts or bequests are valid under the Sunni Mahomedan law. It is contended that a life interest is not unknown to Mahomedan law, as in the case of waqf alal aulad. It may be pointed out that successive life-estates are permissible in a waqf alal aulad for a special reason namely that the ultimate benefit goes to charity. Where the ultimate benefit was not to charity our Bombay High Court, confirmed by the Privy Council, has held that the first life-estate was to be deemed to be an absolute estate (see Nizamudin Gulam v. Abdul Gafur (1888) I.L.R. 13 Bom. 264 and Abdul Gafur v. Nizamudin (1892) I.L.R. 17 Bom. 1, P.C.).

27. Then it is said that the idea of a life-estate may be gathered from an 'ariat' or loan of a property for the life of the person to whom it is lent, and by the gift or bequest of the produce or income of a property to the donee or legatee for life. But it must be observed that an 'ariat' or loan, though it may be made expressly for a lifetime as it implies merely leave and license and carries no consideration with it, is resumable at the will and pleasure of the lender and the property in the corpus remains all the time in the lender. Similarly, in the case of a usufruct, the gift or bequest is of the produce or income of the property, and not of the corpus. It is clear from the Privy Council decisions in Nawab Umjad Ally Khan v. Mussumat Mohumdee Begum (1867) 11 M.I.A. 517 and Mohammad Abdul Ghani v. Fakhr Jahan Begam (1922) L.R. 49 I.A. 195, s.c. 24 Bom. L.R. 1268 that the gift or bequest of the produce or income of a property is not a life-estate in the property itself but is a gift or bequest of the produce or income only, and the retention by the donor of the produce or income of the property for his life has been upheld on the ground that there was a special contract between the donor and the donee, whereby the donee in consideration of being given the ownership of the corpus agreed to give the usufruct or income of the property gifted to him to the donor during the donor's lifetime.

28. It is admitted by the learned Commissioner Mr. Wazir Hasan in his judgment at p. 123 that the Mahomedan law does not recognise a gift of what we understand by the term res incorporates and that the Mahomedan law of gifts contemplates only gifts of the corpus. The learned Commissioner proceeds (p. 123):-

But if the law of the Muhammadans or of any other class of people must keep pace with progress of society and the multifarious relations arising therefrom interests in property apart from the property itself must be recognised. Are we compelled to hold that if a Musalman of today desires to carve by way of gift only a particular estate out of his property and retain the rest of it for himself or his heirs he cannot do so and if ho does, the gift vesta the entire estate into the donee in spite of the intentions of both to the contrary ? I have come to the conclusion that the rules of

the Muhammadan Law do not compel me to so hold.

At page 128 the learned Commissioner arrives at the conclusion :-

The final conclusion therefore at which I have reached is that the rule of the Muhammadan law stated in the texts quoted above is restricted to oases where the subject-matter of the gift is the entire physical property and is inapplicable to a case where it is a limited interest in property and that we are bound to, and should not, extend it to the latter class of cases.

The conclusion arrived at seems to be this: in the existing texts of Mahomedan law life-estates in property reserving the remainder to the donor are not recognised but owing to the exigencies of modern civilization we should, acting on principles of justice, equity and good conscience, treat such gifts as valid and not extend to them the principle of the Mahomedan law by which such a gift would be considered to be an absolute gift of the whole property. In other words the proposition seems to be that the creation of life-estates should be governed by the rules of justice, equity and good conscience and not by rules of Mahomedan law. If the Mahomedan law is applicable to gifts, I am unable to see how the Courts can depart from the texts of that law relating to gifts and act on principles of justice, equity and good conscience, which are in direct conflict with those texts, unless we are to hold that those texts are so obviously against the principles of natural justice that no Court should give effect to them. This can hardly be said of a text laying down a rule of construction which in deference to the Prophet's commandment is recognised as an integral part of the Sunni Mahomedan law of gifts. The remedy clearly, if one is called for, would be by way of legislation and. not by means of what are sometimes called judge-made laws.

29. In my judgment, on principles applying to gifts under the Mahomedan law, whereby the donor must give delivery of possession to the donee of the entire property which is in him, if only a life-interest is sought to be given in the property the donor reserving the remainder to himself or to a third person, the life-estate so sought to be given should be held to be invalid. The validity of the gift or bequest of a life-estate only in the donor's or testator's property is based not upon logic but upon a commandment of the Prophet which is accepted by the text-writers as having the force of law, by which such life-estates are validated by being treated not as mere life-estates according to the intention of the donor or testator but as absolute estates irrespective of such intention. If, under the latest pronouncement of the Privy Council, life-estates under the Sunni Mahomedan law are no longer to be regarded as absolute estates, we must, I think, fall back upon the logical position that gift or bequest of a mere life-estate should be regarded as invalid in toto; otherwise we should be creating a new kind of property as a proper subject-matter of a gift under the Sunni Mahomedan law.

30. If the life-estate given to Hafizabibi under the will is invalid, then Hafizabibi's possession of the property was adverse to that of any remainderman supposing that the bequest to the remainderman could be deemed to be valid under the Mahomedan law, which, in the opinion I have already expressed, it is not. Another way of looking at the situation would be that the life-estate and vested remainder under the will being both invalid Hafizabibi took the entire property in her right as the sole heir of the deceased Aishabai.

31. In my opinion, there can be no objection to a life-estate forming a proper subject-matter of a gift by a Mahomedan provided the life-estate constitutes the donor's entire interest in the property, e. g., where he has acquired a life-estate by means other than a gift or bequest by a Mahomedan donor or testator who has reserved the remainder in the property to himself. An equity of redemption has been held to be a valid subject-matter of gift by a Mahomedan mortgagor and the better opinion seems to be that it is so even though the property may be in the possession of the mortgagee: see Tara Prasanna Sen v. Shandi Bibi (1921) I.L.R. 49 Cal. 68 ; per contra Mohinudin v. Manchershah (1882) I.L.R. 6 Bom. 650, F.B. and Ismal v. Ramji (1899) I.L.R. 23 Bom. 682, s.c. 1 Bom. L.R. 177.

32. Reliance was also placed on the latest decision of the Privy Council in Mohammad Raza v. Abbas Bandi Bibi which was a Shia case, and where the deed in favour of a Mahomedan wife was construed as giving only a life-estate in the property. The deed was upheld as conferring a life-estate only, on the ground that it was arrived at as the result of a compromise of a suit between the parties and was in the nature of a family settlement. The question whether under the Shia law a life-estate with vested remainders in the heirs is permissible was left open by the Board. This decision, in my opinion, is not an authority for holding that the gifts of mere life-estates are valid as such under the Sunni law.

33. Rasoolbibi appealed.

34. Faiz Tyabji, with M.Y. Haindaday, for the appellant, Under the will Hafizabibi gets what would be called a usufructuary interest for the term of her life ; and subject to her interest, Ajam and his heirs get the property.

35. The Commissioner was of opinion that Hafizabibi's life-estate, under the rule of construction applicable, must be considered to be an absolute estate. Mirza J, held that the life-estate was void, and so also was the remainder; and that Hafizabibi took as the heir of Aishabai.

36. Mahomedan law differentiates between the corpus of a property (which is sometimes referred to as "the substance", at other times as "the thing" itself, sometimes as "the entire of property" or "the full interest in the property ") and the usufruct. Wills under this terminology are of two

kinds: (1) wasaya, i. e., dispositions of the absolute owners; and (2) usufructuary dispositions; under the latter, grants of limited interests fall. Hedaya p. 670. Two things are kept entirely distinct: (1) the corpus of the property, and (2) the usufruct: Hedaya. p. 692; Baillie, pp. 623, 663. In a usufructuary will the ownership of only the usufruct is transferred. Similarly, in a wakf, the ownership of the property is as it were transferred to the Almighty, but the usufruct is given to the object of the wakf: Baillie, Part I, p. 784, Part II, p. 229, Hedaya, p. 241. Where the whole ownership of the property is dealt with, it is either a sale or hiba. Ijara (hiring or renting a property) is defined as the sale of the usufruct. Hedaya, pp. 489, 490. At p. 473 reference is made to the use of a thing for a return. Hiring is not defined as giving the property for a short time, but as the sale of its usufruct for a limited time. In Baillie, p. 515, reference is made to hiba, in which the substance (for the whole ownership) is transferred immediately and unconditionally. Hedaya, p. 517, refers to 'ariyat' as the investiture of the use of a thing without a return. Hedaya, p. 578, refers to four kinds of transactions : sale, hiba, ariyat and ijara. Thus, there can be either a transfer out and out, or a transfer of usufruct, or of rights short of ownership.

37. The grant here being a grant for a time only, it is a grant of usufruct of the property: Baillie, p. 653.

38. Where there is the bequest of the usufruct only, the reversion remains in the testator, who can bequeath it to another legatee : Baillie, p. 664 ; Hedaya, p. 694. Abdur Rehman, Institutes of Muhammadan Law, Section 493.

39. Although in the will, Hafizabibi is once referred to as "malik ", yet all that she is entitled to do is to "enjoy the same and take the income thereof as long as she is alive". This is exactly what a usufructuary for life will be entitled to. The word (malik) is not "a term of art", it does not necessarily define the quality of the estate taken but the ownership of whatever that estate may be : Bhaidas Shivdas v. Bai Gulab (1921) L.R. 49 I.A. 1, 6, s.c. 24 Bom. L.R. 551.

40. Baillie, p. 668, deals with remainder. The use of a thing and the substance of the thing being entirely different where the testator gives away the property (including the usufruct) to one and again on a subsequent occasion the usufruct to another, then according to Mahomedan law, the usufruct which is given twice over is divided half and half between the two legatees. This shows that it is competent to give ownership subject to a usufruct or usufruct by itself.

41. There is no distinction between a life-estate and a usufruct for life ; but if any distinction is found between them, and it is held that under Mahomedan law a life-estate cannot be granted, then it is more consonant with principle to cut down the life-estate to a usufruct for life, than to hold the will to be altogether void as Mirza J. has done. If the life-estate cannot be given effect to, then the Court should carry out the provisions of the will (as far as possible) by giving to

Hafizabibi a usufruct for life. See Juttendromohun Tagore v. Ganendromohun Tagore (1872) L.R.I.A. (Sup. Vol.) 47, 65, 66. See also, Hedaya, p. 694 ; Abdur Rahman, Muhammadan Jurisprudence, p. 315. Unless it is shown that a transaction is void, it is to be taken as valid. See Nawab Umjad Ally Khan v. Mussumat Mohumdee Begum (1867) 11 M.I.A. 517, 548.

42. In Abdul Wahid Khan v. Mussumat Nuran Bibi (1885) L.R. 12 I.A. 91 all that is decided is that the representative of a deceased heir cannot take the place of the heir. The question of vested remainder did not arise in that case at all. The deed provided that two persons should succeed the lady as though they were her heirs, made those persona her heirs apparent, and on the death of the heirs apparent, the heirs of those heirs, apparent were held not to be entitled to take the place of the deceased heirs apparent. The absolute proprietary interest of Gauhar Bibi (the donor) was not derogated from, and she remained, what she was, an absolute owner. The sons who were so to say created special heirs (by the compromise) were (on the construction of the compromise deed) to take only if they survived Gauhar Bibi; they did not take a vested estate which they could pass on to their heirs any more than Gauhar Bibi's real heirs would have done. The heirs of the sons were not mentioned in the deed at all.

43. The case of Times Chunder Sircar v. Mussummat Zahoor Fatima (1890) L.R. 17 I.A. 201 is directly in my favour. The settlor Sultanali. gave full interest to his wife Amani if she bore a son by him, but she was only to get a life interest if she had no child, and the existing sons of the settlor were to take in that case. The interest which the existing sons took was during the lifetime of the donor treated as a vested remainder and recognised by the Privy Council. It was regarded as a property capable of being attached (p. 209). It was not in the interest of both parties to support the vested remainder. Umes Chunder (appellant) could only succeed if the deed of January 26, 1871, was valid and conferred a vested remainder on the judgment debtor (Farzand Ali); whereas the respondents (Zahoor Fatima) could only succeed if the deed was invalid, and Farzand Ali took the property as the son and heir of Sultanali and not under the deed. The High Court "treated the case as if the two sons had no interest during the life of their father, but as if, upon the father's death, they inherited the property from him," thereby implying that in their opinion the deed was invalid. The Privy Council reversed the High Court only on this point confirming its decision on all other points. Banoo Begum v. Mir Abed Ali (1907) I.L.R. 32 Bom. 172, s. c. 9 Bom. L.R. 1152 was a Shia case. But Jenkins C.J. holds that Times Chunder Sircar v. Mussumat Zahoor Fatima is a direct authority on the point that a remainder, such as we are concerned with, may be created. He also refers to an estate vested in possession ; and deals with Abdul Wahid Khan v. Mussumat Nuran Bibi.

44. The onus of proving that the bequest is of more than one-third of the whole property is on the heirs, The. bequest is not void if it is in excess of one-third only, but, whatever is in excess of

one-third is void, and the bequest up to one-third is good: Baillie, pp. 625, 627 ; Hedaya, p, 676.

45. Death of legatee is implied acceptance. Hedaya, p. 673; Baillie, p. 624. Therefore, both Hafizabibi and Ajam must be taken to have accepted the bequest, and Hafizabibi being the sole heir, no objection as to a bequest in excess of one-third can be maintained.

46. As to life interest, see Hedaya, p. 489. A condition annexed to a grant of full ownership derogating from such full ownership is void, as being "contrary to the spirit and intendment of the contract." As an instance of this rule an "Amree" is mentioned. This word "Amree" is wrongly translated as a "life grant". Its meaning is shown by the Hedaya itself as "an absolute gift with the invalid condition of its being returned." This is the sense and meaning in which the passage is interpreted in Amjad Khan v. Ashraf Khan (1929) L.R. 56 I.A. 213, s.c. 31 Bom. L.R. 809, which explains the rule. Baillie, p. 517, deals with the same subject. The principle is that you should go to the spirit and intendment. If the intention to give the full interest is clear, the conditions are void.

47. An ariat is to be distinguished from usufructuary bequest on the point of resumability. A usufuctuary bequest cannot be resumed: Hedaya, p. 693.

48. Mussamut Humeeda v. Mussamut Budlun (1872)17 W.R. 525 is the first case on the point. There was no deed. The son transferred property to his mother in lieu of her dower. The mother was already entitled to a two-annas share and had a claim for her dower, and the High Court held that her interest even in the two-annas share was reduced to a life-estate. The case does not lay down that life-interests are not valid. In Amjad Khan's case the above case was explained as dealing only with the evidence required to establish a life-estate and as having no applicability to a case where there is a document.

49. Haji Mahommed Faiz Ahmed Khan v. Haji Ghulam Ahmed Khan (1881) L.R. 8 I.A. 25, 35 is relied on by the other side. There was no question of a life interest there. There was an absolute gift. There was actually a hiba-bil-ewaz.

50. In Prince Suleman Kadar v. Darab Ali Khan (1881) L.R. 8 I.A. 117, 122 the Privy Council declined to consider whether an absolute gift was curtailed to a limited estate.

51. In Nizamudin Gulam v. Abdul Gafur (1888) I.L.R. 13 Bom. 264, 275 the dicta are against me. The question was one of wakf. It does not go beyond Mussamut Humeeda v. Mussamut Budlun. The case went to the Privy Council in Abdul Gafur v. Nizamudin (1892) I.L.R. 17 Bom. 1, P.C..The intention of the donor was held to be that the fee should devolve from generation to generation of descendants in perpetuity. It did not attempt to create a series of life estates.

52. In Abdoola v. Mahomed (1905) 7 Bom. L.R. 306 the learned Judge says that the gift of something to be produced in future is not valid. The proposition is not correct. It would be correct to say that the hiba of something not in existence is invalid. But as Baillie, p. 663, and Hedaya, pp. 478 and 692, show future produce can be transferred without consideration as a gift or bequest.

53. In Mohammad Abdul Ghani v. Fakhr Jahan Begam (1922) L.R. 49 I.A. 195, s.c. 24 Bom. L.R. 1268 the estate in favour of the lady was upheld. The life interest was taken as usufruct for life.

54. In Amjad Khan v. Ashraf' Khan (1929) L.R. 56 I.A. 213, s.c. 31 Bom. L.R. 809 their Lordships do not go into the question whether a life-estate is valid or not, but they do say that a life-estate does not enlarge itself into a full estate. This was in appeal from Amjad Khan v. Ashraf Khan (1924) 2 O.W.N. 83 where, at p. 118, Wazir Hasan A.J.C. summarises general propositions on the subject. We rely on the reasoning of Wazir Hasan A.J.C.

55. Mohammad Abdul Ghani v. Fakhr Jahan Begam (1922) L.R. 49 I.A. 195, s.c. 24 Bom. L.R. 1268 leaves open the question whether "under the Mahomedan law there could not be a transfer of any interest in property by way of gift inter vivos except an absolute interest". This is exactly the position in Juttendromohun Tagore v. Ganendromohun Tagore (1872) L.R.I.A. (Sup. Vol.) 47,74, 75. It was argued there that Hindu law "recognises only one entire estate in the land, and does not allow of that estate being cut up into smaller distinct interests in the way of life-estate reversion remainder and so forth". At p. 75, the objection is thus analysed and dealt with. (1) An annuity is valid (so also in Mahomedan Law, Baillie, pp. 669, 672). (2) The annuity may equal or exceed the profits. (3) Therefore, there can be an effectual gift of all the profits and "practically of the land". (4) "Whether this interest and right of possession for years or life is called an estate or not, it as effectually excludes the general owner as an estate would". (As to right of possession, see Hedaya, p. 694, cited in Mirza J.'s judgment. It is necessary to consign over the house to the legatee in order that he may enjoy the rent or use of the house during the term prescribed. Baillie, p. 664.) (5) Objection is rejected as an extraordinary limitation to the right of property as it would forbid the present parting with the exclusive possession and enjoyment for a time. The same reasoning must be applied to the question left open in Mohammad Abdul Ghani v. Fakhr Jahan Begam.

56. The creation of life-estates is very useful and Hanafi Mussulmans ought not to be deprived of the capacity to do so without strong reasons. I, therefore, put forward the following propositions:

1. In Mahomedan law property is divided into two parts : (a) the "corpus" and (b) the "usufruct". The two together might be called the "property". I use the word "usufruct" in the technical sense

in which it is used in the Hedaya and Baillie.

2. "When a Mussulman has a "usufruct" for life granted to him, he has the same rights in relation to the "property" as the holder of a life estate in English law has in relation to the property, viz,, he has (1) possession; (2) use; and (3) profits thereof.

3. Therefore a "usufruct for life" is the same as "life interest.

4. In the Tagore case also, it is held that there is no difference between a life-estate and usufruct for life.

5. The will of Aishabai is exactly similar to the examples given in the Hedaya and Baillie.

6. If the words are not technically correct, they should be as far as possible so construed as to allow them to be able to take legal effect.

7. If the words purport to grant more than can be legally granted them, the grant should be cut down to what the law allows, because "the giver had at least that intention". Juttendromohun Tagore v. Ganendromohun Tagore (Tagore case).

8. If it is held that a usufruct for life is something different from a life interest, we submit the following :

(a) A life interest as the subject matter of a gift is distinct from the entire estate (see Amjad Khan v. Ashraf Khan (1929) L.R. 56 I.A. 213, s.c. 31 Bom. L.R. 809, 814).

(b) Mahomedan law recongnises the giving of distinct things and only does not allow the giving of such distinct things with conditions inconsistent with the purpose and intendment of the grant.

(c) Life-interests as such distinct subject-matters of a gift, may therefore, be given.

9. Life-interests ought to be recognised in Mahomedan law for the same reason that life interests were recognised in the Hindu law (See Tagore case).

57. On the point of jurisdiction, reference was made to Abdul Hussein v. Mahomedally Adamji (1921) I.L.R. 46 Bom. 772, s.c. 23 Bom. L.R. 1326 and Mahomedally Adamji v. Abdul Hussein (1923) I.L.R. 48 Bom. 331, s.c. 26 Bom. L.R. 163, which hold that an administration suit may be brought in Bombay in respect of property outside jurisdiction and that a declaration as to title of such property may be made in the suit.

58. A.A.A. Fyzee, for respondent No. 35. According to Mahomedan law property is divided into two parts : (1) corpus, and (2) usufruct. If the corpus is transferred during lifetime, the transaction is called hiba (gift); it is called wasiyyat (will) if the transfer is by way of bequest. Where the

usufruct is transferred in one's lifetime, it is known as ariat (commodate loans); but if the usufruct is dealt with by way of bequest, the transaction is known as wasiyyat bil manafi (usufructuary will). The difference between the last two transactions is that the former is resumable, while the latter is not resumable (Hedaya, p. 693).

59. The will in question here is a usufructuary will. In the alternative, the will gives a life-interest. The judgment of Willes J. at pp. 74-75 in Juttendramohun Tagore v. Ganendromohun Tagore (1872) L.R.I.A. (Sup. Vol.) 47 shows that there is no difference between usufruct for life and life-estate. In other words, usufruct for life by will is practically the same thing as life interest by will. Under the Mahomedan law, ariat is resumable but not usufructuary will : for, the owner being dead, who can revoke or resume ? Technical juristic notions of the English common law should not be allowed to defeat the intentions of the donor, where Mahomedan law allows similar interests to be bequeathed. According to English law, the whole property, corpus plus usufruct, vests in the life-tenant, but he has no power of alienation. Under the Mahomedan law, corpus is separated from usufruct, and usufruct alone is given. Corpus may be retained by the donor or transferred to some person other than usufructuary. The term used in law is ain (the substance or corpus). See Abdur Rahman's Institutes of Mussalman Law, Articles 488-493. What, in practical life, is the difference between a usufructuary under a Mahomedan will and a life-tenant in English law ?

60. The essential differences between gift and will under Mahomedan law are : (1) in gift, there is immediate physical transfer of possession ; it is not so in will. (2) Tender, acceptance and seisin are necessary to validate a gift; it is not so in will. (3) Gift in future is void, such a disposition by will is not necessarily void. (4) Gift of limited interests, ariat for instance, is resumable at any time ; limited bequests, usufructuary wills for instance, are not resumable. Therefore it amounts practically to a life interest. The law of gifts and of wills differs in many respects. Hence passages from the Hedaya from pp. 308 and 309, quoted by Mirza J. do not apply in this case. See also Baillie, 2nd Ed., p. 664 ; Ameer Ali's Mahommedan Law, Vol. I, p. 647.

61. The main question in the case is the construction of the will. Compare the present will with the document in Amjad Khan v. Ashraf Khan (1929) L.R. 56 I.A. 213, s.c. 31 Bom. L.R. 809. The present document is more in favour of our contention because (a) it is weaker, and (V) it is a will, and, therefore, not resumable and tantamount to life-interest.

62. There are two questions of law in this case : (a) vested remainder, and (b) life interest. The first question is an open one. It is not covered by authority. If you hold that Abdul Wahid Khan v. Mussumat Nuran Bibi (1885) L.R. 12 I.A. 91 is against me, then you must hold that Umes Chunder Sircar v. Mussummat Zahoor Fatima (1890) L.B. 17 I.A. 201 is in my favour. If an interest like a life interest can be given, then vested remainder can also be given. It is perfectly

consonant with Hanafi Mahomedan law.

63. As to life interest, the question is open, so far at least as life interests by wills or usufructuary wills are concerned. Both are valid and known to Hanafi Mahomedan law. I rely mainly on Amjad Khan v. Ashraf Khan [1925] A.I.R. Oudh 568. The fullest report of the case is in 2 O.W.N. 83. See also I.L.R. 4 Luc. 305, 306-329. All cases are discussed there. The judgment of Ashworth A.J.C. is against mo, but that of Wazir Hasan A.J.C. is in my favour. The construction of the deed by Wazir Hasan A.J.C. is accepted by the Privy Council. This case is followed in Md. Siddique Khan v. Risladar Khan (1926) A.I.B. Oudh 360 and Mt. Sartaj Fatima v. Md. Jawad (1931) A.I.R. Oudh 6. See also Sircar, Vol. II, pp. 76, 78 and 79.

64. To conclude, this is a Court of equity. The testatrix here is a pardanashin woman. Bear her intention in mind, after paying regard to surrounding circumstances. Do not give absolute interest where she desired to give only partial interest, unless the law compels you to do so. Cf. Wazir Hasan A.C.J.'s remarks in Amjad Khan v. Ashraf Khan (1925) A.I.R. Oudh. 568, 585, 587. Such bequests are most useful in modern times.

65. If the disposition is valid, Ajam gets the whole ; but if it is not, then he gets one-third by acceleration.

66. K.S. Shavaksha, for respondents Nos. 2 and 15 to 23. In this case, as Ajam has predeceased Hafizabibi, the property goes to the heirs of Hafizabibi. What is given to Ajam here can be called a personal remainder. It is neither a vested nor a contingent remainder. There is no vested remainder in Mahomedan law. If a remaiderman dies before the remainder opens, his heirs get nothing.

67. This is not a usufructury will. But even if this is a bequest of the usufruct to Hafizabibi, the heirs of Ajam take nothing. Here the legacy of the usufruct is absolute, and as Ajam died before Hafizabibi, the heirs of the testatrix take. See Baillie, p. 664, Ameer Ali. Vol. I, 4th ed., p. 647. My learned friends argue that hero the bequest is not to Ajam alone but to Ajam and his heirs and that such was not the case in Abdul Wahid Khan v. Mussamat Nuran Bibi (1885) L.R. 12 I.A. 91. The contention is without force ; but assuming the argument to be correct, it has no application. What we are concerned with here is what Ajam took, and not at all with what Ajam's heirs took. If Ajam had been alive at Hafizabibi's death, he would have taken absolutely. As he was not alive then, he does not take anything, and the property goes back to the testatrix's heirs.

68. Vested remainder is not recognised in Mahomedan law in any shape or form.

69. It is submitted that if this had been the will of a Parsee or Christian, it would be construed as giving a life-estate to Hafizabibi and a vested remainder to Ajam. The saying of the Prophet is

applicable only to cases of pure hiba and this is a case of pure hiba. Therefore, the life-estate is enhanced into an absolute estate. The saying of the Prophet has no application where the gift is for a consideration. See Mulla's Mahomedan Law, 10th ed., pp. 27-28.

70. In Amjad Khan v. Ashraf Khan (1929) L.R. 56 I.A. 213, s.c. 31 Bom. L.R. 809 their Lordships of the Privy Council agreed only with the conclusion of Wazir Hasan A.J.C. The relevant portion of the deed is at p. 218, where the consent of the donee is recited. The principle is stated at p. 219. That was a case of family settlement, and a life-interest was created. The judgment of the Oudh Court is vitiated by the fact that no distinction was made there between a hiba and a hiba-bil-ewaz. The case was not one of hiba proper. The man first made a will, and then he made a gift in his lifetime. The consent there created an estoppel. Otherwise it was admitted by counsel for respondents that the principle I contend for was applicable. See p. 220 of the report.

71. The case of Mussamut Humeeda v. Mussamut Budlun (1872) 17 W.R. 525 was not a case of a pure hiba but of an agreement. The Mahomedan notion is that if you wish to make a gift to anyone, you should make it absolutely.

72. According to Nizamudin Gulam v. Abdul Gafur (1888) I.L.R. 13 Bom. 264 the creation of life-estate is invalid under Sunni Mahomedan law; but it could be created by consent. See p. 275 of the report. It was a case of pure hiba. There was no doubt that the lady would have taken an absolute estate.

73. Prince Sulaiman Kadar v. Darab Ali Khan (1881) L.R. 8 I.A. 117 is an important case. It was a case of a pure hiba or a gift. The person objecting was the lady's son. Their Lordships say that the life-estate, according to Mahomedan law, would be an absolute estate (p. 122). The text-writers have treated this case as one of Sunnis,

74. Abdul Wahid Khan v. Mussamat Nuran Bibi is conclusive on the matter. If the parties there had been either Christians or Parsis, the first argument would have been that it was a case of vested remainder. It was not a case of hiba. The case lays down that the Mahomedan law does not recognise vested remainders. The argument of counsel is clear.

75. In Times Chunder Sircar v. Mussummat Zahoor Fatima (1890) L.R. 17 I.A. 201 there was no question of Mahomedan law. The case was argued on the Code of Civil Procedure. It only lays down that a contingent remainder is saleable Their Lordships used the phrase "like vested remainder" (p. 210). The lady there had a vested interest liable to be divested. The sons had an interest contingent upon her not getting a son. According to the judgment you can have a contingent bequest or a contingent gift, which, it is not disputed, is contrary to Mahomedan law.

This shows that no question arose in that case under Mahomedan law.

76. The case of Abdul Gafur v. Nizamudin (1892) I.L.R. 17 Bom. 1, 5, P.C. was treated as one of will. It was argued by the same counsel who argued Umes Chunder Sircar v. Mussummat Zahoor Fatima, and the latter case was actually cited.

77. The next case is of Abdool v. Mahomed (1906) 7 Bom. L.R. 306.

78. The facts in Muhammad Ahsan v. Umardaraz (1906) I.L.R. 28 All. 633, 636 are somewhat similar to those in Umes Chunder Sircar v. Mussummat Zahoor Fatima. It says that life-estates and contingent interests are not recognised by Mahomedan law. The case was one of hiba by will. Mahomed Shah v. Official Trustee of Bengal (1909) I.L.R. 36 Cal. 431 lays down that a deed creating a life-estate is invalid according to Mahomedan law. The case of Amjad Khan v. Ashraf Khan (1929) L.R. 56 I.A. 213, s.c. 31 Bom. L.R. 809 was not one of hiba.

79. The principle of stare decisis is applicable here.

80. All text-writers on Mahomedan law have taken the same view as I am contending for. Sircar, Vol. II, p. 23, says : "An oomra or life grant is lawful to the grantee during his life and descends thereafter to his heirs".

81. [Beaumont C.J. Are not the cases of Abdul Wahid Khan v. Mussumat Nuran Bibi and Umes Chunder Sircar v. Mussumat Zahoor Fatima irreconcilable.]

82. Although they appear to be inconsistent, they are reconcilable on the facts. See Akbar-Ali v. Abdool Ali , In Umesh Chunder's case the remainderman was alive when the remainder opened. In the prior ease the remainderman had died. Abdul Wahid's case has been followed and vested remainders not recognised in Muhammad Ahsan v. Umardaraz (1906) I.L.R. 28 All. 633, 637 ; Harpal Singh v. Lekhraj Kunwar (1908) I.L.R. 30 All. 406, 419; Abdool Hoosein v. Goolam Hoosein (1905) I.L.R. 30 Bom. 304, 307, s.c. 7 Bom. L.R. 742, and Marangami Rowthen v. Nagur Meera Labbai (1912) 24 M.L.J. 258.

83. M.Y. Haindaday, in reply. All the Mahomedan texts that were referred to deal with gifts inter vivos. The term "gift" includes several kinds of dispositions under Mahomedan law. It would include hiba. Hiba may be without consideration or with consideration. Different considerations apply to hiba pure and simple, hiba-bil-ewaz and hiba-bi-shurtil-ewaz.

84. All the texts on Mahomedan law deal in separate books with gift, ariyat, wada (deposit) and wills. It has very few provisions on the law of gift; but the subject of wills is discussed at length, and different considerations apply to dispositions by will.

85. The question that arises is whether under the Mahomedan law you can make a bequest of usufruct to one, and of corpus to another. By will you can do so simultaneously. Here we have a bequest of usufruct for life to one person and of corpus to another.

86. To make clear the distinction between hiba and will, we must bear in mind the definitions of the two terms. "Gift...is the conferring of a right of property in something specific, without an exchange" (Baillie, p. 515); and "to bequeath is in the language of law, to confer a right of property in a specific thing, or in a profit or advantage in the manner of a gratuity, postponed till after the death of a testator." (Baillie, p. 623). See also Ameer Ali, Vol. I, pp. 570, 630.

87. In the case of gift any condition derogatory of the completeness of the gift is void and the gift takes effect absolutely. It is for this reason that umra (ordinarily spelt as amree), which is a kind of gift, has the effect of an absolute gift and the condition that the property should revert to the donor after the death of the donee is void. There is no word like 'hayatee' in Arabic.

88. When in a will there is a bequest of the usufruct in favour of one person and of the corpus in favour of another, the donee of the corpus, if alive at the death of the testator, becomes the owner of the corpus, and the usufructuary donee becomes the owner of the usufruct. Thus, Ajam became on the death of Aishabai the owner of the corpus.

89. The word "malik "does not of necessity mean absolute owner. It is translated as "owner" or "possessor" It is used in different senses in Clauses (6) and (7) of the will. The context cuts down the meaning of the term: Mahomed Shumsool v. Shewukram (1874) L.R. 2 I.A. 7, Mithibai v. Meherbai (1921) I.L.R. 46 Bom. 162, s.c. 23 Bom. L.R. 858 and Mohammad Raze v. Abbas Bandi Bibi .

90. It is stated in Baillie (p. 664) :-

Where the service of a slave is bequeathed to one legatee, and his person to another, and the slave is within a third, each legatee is entitled to what has been bequeathed to him respectively. And if the bequest be absolute, the legatee of the service is entitled to it till his death ; after which it is to be transferred to the legatee of the person, if ho be alive, and if not, then it is to be transferred to the heirs of the testator.

The above is not a correct translation of the Arabic texts. The correct rendering is as follows :-

And if (a man) made a bequest of the service of his slave (to one) and of his person to another and it comes out of the third, then the person is for the legatee of the person and the service for the legatee of the service. So is in Hedaya. AND if the bequest is absolute it is valid up to the death of the legatee (of usufruct) then it reverts to the legatee of the person, if there be any

legatee of the person, and if there not bo one, it goes to the heirs of the testator." (Translation of a passage at pages 188 and 189 of Fatawa-i-Alamgiri, 6th Volume of Calcutta Edition).

91. [Rangnekar J. What is the difference between these two translations ?]

92. The words "if he be alive" are not in the original Arabic. The author of Fatawa-i-Alamgiri first cites a passage from Hedaya, which lays down the law on the subject, and then proceeds to expound the same. What the passage means is that where there is a bequest of the usufruct only, then after the death of the legatee of the usufruct, the property reverts to the heirs of the testator, but when there is a bequest of the usufruct in favour of one person and of the corpus in favour of another, then after the death of the legatee of the usufruct, the property goes to the legatee of the corpus. If Baillie's translation is accepted the author of Fatawa-i-Alamgiri would seem to contemplate the creation of (a) a vested remainder liable to be divested or (b) a contingent remainder. In fact Mahomedan law does not permit the creation of either of such estates.

93. So far as the Mahomedan law of wills is concerned it is conclusively in my favour. See Hedaya, p. 692, col. 2, p. 694, col. 1 and col. 2 Ameer Ali, Vol. I, Sections 540, 544, Baillie, pp. 663, 668, Sirkar, p. 77. There is no text of Mahomedan law or any other authority against me.

94. All that Abdul Wahid Khan v. Mussumat Nuran Bibi (1885) L.E. 13 I.A. 91 lays down is that the principle of representation is not recognised by Mahomedan law. The case does not go beyond this. In Umes Chunder Sircar v. Mussummat Zahoor Fatima (1890) L.R. 17 I.A. 201 the contest was between the auction purchaser under the first attachment and the auction purchaser under the second attachment. The latter contended that the first attachment was of no effect as it was that of a vested remainder. Their Lordships held that the first attachment was valid. This shows that vested remainders were recognised by Mahomedan law. Amjad Khan v. Ashraf Khan (1929) L.R. 56 I.A. 213, s. c. 31 Bom. L.R. 809 is not a case of family arrangement. See Amjad Khan v. Ashraf Khan [1925] A.I.B. Oudh 568, of per Ash worth A.J.C. at pp. 569, 570, 574, and per Wazir Hasan A.J.C., at p. 591.

Cur. adv. vult.

Beaumont, C.J.

95. The question which arises upon this appeal is whether the deceased Haji Ajam, whose estate is being administered, took any and what interest in certain property bequeathed by the will of his step-mother Aishabai. The matter was referred to the Commissioner for taking accounts, who reported that the deceased took no interest in the property. The report was confirmed by Mr. Justice Mirza, from whose decision this appeal is brought. The parties are Sunni Mahomedans governed by the Hanafi law, and in this judgment references to Mahomedan law are intended to

apply only to that law as it affects Sunnis. I have assumed that the property in question forms less than one-third of the property of Aishabai, and that she, therefore, had a disposable interest over it, though this fact has not been definitely proved.

96. The will of Aishabai, to which I will refer more in detail presently, in effect gave the property in question to her daughter Hafizabibi for her life and after her death to the deceased Haji Ajam. The property is partly moveable and partly immoveable, but no distinction exists in Mahomedan law between these two classes of property. Aishabai died in 1897, Haji Ajam died in 1919, and Hafizabibi died in 1926. The Commissioner held that under Mahomedan law the gift of a life interest confers an absolute interest, that accordingly Hafizabibi took the entire estate under the will, and that Haji Ajam took: nothing. Mr. Justice Mirza was of opinion that the view of the Commissioner as to the effect of a life interest under Mahomedan law was really right, but that he was precluded from so holding by the decision of the Privy Council in Amjad Khan v. Ashraf Khan (1929) L.R. 56 I.A. 213, s. c. 31 Bom. L.R. 809 ; but he held that, even if the will did not confer an absolute interest on Hafizabibi, the remainder to Haji Ajam expectant on the death of Hafizabibi failed on his death in her lifetime, and that accordingly Hafizabibi took the estate as heir. The learned Judge expressed the opinion, not necessary for the decision of the case, that if the gift to Hafizabibi for life did not confer an absolute interest it was wholly void.

97. In this Court Mr. Tyabji, himself the author of a learned work on Muhammadan Law, has argued, first, that this is a usufructuary will, giving the property to Haji Ajam, and the use only to Hafizabibi during her life, and that such a disposition is valid by Mahomedan law; in the alternative he has contended that if on its true construction the will confers a life interest on Hafizabibi with remainder to Haji Ajam, there is nothing in Mahomedan law to prevent such a disposition from taking effect according to its terms.

98. On the other hand, Mr. Shavaksha for the respondents has argued, first, that the rule of Mahomedan law is that a gift by will of a life interest confers on the legatee an absolute interest and that the Privy Council has not altered this rule; in the alternative he has argued that there is no such thing known to Mahomedan law as what in English law is called a vested remainder, and that Haji Ajam, having predeceased the tenant for life, took nothing, the estate devolving upon Hafizabibi as the heir of the testatrix.

99. Mr. Tyabji in support of his first point that this is a usufructuary will has referred us to passages in Hamilton's Hedaya and in Baillie which show that Mahomedan law recognises a gift of property to one and a gift of the use of that property to another. In order to determine whether the gifts in Aishabibi's will are of this nature it is necessary to look at the exact terms of the will. The material clauses are Clauses 6 and 7 which have been translated in Ex. A in the following manner:-

6. After the expenses mentioned above are incurred as to whatever moveable property belonging to me may remain as surplus, the aforesaid Bai Hafizabibi is the owner thereof. She is at liberty to deal with the same in any way she likes. The authority and ownership in respect thereof rests in her. My said daughter has no issue. That being so, as regards the immoveable property mentioned above together with the articles and things therein I direct as follows :-

7. My daughter Hafizabibi aforesaid is to enjoy the abovementioned part and the furniture &c. therein as long as she is alive and she is to enjoy the income thereof.

As long as my daughter is alive, she is the owner of the said part. However she cannot alienate the same to anyone for any reason whatsoever by way of sale, mortgage, gift &c. I appoint her to be entitled to enjoy the same and take the income thereof as long as she is alive. And after her death I appoint the aforesaid boy Ajam the son of Gulam Hussein as the owner of the said part and the furniture &c. therein. Therefore after the death of Hafizabibi the aforesaid Ajam and his descendants whoever may be shall take into their possession the aforesaid part together with the articles and things therein and they are duly the absolute owners thereof. After the death of Hafizabibi no person other than Ajambhai and his heirs shall have any claim upon the aforesaid part and the furniture and articles therein. Should anyone wake such claim, the same is null and void.

100. I agree with Mr. Justice Mirza in thinking that it is impossible to construe these clauses as giving the whole property to Haji Ajam, and the use only to Hafizabibi. Not only is Hafizabibi referred to expressly as the owner of the property during her life, but Haji Ajam is only appointed the owner after her death. In my opinion the will amounts to a gift of the property to Hafizabibi for life with remainder to Haji Ajam, and what we have to consider is the effect of such a gift under Mahomedan law. It is clear that by English law under such a gift Haji Ajam would take a vested remainder which would take effect irrespecttive of whether he survived the tenant for life or not; but it is by no means clear that the same result follows under Mahomedan law.

101. The view is expressed in many of the leading text-books on Mahomedan law that the effect of a gift for life is to confer an absolute interest on the donee. In Sir Dinshah Mulla's book on Mahomedan Law, 10th Edition, page 27, the rule is stated that if a gift is made by a Sunni Mahomedan of his property to 'A' for life, the condition that 'A' shall enjoy only the income of the property for life is void, and 'A' will take an absolute interest in the property as if no condition were attached to it. The same rule is stated in Sirkar's Mahomedan Law, Part II, page 33, and in Amir All's Mahomedan Law at page 140. The view of the test writers appear to be based primarily on a passage in the Hedaya, Volume III, Book 30, Chap. II, page 309 :-

Case of life-grants.-An Amree, or life-grant, is lawful to the grantee during his life, and descends

to his hairs, because of the tradition before quoted.-Besides, the meaning of Amree is a gift of a house (for example) during the life of the donee, on condition of its being returned upon his death.-The conveyance of the house, therefore, is valid without any return ; and the condition annexed is null, because the prophet has sanctioned the gift, in this instance, and annulled the condition, as before mentioned. An Amree, moreover, is nothing but a gift and a condition ; and the condition is invalid ; but a gift is not rendered null by involving an invalid condition, as has bean already demonstrated.

In construing these old texts the Court must endeavour to ascertain the principle laid down according to the true intent and meaning of the words, and it is often impossible or inappropriate to apply the words in a literal sense to the changed conditions of modern life. The principle laid down in the passage quoted seems to me to be that where there is a gift subject to a condition which is repugnant, the gift remains, and the condition is rejected. The case of Amree or gift of property during the life of the grantee on condition that it is to be returned on death is merely an illustration of the principle. In my view the passage quoted was not intended to lay down as a rule of law that whenever a life interest is given, and in whatever form the gift may be expressed, it must be construed as an absolute gift subject to a repugnant condition, so as to defeat in every case the intention of the donor. The normal method of granting a life estate or other limited interest in modern times is not to make a grant of the whole estate subject to a condition, but to confine the estate granted to a limited period, and the passage in the Hedaya seems to me to have no application to a grant in the latter form. There is nothing remarkable in holding that the effect to be given to a testator's manifest intention depends upon the form in which that intention is expressed. 1 may take an illustration of my meaning from English law. A testator desiring to give his daughter an interest in property during spinsterhood may give the estate to the daughter subject to a condition of forfeiture on her marriage : in such a case the condition would fail as being in general restraint of marriage and the gift to the daughter would remain unfettered, so that the intention of the testator would fail. But if the limitation be to the daughter until she shall marry, the estate comes to an end on the happening of the event, and the testator's intention prevails.

102. We have been referred to all the cases supposed to support the rule in the text-books beginning with Mussamut Humeeda v. Mussamut Budlun (1872) 17 W.R. 525, They are all discussed in the judgment under appeal, and it is not, in my opinion, necessary to refer to them in detail because I agree with Mr. Justice Mirza that in view of the decision of the Privy Council in Amjad Khan v. Ashraf Khan (1929) L.R. 56 I.A. 213, s.c. 31 Bom. L.R. 809 the rule can no longer be supported, and the view expressed in Nizamudin Gulam v. Abdul Gafur (1888) I.L.R. 13 Bom. 264 and Abdoola v. Mahomed (1905) 7 Bow. L.R. 306 must be considered as overruled. In the Privy Council case the document which had to be construed was a deed by

which certain property was given by a Sunni Mahomedan to his wife subject to the condition that she should remain in possession of it for her life and that after her death the property should revert to certain named collaterals. After her death her brother the appellant claimed the whole property as her heir. In the Court of the Judicial Commissioner at Oudh, Ashworth A.J.C. expressed the view that under the document the wife took an absolute interest. On the other hand Wazir Hazan A.J.C. in an exhaustive judgment referring to all the cases, came to the conclusion that there was nothing in Mahomedan law to prevent the creation of a life-estate. The Privy Council accepted the view that where the intention of the donor was to make a gift to the donee of the corpus of property with a condition attached that the donee should take a limited interest or take it for life, under the Hanafi law the condition would be void and there would be a complete and absolute interest in the property. But they held that the question turned on the true construction of the deed, and that all that the deed purported to give to the wife was a life interest, and that the appellant who claimed as her heir took nothing. Their Lordships left open the question whether the life-estate to the wife was valid, as it was not necessary to decide the question. Mr. Justice Mirza doubted the correctness of this decision and followed it with reluctance, but I confess that I do not share either his doubt or his reluctance. I do not see why a Mahomedan should be deprived of a power; found convenient by other communities, of conferring a limited interest in property over which there is an absolute power of disposition, unless the authorities make such a result inevitable. Mr. Justice Mirza expressed the opinion that a life-estate, if it did not confer an absolute interest, was void under Mahomedan law. It is not necessary to decide that point, but I would say that we were referred to no authority in support of the proposition, and I do not myself agree with the opinion. Mr. Shavaksha endeavoured to distinguish the case of Amjad Khan v. Ashraf Khan (1929) L.R. 56 I.A. 213, s. c. 31 Bom. L.R. 809 on the ground that the question there arose on a deed and not on a will, and that the wife consented to the deed. But both the learned Judges in the Judicial Commissioner's Court held that the transaction did not amount to a family arrangement, and there was no evidence that the wife contracted to claim no more than a life interest. The principle upon which the Privy Council acted is, in my opinion, as applicable to a will as to a deed inter vivos. In my view, therefore, Hafizabibi did not acquire an absolute interest under the will.

103. The next question which arises is whether the remainder to Haji Ajam took effect in view of the fact that he predeceased the tenant for life. On this point the learned Judge held against the appellant, and I agree with his conclusion. The case is, I think, governed by Abdul Wahid Khan v. Mussumat Nuran Bibi (1885) L.R. 12 I.A. 91. In that case there was a deed of compromise between a Mahomedan widow and sons of her deceased husband, and it was stipulated that the widow should remain proprietor and that the sons should be entitled to succeed on her death. By English rules of construction, I think the sons would have taken vested interests, but the Privy

Council held that such an interest did not seem to be recognised by Mahomedan law, and that it would be opposed to Mahomedan law to hold that the deed created a vested interest in the sons which passed to their heirs on their deaths (which had happened) in the lifetime of the widow. The case has been treated in the Indian High Courts as an authority for the proposition that the remainderman cannot take unless he survives the tenant for life : see Abdul Karim Khan v. Abdul Qayum Khan (1906) I.L.R. 28 All. 342; Harpal Singh v. Lekhraj Kunwar (1908) I.L.R. 30 All. 406, 420 ; Abdool Hoosein v. Goolam Hooosein (1905) I.L.R. 30 Bom. 304, 317, s. c. 7 Bom. L.R. 742. As against these cases Mr. Tyabji relies strongly on Umes Chunder Sircar v. Mussummat Zahoor Fatima (1890) L.R. 17 I.A. 201. In that case by a Mahomedan deed of settlement a husband granted the lands in suit to his wife on condition that if she had a child by him the grant should be taken as a perpetual mokurruri and in case of no child being born as a life mokurruri with remainder to the settlor's two sons. It was held that the two sons took interests like what would be called in English law a vested remainder and that such interests were liable to attachment not being a mere expectancy in succession by survivorship or other mere contingent or possible right or interest within Section 266 of the Civil Procedure Code of 1877. The decision is difficult to reconcile with Abdul Wahid Khan v. Mussumat Nuran Bibi (1885) L.R. 12 I.A. 91. The fact that the parties were Sunni Mahomedans is not noted in the judgment, and no question relating to Mahomedan law was discussed and none of the tests or authorities were cited. It is, I think, impossible to hold that the Board, three members of whom had been parties to the decision in Abdul Wahid Khan v. Mussumat Nuran Bibi intended to differ from the latter decision. The Board no doubt decided that the sons took an attachable interest during the lifetime of the widow, but as both the widow and the sons were alive the question whether the sons would actually inherit if they predeceased the widow did not directly arise.

104. In my opinion, the effect of the will in the present case was to grant a life interest to Hafizabibi with remainder to Haji Ajam, but the remainder to Haji Ajam could only take effect if he survived Hafizabibi, an event which did not happen. He, therefore, took nothing, and the appeal must be dismissed.

105. Costs of the appeal of respondents Nos. 2 and 15 to 23 to be paid by the appellant with liberty to such respondents to have their costs paid out of the appellant's share in the estate in the hands of the Court Receiver, if not recovered from the appellant, and failing payment of the whole or part of the costs in the manner aforesaid, such costs to come out of the estate. Respondent No. 35 to bear her own costs.

Rangnekar, J.

106. This appeal arises out of a suit brought by the appellant against two of her brothers and two sisters for the administration of the estate for her deceased father Haji Ajam, and the main

question raised in the appeal is as regards the effect of a will executed by a Mahomedan lady. First as to the facts. One Aishabai died in 1897 leaving a will dated November 21, 1882, and leaving her surviving her daughter Hafizabibi and her step-son the said Haji Ajam. Haji Ajam died in February 1919, and Hafizabibi died in December 1926. By an order of reference made on a notice of motion in the suit the Commissioner was directed to ascertain the right, title and interest of Haji Ajam in certain property situate at Bander. The appellant contended that under the will of Aishabai Hafizabibi had only a life-estate and Haji Ajam took a vested remainder. Respondents Nos. 2A and 20, who are the sons of Haji Ajam, argued that under the Mahomedan law a life-estate as such operates as an absolute estate, and, therefore, Hafizabibi took an absolute estate and on her death they were entitled to take the property as her heirs. They further contended that in any event the Mahomedan law does not recognise a vested remainder, and that Haji Ajam having predeceased Hafizabibi, his heirs as such took no interest in the property. It is conceded that if Hafizabibi took an absolute interest in the property, it would devolve after her death on the sons of Haji Ajam to the exclusion of the daughters. If, on the other hand, it formed part of the estate of Haji Ajam, then all his heirs, both male and female, would succeed to the property in proportion to their shares under the Mahomedan law. It may be stated that the parties to the litigation are Sunnis and governed by the Hanafi School of Mahomedan law. The learned Commissioner held that the intention of the testatrix was only to give a life-interest to her daughter Hafizabibi with a restraint against alienation and the remainder to her step-son Haji Ajam and his heirs, but under the Mahomedan law applicable to the parties the restraint against alienation was void and Hafizabibi took an absolute interest. He, therefore, held that neither the deceased Haji Ajam nor his heirs had any right, title or interest in the property. To the report of the Commissioner the plaintiff filed exceptions, which came up for hearing before Mr. Justice Mirza, who dismissed the same and confirmed the report. The learned Judge held that according to the Mahomedan law applicable to the parties the grant of a life-estate operated as an absolute estate in favour of the donee of the grant, but he felt himself bound by the Privy Council decision in Amjad Khan v. Aehraf Khan (1929) L.R. 56 I.A. 213, s. c. 31 Bom. L.R. 809, although he did not agree with it, and held that the life-estate given to Hafizabibi could not be regarded as an absolute estate. But he further held that the gift was bad under the Mahomedan law and that the gift over or the vested remainder in favour of Haji Ajam was invalid.

107. The learned counsel for the appellant has raised three points : (1) that the will of Aishabai is what is called under the Mahomedan law a usufructury will and that the clause in question granted to Hafizabibi only the use of the property during her lifetime and a bequest of such use was valid and recognised under the Mahomedan law ; (2) even if the will was to be considered as a grant of only a life-estate to Hafizabibi, such a bequest was not forbidden by the Mahomedan law and took effect, and the remainder over would take effect after the termination of the prior

interest. In other words, on the death of Hafizabibi the heirs of Haji Ajam who had taken a vested interest would succeed ; and (3) that even if the life-estate as such was not recognised by the Mahomedan law, effect should be given to the intention of the testatrix by holding that there was a bequest of the use of the property.

The material clause of the will is Clause 7, which runs as follows :-

7. My daughter Hafizabibi aforesaid is to enjoy the abovementioned part and the furniture etc. therein as long as she is alive and she is to enjoy the income thereof.

As long as my daughter is alive, so long she is the owner of the said part. However, she cannot alienate the same to any one for any reason whatever by way of sale, mortgage, gift, etc. I appoint her to be entitled to enjoy the same and take the income thereof as long as she is alive. And after her death I appoint the aforesaid boy Ajam the son of Gulam Hussein as the owner of the said part and the furniture etc. therein. Therefore after the death of Hafizabibi the aforesaid Ajam and his descendants whoever may be shall take into their possession the aforesaid part together with the articles and things therein and they are duly the absolute owners thereof. After the death of Hafizabibi no person other than Ajambhai and his heirs shall have any claim upon the aforesaid part and the furniture and articles therein. Should anyone make such claim, the same is null and void.

108. If this will had to be construed according to the English law, it is clear that Hafizabibi took a life interest in the property and Haji Ajam a vested remainder.

109. The question really is what is the position under the Mahomedan law ? With regard to the first contention, I entirely agree with the learned Judge that the Will was not a mere usufructuary will conferring upon Hafizabibi the mere "use" of the property, but that she was to take a life-estate in the property and Haji Ajam was to become "the owner" of the property after her death.

110. Mr. Tyabji has referred to good many texts, most of whom, as far as 1 can see, have been cited in the judgment of the learned Judge. A careful perusal of those texts and the illustrations given show clearly the distinction between a life-estate as such and a mere bequest of use or of service or of produce. Ameer Ali in his Mahomedan Law, Vol. I, page 648, says :-

When the bequest is of the rents and profits of a house, and the legatee wishes to occupy it himself he cannot lawfully do BO. It the bequest be of the occupancy of a mansion and there is no property besides, the legatee may occupy a third of the mansion and the heirs have no right) to sell the two-thirds of the mansion in their possession. Neither is the legatee of the occupancy of a house entitled to let it, nor to remove the slaves whose services are bequeathed from the testator's place of residence to another, unless the legatee and his family are in the latter place, when the

slave may be taken there for the purpose of serving them. Radd-ul-Muhtar, Vol. V. p. 680.

In Baillie the subject is treated in Ch. VI, p. 652. Minute rules are given as to how far, for example, a bequest of a service of a slave or of the occupancy of a mansion is to be enjoyed by the legatee. One of the rules is as follows at page 654 :- "Neither has a legatee of occupancy a right to let the mansion or slave to hire, according to 'us". According to Wilson the chapters in Baillie and Hedaya, dealing with the subject of usufructuary wills, carefully distinguish bequests of the "use" from bequests of "fruit" or "produce" of a slave or house and never advert to the possibility of combining the two rights so as to make up what is commonly called the "usufruct" under the English law. Sircar observes as follows at page 78:-

A bequest of the produce of an article doss not entitle the legatee to the personal use of that article, nor does a bequest of the use entitle him to let it out on hire.

Then he cites Hedaya, Vol. IV, pp. 528 and 529, and then the passage is :-

It is not lawful for the usufructuary legatee of a slave or of a house to let them out for hire.

In the case of a life-estate, however, the whole estate vests in the life tenant for full enjoyment and possession subject to his keeping the reversion unimpaired for the benefit of the reversioner. A life tenant as such can let out the property, can mortgage his life-interest, and can even dispose of it by sale. This, it is clear, a usufructuary grantee under the Mahomedan law cannot.

111. But there is another difficulty in the appellant's way. According to the Hedaya, as translated by Baillie, the following passage appears at page 664:-

When the service of a slave is bequeathed to one legatee, and his person to another, and the slave is within a third, each legatee is entitled to what has been bequeathed to him respectively. And if the bequest be absolute, the legatee of the service is entitled to it till his death ; after which it is to be transferred to the legatee of the person, if he be alive, and if not, then it is to be transferred to the heirs of the testator.

Now, in this case Haji Ajam died before Hafizabibi, so that if Hafizabibi was a legatee of a mere use, then on the death of Hafizabibi the property must go to the heirs of Aishabai and Haji Ajam's heirs would take nothing. But it was argued by Mr. Haindaday in reply that the translation of the texts in Baillie was incorrect and he got the passage translated by the Court Translator, and the translation runs as follows :-

And if (a man) made a bequest of the service of his slave (to one) and of his person to another and it comes out of the third, then the person is for the legatee of the person and the service for the legatee of the service. So is in Hedaya. And if the bequest is absolute it is valid up to the

death of the legatee (of usufruct), than it reverts to the legatee of the person, if there be any legatee of the person, and i there not be one, it goes to the heirs of the testator.

I am unable to see that this makes any difference. The translation in Baillie has never been challenged at any time, and as far as I can see, this has been accepted by all the texts writers, including Sircar and Ameer Ali. I agree, therefore, with the learned Judge that this contention is unsound, and must be rejected.

112. This brings me to the second and the main question. The points which arise are, first, whether under the Mahomedan law applicable to the parties it is open to create a life-estate or a life-grant by will; secondly, whether when such life-estate is created it does not operate as an absolute estate, the condition being disregarded; and, thirdly, whether Mahomedan law recognises a vested remainder. The last question, I think, is important, because whatever the nature of the interest of Hafizabibi may be, in order to show that this property formed part of the estate of Haji Ajam it is incumbent upon the appellant to show that a vested remainder as such is recognised by Mahomedan law. On this point I am clearly of opinion that it is not. This is clear from the decision of the Privy Council in Abdul Wahid Khan v. Mussumat Nuran Bibi (1885) L.R. 12 I.A. 91, the headnote of which runs:-

Mahomedan Law does not recognise vested estates in remainder.

In view of the contention that the opinion there expressed by their Lordships is a mere obiter dictum, it is necessary to examine the facts of the case and the decision of their Lordships. The facts were : One Mouzzam Khan was the owner of certain property and had also purchased certain other property in the name of two of his sons, Abdus Subhan and Abdul Rahman. He died in 1850 leaving three widows, Gauhar, Chameli and Bakhtawar, and these two sons. Bakhtawar had also a daughter, Nuran. In 1866 Abdus Subhan brought a suit against Gauharbibi to recover half of one of the villages on the ground that Mouzzam Khan had caused a kabulayat of the village of the entire taluka to be executed in his name and that of his brother Abdul Rahman. This claim was opposed by Gauharbibi apparently on the ground that the Government had a settlement of the estate on her and had executed a kabulayat and she herself had been in possession thereof. The suit was compromised by two petitions, one signed by the sons and the other by the daughter, upon which the suit was dismissed by consent. The material portion of the deeds runs as follows (p. 99):-

Now, an amicable settlement having been made between the Petitioner and his said mother, a deed of compromise is filed this day in the Settlement Court, therefore I, the declarant (man mukir) commit to writing that (my) mother, Defendant, shall during her lifetime continue as heretofore (ba dastur) to hold possession of and be mistress of the talooka, and manage the estate

through agents, but she shall not, without any special emergency, alienate any property so as to deprive mo of my right, and that after her death I, the declarant (mau mukir), and my step-brother, Abdul Rahman, shall possess and enjoy each one half of the entire ilaka, situate in the districts of Sultanpur and Partabgarh, and that so long as the Defendant may be living I shall obey her.

The second petition of Gauharbibi was similar to the above except that the following words were added after the names of Abdul Rahman and Abdus Subhan, viz., "shall become successors to and proprietors of the said ilaka." Thereafter Abus Subhan died in 1868 and Abdul Rahman in 1874 leaving a daughter Muradi. After his death Gauharbibi executed a deed of gift in favour of Muradi, and shortly thereafter she died. The contest in the suit, which was the subject of the appeal, was between the persona claiming through Gauharbibi and the persons claiming through the daughter of one of the other widows of Mouzzam Khan, and the question was what was the nature of the estate of Gauharbibi. The Subordinate Judge held that Abdul Rahman and Abdus Subhan having died in the lifetime of Gauharbibi they never acquired any estate in the suit property and the devolution of the property was subject to the Mahomedan law of inheritance. In appeal the Judicial Commissioner held that the effect of the compromise was to give Gauharbibi a life interest in the property, and reversed the decree of the Subordinate Judge. In the Privy Council it was contended for the appellant among other things that the petitions of compromise did not operate to cut down Gauharbibi's rights in the property to the life-estate and they could not, according to the Mahomedan law, operate to create or evidence any estate or interest of a present vested, reversionary or contingent nature in the property, and that it was not a transaction of gift, but of mutual compromise. Dealing with the question their Lordships observed (p. 100) :-

...Gauhar Bibi is not merely to have possession of the estate during her life; she is to be mistress (or, as the District Judge has translated the petition, proprietor) of the talooka. During her life, the whole interest in the estate is to be in her. Then conies the question. What is the interest which is given by the compromise to the sons ? To give the Plaintiffs a title to the estate it must be a vested interest which, on the death of the sons, passed to their heirs and is similar to a vested remainder under the English law. Such an interest in an estate does not seem to bo recognised by the Mahomedan law.

Further on their Lordships observed as follows (p. 102):-

Their Lordships do not take this view of the compromise. In Musammut Humeeda v. Musammut Budlun (1872) 17 W.R. 525, in which judgment was given by this Committee on the 26th March, 1872, the High Court of Calcutta had held that, by an arrangement between the Plaintiff, a Mahomedan widow, and her son, an estate was vested in the Plaintiff for life, and after her death was to devolve on her son by way of remainder, but their Lordships held that the creation of such

a life estate did not seem to be consistent with Mahomedan usage, and there ought to be very clear proof of so unusual a transaction. They thought that expressions from which it might be inferred that the Plaintiff was to take only a life interest might be explained on the supposition that they may have been used to import that the property was to remain with the widow for the full term of her life, and that the son as her heir would succeed to it after her death. Their Lordships think this the reasonable construction of the compromise in this case, and that it would be opposed to Mahomedan law to hold that it created a vested interest in Abdul Rahman and Abdus Subhan which passed to their heirs on their death in the life-time of Gauhar Bibi.

Undoubtedly, the question which arose was as to the nature of the interest of the two sons, and depended upon the construction of the compromise. But one party contended that Gauharbibi had a life-estate and that the sons had taken vested remainder, and though their Lordships held that the sons only took a contingent interest, their Lordships held clearly that even supposing the sons had taken vested interest, such vested interest could not be recognised under the Mahomedan law. I may mention that this decision has always been understood in this country as an authority for the proposition that the Mahomedan law does not recognise a vested remainder. See Abdul Karim Khan v. Abdul Qayum Khan (1906) I.L.R. 28 All. 342, Harpal Singh v. Lekhraj Kunwar (1908) I.L.R. 30 All. 406, and Abdool Hoosein v. Goolam Hoosein (1905) I.L.R. 30 Bom. 304, s. c. 7 Bom. L.R. 742.

113. This really is sufficient to dispose of the appeal. But the question on which a good deal of argument is concentrated is whether there is anything in the Mahomedan law applicable to the parties which prohibits the creation of a life-estate, or, to put it the other way, whether the gift of a life-estate operates as an absolute estate. Now it is true there are no specific texts on this point either one way or the other in the chapters dealing with the subject on wills in the Mahomedan law books. But the general principles which apply to gifts are also applicable to the case of wills, and there is a good deal of literature in the texts dealing with gifts which seems to apply equally to the case of wills. These texts are cited in the judgment of the learned Judge and I shall only refer to some of them.

114. Thus in Hedaya, Book XXX, Ch. II, (Charles Hamilton's Translation of Hedaya, Vol. Ill, page 308), it is said :-

...neither gifts nor charities are affected by being accompanied with an invalid condition, because the prophet approved of Amrees [gifts for life,] but held the condition annexed to them by the granter to bo void.

115. The author's note to this is:-

The condition of restoration upon the demise of the grantee.

The Hedaya continues (p. 309) :-

An Amree, or life grant, is lawful to the grantee during his life, and descends to his heirs, because of the tradition before quoted.-Besides, the meaning of Amree is a gift of a house (for example) during the life of the donee, on condition of its being returned upon his death.-The conveyance of the house, therefore, is valid without any return ; and the condition annexed is null, because the prophet has sanctioned the gift, in this instance, and annulled the condition, as before mentioned. An Amree, moreover, is nothing but a gift and a condition ; and the condition is invalid ; but a gift is not rendered null by involving an invalid condition, as has been already demonstrated.

The passage in Baillie's Digest of Moohummudan Law at page 517 is as follows:-

So also if he had said, 'This mansion is to thee oomree' (for thy ago-oomr), or 'hyatee' (for thy life-hyat), 'and when them art dead it reverts to me,' in which case the gift is lawful, and the condition void.

The footnote to this passage runs thus :-

From this it appears that gift cannot be limited in respect of time, any more than sale (M.L.S.), p. 4). But why, it may be asked, is the gift valid in this case, and not so in that of the rookba ? The reason assigned for this in the Hidayah (vol. iii., p. 698) is that the Prophet allowed it in the one case, and rejected it in the other.

It is difficult to find any distinction on principle between "a gift to A for life and thereafter to B", and, "a gift to A for life and thereafter to me or to my heirs on A's death". Sircar, who is admittedly a great scholar and an authority on Mahomedan law, puts the position in this way (p. 23) :-

An Umra, or life grant, is lawful to the grantee during his life, and descends to his heirs.-Hidayah, vol. iii., p. 309.

Then at page 24 :-

If he (the grantor) said,' This mansion is to thee Umra (for thy age), or hayati (for thy life), and when thou art dead it reverts to me,' in which the gift is lawful, and the condition void.-Fatwa Alamgiri, vol. iv., pp. 520 and 521.-Baillie's Digest, pp. 508 and 509.

Ameer Ali says at p, 140:-

Under the Hanafi Law, a life-grant or 'Umra,' if made in terms which imply an absolute gift,

takes effect as a hiba, the condition limiting the gift being held void. A gift to A for life and remainder to B takes effect as an absolute gift to A,-to use an English expression, gives him an estate in fee.

The footnote to the above passage is important:-

Ahmed bin Hanbal and others, says the Durr-ul-Mukhtar, have held a rukba to be invalid and an 'umra' to be valid on the authority of a tradition of the Prophet who declared that when a grant is made for another's life he takes it for his life.

These texts and passages undoubtedly show that a life grant with a condition that on the death of the grantee it should revert to the donor was construed by Mahomedan lawyers to have the effect of an absolute grant. The gift was held good and the condition void. On principle it is difficult to find any distinction between a life grant of this nature, or as it is called umri, and a life grant with a condition that on the death of the donee the estate should go over to somebody else, and this does not seem to be disputed. The argument, however, is, if I understand it correctly, that the word "Umri" does not mean a life grant. It means a grant of absolute property subject to a condition of this kind or any other inconsistent condition, and therefore Mahomedan lawyers construed the condition to be void and upheld the gift or grant. The translation of umri as a life grant or hayati for life by Baillie and other writers including Ameer Ali has never been questioned. According to the texts, then, an umri is not, on the face of it, an absolute grant, yet it operates as an absolute grant, and the actual reason for recognising that an umri operates as an absolute grant is what is called in the Hedaya as tradition and the Prophet's command. In fact in the whole of the texts, to which our attention has been drawn, there is no specific text which seems to show that a life-estate as such with a remainder could be created or recognised in those days. If, then, the validity of an umri depends upon tradition or commandment, it is difficult to see how the question of construing a life grant according "to the intent and significance" could arise.

116. Then the only question now is whether there is anything in the decided cases which supports the appellant's contention, and I am clearly of opinion that there is no case which has gone to the extent of saying that under the Hanafi law a life-estate as such can be recognised or created.

117. The first case in which the question arose as to the validity of a grant of a life-estate under the Mahomedan law is Mussamut Humeeda v. Mussamut Budlun (1872) 17 W.R. 525. In that case there was an arrangement between a mother and her son. The first Court held that the effect of the arrangement was to confer an absolute estate in the property, the subject-matter of the arrangement, on the mother. The High Court held that the mother had only a life-estate under the arrangement. Their Lordships of the Privy Council first held that the arrangement set up by the

mother was true, and observed that the only question was what was the effect of it. After pointing out that the High Court had made out a new case as regards the nature of the arrangement they observed that the arrangement would be prima facie absolute. Their Lordships then considered the question whether there was any ground that when the son gave up his right, title and interest in the property under the arrangement he gave up only for the life of the mother, and proceeded to observe as follows (p. 527):-

Upon what grounds then ought it to be held that what the son gave up, ho gave up for only the life of his mother, retaining the legal reversion in himself ? The creation of such a life-estate does not seem to be consistent with Mahomedan usage, and there ought to be very clear proof of so unusual a transaction.

Later on their Lordships observed that the expressions used were too weak to prove the transaction was improper among the Mahomedans as an alienation of the son for the life of his mother, so that the opinion of their Lordships in this case seems to be that an arrangement under the Mahomedan law which gives a life-estate and provides that on the death of the life tenant the estate was to revert to the son was unusual, improper and inconsistent with Mahomedan usage.

118. The next case is the case of Abdul Wahid Khan v. Mussumat Nuran Bibi (1885) L.R. 12 I.A. 91, to which I have already referred, and it is clear from the judgment that Mussamut Humeeda v. Mussamut Budlun was approved of and followed by their Lordships of the Privy Council in this case. In Nizamudin Gulam v. Abdul Gafur (1838) I.L.R. 13 Bom. 264 a Mahomedan executed a deed called wakfnama by which he settled his property on wakf on his wife and daughters and their descendants perpetually. He provided for the management and devolution of the property in a certain manner, to which it is unnecessary to refer, but the effect of it was that management was to go on from generation to generation and neither the two wives nor the daughters had the power to alienate the property. The plaintiffs alleging that they were the mutawalis brought a suit to recover possession of the property which was purchased by the defendant at a Court sale in execution of a decree against Tahira, one of the daughters of the settlor. The grounds of their claim, as appears from the judgment, were that the property in question was wakf, and, secondly, that Tahira, the daughter of the settlor, had only a life-interest therein. Two points arose, therefore, for consideration: (1) whether the property was wakf, and (2) whether the estate of Tahira therein was only a life estate. Their Lordships held that the wakfnama was invalid. On the second question they held that it was not competent to the settlor to create a life-estate and to grant the property to his next of kin upon determination of such life-estate. This is the most direct authority on the point under consideration, and I would cite here the observations of their Lordships, which are as follows (pp. 274-275):-

It was not, however, shown to us how Karimuddin (settlor) could legally create such a life-estate,

or grant the property to his next of kin on the determination of the life-estates. In his lifetime he made nogrant, for he kept the possession of the property with himself until his death, and on his death his estate would devolve on his heirs, by Mahomedan law ; and, as said in the case of Ranee Khujooroonissa v. Mussamut Roushun Jehan (1876) L.R. 3 I.A. 291, 307 'the policy of the Mahomedan law appears to be to prevent a testator interfering by will with the course of the devolution of property according to law among his heirs. The creation of any life-estate at all appears quite inconsistent with the Mahomedan Law. See Mussamut Humeeda v. Mussamut Budlun (1872) 17 W.R. 525, It might be that by consent such an estate might be created ; but, as a general rule, the donee in such a case would take an absolute estate.' All our masters are agreed that when one has made a gift and stipulated for a condition that is fasid, or invalid, the gift is valid and the condition void. (Baillie's Moohummudan Law, p. 537). So in the Hedaya, III, p. 309, it is said : 'An amree, or life grant, is nothing but a gift and a condition ; and the condition is invalid ; but a gift is not rendered null by involving an invalid condition.' This case went in appeal to the Privy Council and the decision of the High Court was confirmed in Abdul Gafur v. Nizamudin (1892) I.L.R. 17 Bom. 1, P.C., The case was argued on behalf of the appellant ex parte by Mr. Mayne, who conceded that the case as to wakfnama or settlement could not be supported. He argued, however, that the deed executed by the owner of the property could be supported as a will on the ground that the heirs had consented to it, and relied, for the purposes of his argument, on umes Chunder Sircar v. Mussummat Zahoor Fatima (1890) L.R. 17 I.A. 201, to which I shall refer presently. Mr. Mayne's argument was (p. 3):-

There was, however, the case of grant for life in Umes Chunder Sircar v. Zahoor Fatima.

Dealing with that point Lord Watson observed as follows (p. 4):-

He did not dispute that a Mahomedan cannot of himself, by a testamentary writing, either curtail or defeat the legal interests of his heirs ; and that a Mahomedan will is, therefore, imperative with regard to two-thirds of the testator's succession, unless it is validated by the consent of the heirs having interest. Their Lordships do not think the appellants would take any benefit from the document of 1838 if it were construed as the will of Karimudin. It was plainly not his intention to create a series of life rants, a kind of estate which does not appear to be known to 'Mahomedan law (see Mussamut Humeeda v. Mussamut Budlun), but to make the fee devolve from one generation of his descendants to another without its being alienable by them, or liable to be taken in execution for their debts. Even if Tahirabibi had expressly consented to accept the will, she would not have been the owner of a life estate, but a full owner, with prohibition against alienation, which, being void in law, could not affect either herself or her creditors.

Then, as the last part of the judgment shows, their Lordships of the Privy Council approved of the decision of the Bombay High Court on all the points in the case.

119. It was argued by Mr. Tyabji that what their Lordships held was that the intention of the testator was to give to each successive life tenant an absolute estate in fee but subject to a repugnant condition against alienation of property during each such life. I am unable to accept this argument. The Privy Council has clearly observed in the passage to which Mr. Tyabji refers that the reason for the construction which they place on the will was that a life grant was unknown to the Mahomedan law, and presumably, therefore, would amount to an absolute estate.

120. The same question arose in Abdoola v. Mahomed (1905) 7 Bom. L.R. 306, and there Mr. Justice Batchelor held that the creation of a life-estate was inconsistent with the Mahomedan law ; and where a life estate was attempted to be created, the donee would take an absolute estate. For this opinion Mr. Justice .Batchelor relied on Nizamudin Gulam v. Abdul Gafur, and the observations of Lord Watson in the same case under appeal to the Privy Council.

121. The next case is Akbar Ali v. Abdool Ali . In that case Mr. Justice Russell observed (p. 299) :-

Now although of course there are many cases which say that under the Mahomedan law applicable to Sunnis a life estate is invalid, the contrary appears to be the case under the law applicable to Shias. 1 have above referred to Wilson and I need not set out the other authorities for this inasmuch as Mr. Lowndes conceded, as I have mentioned above, throughout his arguments that a life-estate was not invalid according to Shia law. The great difficulty which I have felt in this case has bean caused by the case of Umes Chunder Sircar v. Mussmmat Zahoor Fatima (1990) L.R. 17 I.A. 201, because that case apppears to me to be quite contrary to the case of Abdul Wahid Khan v. Mussumat Nuran Bibi (1883) L.R. 12 I.A. 91, which was not referred to in Vines Chunder v. Mt. Zahoor.

122. The learned Judge after pointing out the difficulty in reconciling these two decisions made the following observations (pp. 301-302):-

Mr. Lowndes in his argument after I had drawn his attention to Umes Chunder Sircar v. Mussummat Zahoor Fatima (1890) L.R. 17 I.A. 201 confessed his inability to reconcile it with Abdul Wahid Khan v. Mussumat Nuran Bibi (1885) L.R. 12 I.A. 91. I have found it very difficult to do so and am of opinion that the first line of the head-nota in Abdul Wahid Khan v. Mussumat Nuran Bibi is stated too broadly. In my opinion it should be stated that Mahomedan law does not recognise vested estates in remainder with all their consequences. To reconcile Abdul Wahid Khan v. Mussumat Nuran Bibi with Umes Chunder Sircar v. Mussummat Zahoor Fatima, I think the proposition would have to be stated thus :-

Under the Mahomedan law applicable to Shias (thereunder life-estates are recognised) the estate

of a tenant for life will not devolve upon the remainderman unless the latter survives the former. The estate of the remainderman cannot be said to vest in him-to use the expression of English law-so as to pass to his heirs in the event of his decease during the lifetime of the tenant for life.

The view taken in this case has been approved of in Abdul Karim Khan v. Abdul Qayum Khan (1906) I.L.R. 28 All. 342 and Mahomed Shah v. Official Trustee of Bengal (1909) I.L.R. 36 Cal. 431. I may also refer to Prince Suleman Kadr v. Darab Ali Khan (1881) L.R. 8 I.A. 117. The question raised there was as to the effect of a deed executed by a Mahomedan lady. The first was that there was no absolute bequest but a mere expression of wish, secondly, that it was a specific bequest of the legacies to be paid out of a certain specific fund and no other, and thirdly, that the lady had only a life-estate in the funds, and, therefore, could not exercise any testamentary power over it. Their Lordships disposed of the appeal on the first two questions and made the following observations with regard to the third (p. 122):-

At the same time, their Lordships think it right to guard themselves against it being supposed that they assent to the proposition that, even if this had been a specific legacy payable out of the specific fund mentioned, it would have been invalid. Their Lordships are by no means satisfied that the gift to this lady of these Government promissory notes subject to a condition that she is to have the interest only for life, and that after her death there is to be a trust in perpetuity for all her heirs to all time, is not, according to Mahomedan law, in its legal effect a gift to her absolutely, the condition being void.

123. I now come to the two decisions of the Privy Council on which the learned counsel for the appellant has relied. The first is the case which I have already mentioned, limes Chunder Sircar v. Mussummat Zahoor Fatima (1890) L.R. 17 I.A. 201. The facts in that case were that a Sunni Mahomedan granted a mukerrari lease of a certain property at an annual rent of Rs. 1 to his second wife with a condition that if she died childless it should go to his son by his predeceased wife. A decree-holder attached the interest of the son under the deed. At that date the second wife had no child. The grantor died thereafter, and after his death the interest of the son was brought to sale, and the main question in the case was whether the interest given to the son under the deed was liable to be attached. Their Lordships held that the son took under the deed a definite interest like what is called in the English law a vested remainder only and that it was liable to be displaced in the event of there being a son after the grantor by his second wife and that it was not a mere expectancy or a mere contingent or possible right and it was therefore liable to be attached and sold in execution of the decree. I confess I share the difficulty which I have pointed out Mr. Justice Russell experienced in reconciling the decision with that in Abdul Wahid Khan v. Mussumat Nuran Bibi. After giving my best consideration to the matter it seems to me that this decision must be restricted to the facts of that case. In the first place this was not a case of a pure

hiba but of a hiba-bil-iwaz. In the case of a hiba-bil-iwaz the rule that it is not competent to the donor to make a gift of a life-estate and give a vested remainder to somebody else does not apply. Secondly, no rule of Mahomedan law was referred to in this case and it was decided under Section 266 of the Civil Procedure Code then in force, the point being whether the interest taken by the son was a mere expectancy or a definite interest liable to be divested. Their Lordships held that it was a definite interest liable to be divested in the event of a son being born. Then just after this case the Privy Council had before them another case, namely, Abdul Gafur v. Nizamudin (1892) I.L.R. 17 Bom. 1, P.C. Mr. Mayne was counsel in both the cases, and in the course of his argument in the latter case he relied on Umesh Chunder Sircar v. Mussummat Zahoor Fatima. Their Lordships, however, did not accept the authority of that case nor referred to it as a decision that under the Mahomedan law it is competent to create a vested remainder. Lastly, it may be pointed out that the son was actually alive at the date of the attachment. Perhaps the best method of reconciling the two decisions is to adopt the one followed by Mr. Justice Russell in Akbar Ali v. Abdool Ali , to which I have already referred. The second case, on which Mr. Tyabji has relied and on which he has laid considerable stress as overruling all previous decisions to which I have referred, is Amjad Khan v. Ashraf Khan (1929) L.R. 58 I.A. 213, s. c. 31 Bom. L.R. 809. The facts there were that a Sunni Mahomedan of the Hanafi school executed a deed stating that he made a gift without consideration of his entire property to his wife, subject to the condition that she should remain in possession of a share worth Rs. 5,000 with full power to alienate it, and that as to the rest worth Rs. 10,000 she should not have power to alienate but should remain in possession during her lifetime, and that after the donee's death the entire property gifted away should revert to named collaterals. The deed itself recites that to the disposition thus made the consent of the donees and collaterals was obtained. Upon the death of the donee her brother claimed the whole property as heir. He contended that the intention shown by the deed was to make a gift of the whole property itself subject to a restrictive condition, and that under the Mahomedan law the gift was valid, but the condition void. The Subordinate Judge held that the deed was in the nature of a family settlement and that the wife took absolute interest in one-third of the property. On appeal Ashworth A.J.C. held that under the Mahomedan law the deed operated as a gift of an absolute estate. Wazir Hasan A.J.C. took the view that the wife took a life-estate and that under the Mahomedan law such a gift was valid and could not operate as a gift of an absolute estate. Both the learned Judges rejected the finding of the trial Court that the deed was in the nature of a family arrangement. In one part of his judgment, however, Wazir Hasan A.J.C. observed as follows (p. 120):-

Apart from trust, the transaction may be looked at from another point of view. It is not a simple gift but a contract for consideration which has moved from both sides as shown above.

Their Lordships of the Privy Council accepted the conclusion of the learned Judicial

Commissioner as to the construction of the deed, but expressed no opinion on the question at issue in this case whether the grant of a life-estate was valid and whether it necessarily operated as a grant of an absolute-estate. As pointed out above, Mr, Justice Mirza accepted the learned counsel's argument that this decision overrules all the previous decisions to which I have referred. With great respect to the learned Judge I do not agree.

124. In my opinion the question whether a life-estate operates as an absolute estate or not was expressly left over by their Lordships of the Privy Council, who, as far as I can see, held on the construction of the deed that in that particular case the grant of the life-estate was valid, basing their judgment on the terms thereof. The arguments show what the case was which was presented to their Lordships. It was argued that a Mahomedan can create a life-estate by contract, but it was not established that the deed was the result of arrangement among the family. Then in reply the appellant's counsel said (p. 215):

The Statement by the Board in Hameeda v. Budlun that the creation of a life estate 'does not seem to be consistent with Mahomedan law' is relied on as a reason for construing the present deed as being what its language states-namely, 'a gift of the entire property subject to the condition' expressed.

At page 219 their Lordships observed :-

The principle on which the plaintiff relied was that where it is clear that the intention of the donor is to make a gift to the donee of the corpus of the property comprised in the gift, and there is a condition attached that the donees should take a limited interest or should take it for life, under the Hanafi law the condition would be void and there would be a complete and absolute gift of the property : in other words, it was argued that if a gift of tangible property is made subject to a condition inconsistent with full ownership on the part of the donee of the thing given, the gift is valid, but the condition void : see Wilson's Digest of Anglo-Muhammadan Law, 1908 Ed., para. 315.

Then their Lordships distinguished the case of Musammat Humeeda v. Musammat Budlun, and observed as follows (p. 220):-

Other authorities were referred to during the course of the argument, but in their Lordships' opinion it is not necessary to refer to them in detail, for the reason that the above mentioned principles were not disputed by the learned counsel for the defendant respondents : their case was based on. the argument that the subject-mattar of the gift in the deed of January 17, 1905, was a life interest only in the property and that it was not a gift to the wife of an absolute interest in the property with an inconsistent condition.

Further on at page 221 their Lordships observed :-

It was, however, further argued on behalf of the plaintiff that under Mahomedan law, which is applicable to this case, a transfer of a life estate could not be made by moans of a gift : in other words, it was argued that under the said law there could not be a transfer of any interest in property by way of gift inter vivos except as an absolute interest.

In their Lordships' opinion, it is not necessary to express any opinion on the last mentioned argument, because in view of the construction of the deed which their Lordships have adopted, the plaintiff' appellant is on the horns of a dilemma.

Now it seems to me that the dilemma raised by their Lordships at page 221 is only intelligible on the footing of the case being treated as not being a case of a pure hiba. That it was not a pure hiba is clear from the recital in the deed which shows that the consent of the donees was obtained to it and also from the observations of Wazir Hasan A.J.C. to which I have referred. It is true that on the face of the judgment there is nothing to show that their Lordships considered the transaction otherwise than a mere hiba. But, on the other hand, their Lordships state that the principles on which the plaintiff relied were not in dispute. They set out the principles and then proceed to consider the terms of the deed. The deed recites the consent of the donees. If all the earlier decisions of the Privy Council, to which I have referred, were intended to be overruled, I should have expected some definite pronouncement to that effect in the judgment. But although those decisions were cited they were not referred to, and properly because the principles laid down in them were never disputed. Finally, there was an exhaustive and learned judgment of Wazir Hasan A.J.C. before them. The learned Judge had specifically raised the question as to whether there can be a grant of a life-estate and whether such a grant operates as one of absolute estate. He had pronounced a definite opinion on it. His colleague had taken a distinctly opposite view. The question was before their Lordships and yet their Lordships deliberately left it open and expressed no opinion on it. In these circumstances it is difficult to see how it can be contended that the earlier decisions to which I have referred must be considered to be overruled by the decision in Amjad Khan's case. In my opinion, the series of decisions, to which I have referred, cannot be considered to have been overruled by this case (1924) 2 C.W.N. 83, 123. Mr. Tyabji also relied on the judgment of Wazir Hasan A.J.C. in that case. It is unnecessary to consider the judgment in detail. The learned Judge confessed that the question was not free from doubt. After considering the cases and the texts he seems to have felt the difficulty of the situation, as appears from the following observations at p. 123 :-

But if the law of the Muhammadans or of any other class of people must keep pace with progress of society and the multifarious relations arising therefrom interests in property apart from the property itself must be recognised. Are we compelled to hold that if a Musalman of today desires

to carve by way of gift only a particular estate out of his property and retain the rest of it for himself or his heirs be cannot do so and if he does, the gift vests the entire estate into the donee in spite of the intentions of both to the contrary ? I have come to the conclusion that the rules of the Muhammadan Law do not compel me to so hold.

Undoubtedly, there is no reason why a Mahomedan should not be allowed to transfer a life interest in property with remainder over or any other limited interest in property like other people. But, as far as I can see, the texts do not recognise such a limited grant and lay down a rule of construction which, in deference to the Prophet's commandment, is a part of the law. The cases to which I have referred and by which we are bound also lay down the same proposition. Our duty is to apply the Mahomedan law to the Mahomedans, and if there is a defect or a hardship, the remedy would be by way of legislation. In my opinion, therefore, the grant of a life-estate operates under the Mahomedan law as a grant of an absolute estate, and Hafizabibi took the property absolutely.

125. Mr. Tyabji relies on Banoo Begam v. Mir Abad Ali (1907) I.L.R. 32 Bom. 172, s.c. 9 Bom. L.R. 1152. In this case the parties were Shias, and there is no question that according to the law applicable to them a life-estate as such can be created and vested remainders are good. It is true that Sir Lawrence Jenkins understood the case of times Chunder Sircar v. Mussummat Zahoor Fatima as affirming of possibility of the creation by a Mahomedan of a definite interest like what we should call in English law a vested remainder, but in the following sentence observes as follows (p. 178):-

Now here we have to do with Shias and not with Sunnis, and where they are concerned the creation of life-interest is allowed.

At page 180 the learned Chief Justice observed as follows :-

Therefore what weighed with their Lordships of the Privy Council in Mussumat Aumeeda's case and Abdul Wahid Khan's case has no application, for it would not be correct to extend to Shias the proposition that the creation of a life-estate did not seem to be consistent with Mahomedan usage.

126. In the result the appeal fails and must be dismissed with costs.