We are asked by Mr. O'Conor on behalf of the defendant Bank to fix a time within which the lease should be executed. Mr. Wallach, on behalf of the respondent, raises no objection. We think that the lease should be executed within a period of two months from this date, and so we direct.

*Appeal dismissed.*

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*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.*

MUHAMMAD SAYEED AND OTHERS (DEFENDANTS) *v.* MUHAMMAD ISMAIL (PLAINTIFF) AND ZAFAR-ULLAH AND OTHERS (DEFENDANTS)*

*Civil Procedure Code* (1882), *section 325A—"Alienation"—Muhammadan law—Gift during* marz-ul-maut—*Will.*

*Held* that a gift made by a Muhammadan during death-illness is (1) under the Muhammadan law a will and therefore valid as to one-third of the property comprised in it, and (2) is not an alienation which might fall under the prohibition contained in section 325 A of the Code of Civil Procedure (1882.)

THIS was a suit for a declaration that a deed of gift executed by one Saleh-un-nissa, was void on the ground that she was suffering from death-illness at the time of the gift and that the property was under the management of the Collector and therefore, according to section 325A, Civil Procedure Code, the lady was not competent to make the gift. It was found that the lady was suffering from death-illness when she executed the gift, but was in possession of her proper senses when the property was given to her daughter, son-in-law and maternal uncle. The court of first instance (Munsif of Ghazipur) decreed the claim, and that decree was affirmed on appeal by the officiating District Judge. The defendant appealed to the High Court, and there raised the plea that the gift being made in *marz-ul-maut* operated as a will and was valid to the extent of one-third.

Maulvi *Muhammad Ishaq*, for the appellants. A gift made in *marz-ul-maut*, operates as a will. Ameer Ali, Vol. I., pp. 23—25. The gift to the extent of one-third is therefore valid. Section 325A of the Code of Civil Procedure is no bar to the lady making a will at least in favour of the donees who were

* Second Appeal No. 136 of 1910, from a decree of Chhajju Mal, Officiating District Judge of Ghazipur, dated the 24th of November 1909, confirming a decree of Baij Nath Das, Munsif of Ghazipur, dated the 26th of March 1909.

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not her heirs. That section only prevents alienations which are to take effect immediately and not after death.

Mr. *Ishaq Khan*, for the respondent, submitted that the transfer amounted to an alienation and was not valid. The word alienation includes all transfers including a will. The judgement-debtor purported to make a gift, but under the Muhammadan Law it amounts to a will. The will is not valid in favour of an heir for more than one-third. The will was made to daughter and son-in-law and maternal uncle. If valid, it operates in respect of one-third share given to those who are not heirs. Alienation by will is also an alienation which is to take effect after death. The will therefore cannot be made while the property is in the Collector's charge.

STANLEY, C. J. and BANERJI, J.—The suit out of which this appeal has arisen was brought by the plaintiff respondent, Muhammad Ismail, for a declaration that a deed of gift, dated the 29th of June 1908, executed by Musammat Saleh-un-nissa, is void on the grounds, first, that she was suffering from death-illness at the time of executing the document, and secondly, that the property was under the management of the Collector under the provisions of the Code of Civil Procedure, and under section 325 (A) of Act No. XIV of 1882 the lady was not competent to make the gift. The court of first instance decreed the claim and the lower appellate court has affirmed that decree. It has been found that the lady was suffering from death-illness when she executed the deed of gift. It has also been found on the issue referred by us to the court below, namely, whether she was in possession of her senses and had full knowledge of the contents and effect of the deed of gift, that she was in possession of her senses and was fully cognisant of the contents and effect of the document.

Upon these findings it is contended before us that the gift being one made during death-illness is a will under the Muhammadan Law and is valid as regards one-third of the property comprised in it, and that it is not valid in so far as it bestows any part of the property on the heirs of the deceased and also as regards two-thirds of the remainder. Now under the

gift in question half of the property was given to Muhammad Saiyeed, the paternal uncle of the lady, and out of the remaining half, one-third was given to her daughter and two-thirds to her son-in-law, the husband of another daughter. In so far as the document bestows any part of the property on the daughter Asghar-un-nissa, it is admittedly void as a will. It is conceded that if section 325(A) of the Code of Civil Procedure was no bar to the right of the lady to make a will, the document is a valid will as regards one-third of the property given to Jawad Husain and Muhammad Sayeed, that is to say, that it is valid in regard to one-sixth share obtained by Muhammad Sayeed and one-ninth obtained by Jawad Husain. It is not denied that under the Muhammadan Law a gift made during death-illness operates as a will. So that if section 325 (A) is not a bar to the right of the lady to make the will, it would operate in respect of the one-sixth and the one-ninth shares mentioned above and would not be void as regards those shares.

We have therefore to determine whether section 325 (A) precluded Musammat Saleh-un-nissa from making a will of her property. That section provides that so long as the Collector can exercise or perform in respect of the judgement-debtor's immovable property, or any part thereof, any of the powers or duties confered or imposed on him by sections 322-325, the judgement-debtor or his representative in interest shall be incompetent to mortgage, charge, lease or alienate such property or part except with the written permission of the Collector. It is urged that a will comes within the term "alienate" as mentioned in the section. We are unable to agree with this contention. The word "alienate" in our opinion was used *ejusdem generis* with the words preceding, namely, mortgage, charge, lease, and manifestly contemplates a transfer which would have present effect and not a devise which can only have operation after the death of the testator. In this view the will was not void and the lady was not incompetent to make it. That being so, the plaintiff's claim should be dismissed in so far as it relates to a one-sixth share acquired by Muhammad Sayeed and a one-ninth share acquired by Jawad Husain under the document in question, treating it as a will, and as regards the rest the said document is void.

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We accordingly allow the appeal and dismiss the claim as regards a sixth share of the property acquired by Muhammad Sayeed and a ninth share, acquired by Jawad Husain. We affirm the decree of the court below as regards the remainder of the claim. Under the circumstances we direct the parties to pay their own costs in all courts.

*Appeal allowed.*

## REVISIONAL CIVIL.

1910
*November 7.*

*Before Mr. Justice Sir George Knox and Mr. Justice Karamat Husain.*

LACHMAN PRASAD (PLAINTIFF) APPLICANT *v.* RAM KISHAN (DEFENDANT) OPPOSITE PARTY. *

*Civil Procedure Code (1908), order XX, rule 2—Judgement written but not delivered before transfer of Judge—Successor in office competent to pronounce his own judgement.*

Where a Judge fixed a date for delivering judgement, wrote it out and placed it upon the record, but was transferred before the date fixed, and his successor took a different view and delivered his own judgement. *Held* that his successor in office was not obliged to deliver the judgement of his predecessor but was competent to pronounce a judgement of his own in the case. *In the Goods of Prem Chand Moonshee* (1) followed. *Re Baker ; Nicholas v. Baker* (2) referred to.

THE facts of this case, so far as they are necessary for the purposes of this report, are as follows. The Subordinate Judge of Jhansi having heard an appeal reserved judgement and appointed a certain date for delivery of judgement in the case. He also wrote a draft judgement and placed it on the record. Before delivering judgement, however, he ceased to be Subordinate Judge of Jhansi. His successor in office took a different view of the appeal from the former judge and pronounced his own judgement which dismissed the appeal, whereas the first judgement was for decreeing it. The plaintiff appellant appealed to the High Court.

Babu *Piari Lal Banerji*, for the appellant.

Babu *Durga Charan Banerji* (with him Babu *Surendra Nath Sen*), for the respondent.

KNOX and KARAMAT HUSAIN, JJ.—The officer who held the post of the Subordinate Judge of Jhansi heard an appeal and had

* Civil Revision No. 25 of 1910.

(1) (1894) I. L. R., 21 Calc., 832. (2 90) 44 Ch. D., 262.