was made a condition that there was to be no liability on their part cannot be allowed to displace the ordinary results which a contract between principals entails.

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BALTHAZAR & SON v. E. M. AROWATH (A FIRM).

Their Lordships will, therefore, humbly advise His Majesty to dismiss the appeal with costs.

PRIVY COUNCIL.

J.C.* 1926

Nov. 1.

MA MI AND ANOTHER
v.
KALLANDER AMMAL (No. 1).

(On Appeal from the High Court at Rangoon.)

Mahomedan law—Gift—Delivery of possession—Gift to wife—Mutation—Acts of husband after Mutation—Power of Local Government—Power to adopt any part of Act—Section modified by later Section—Wakf *or Gift on Trust—Mussalman Wakf Validating Act* (*VI of* 1913), *section* 2—*Transfer of Property Act* (*IV of* 1882), *sections* 1, 123, 129.

The Transfer of Property Act, 1882, provides in Chapter VII by section 123, that a gift of immovable property must be made by a registered instrument, and by section 129 that nothing in the chapter is to be deemed to affect any rule of Mohamedan law. By section 1 of the Act (as amended) the Local Government of Lower Burma might by notification extend " the Act or any part of it " to Lower Burma. In 1904 various sections of the Act including section 123, but not in terms section 129, were extended to the Pegu District. It is well established as a rule of Mahomedan law applying in India that a gift by a Mahomedan is not valid unless possession has been delivered and that that rule is preserved by section 129 of the above Act.

In 1914 a Mahomedan conveyed immovable property in the Pegu District to his wife by a registered deed, he effected mutation into her name, but continued to manage the property himself.

Held, (1) that the Local Government was not authorized by section 1, and did not appear to have intended, to extend section 123 apart from section 129; and consequently that the above rule of Mahomedan law applied in the Pegu District under the notification.

(2) that the acts of the husband after the mutation in reference to the property must be regarded as being on his wife's behalf, and that there had been delivery of possession within the rule; and that consequently the gift was valid under Mohamedan law.

Amina Bi Bi v. *Khatija Bi Bi* (1864), 1 Bom. H.C. 157 and *Emnabai* v. *Hajirabai*, (1888) I.L.R. 13 Bom. 352—*approved*.

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* PRESENT :—LORD ATKINSON, LORD CARSON and Sir JOHN WALLIS.

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The definition of a "wakf" in the Mussalman Wakf Validating Act, 1913, is for the purposes of that Act, and is not necessarily exhaustive apart from the Act.

Decision of the High Court affirmed on a different ground.

Appeal (No. 95 of 1925) from a decree of the High Court, (July 7, 1924), reversing a decree of the District Court of Pegu (May 10, 1923).

The respondent brought a suit against the appellants claiming certain lands in the Pegu District, Burma, under a registered deed of gift executed on July 20, 1914, by her husband Shaik Mohideen, since deceased. The appellants were in possession claiming to be heirs of the deceased.

The appellants pleaded *inter alia*, that the gift was invalid according to Mahomedan law, as possession had not been given under it, and that it had been revoked.

The material facts of the case, including the provisions of the deed of gift, appear from the judgment of the Judicial Committee.

Under a notification by the Local Government dated November 1, 1904, certain sections of the Transfer of Property Act (IV of 1882), including section 123 but not including section 129, had been extended to the Pegu District. The rest of the Act was not extended to Burma generally until a date later than that of the deed.

The District Judge held that the plaintiff had not established that possession was given to her, and that the gift was consequently invalid under Mahomedan law. He dismissed the suit.

On appeal to the High Court (Young and Baguley, JJ.) the decision was reversed. Young, J., held that apart from the Transfer of Property Act, the effect of the Burma Laws Act, section 13, sub-section 3 was to make Mahomedan law applicable to gifts in Burma between Mahomedans, but that the effect

of the extension of section 123, coupled with the non-extension of section 129 of the Transfer of Property Act was that in the case of a registered gift the forms necessary under Mahomedan law were not needed to complete a gift. In his view it was competent to the Local Government under section 1 of the Transfer of Property Act to extend section 123 without extending section 129.

Baguley, J., concurred.

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July 29.

Sir George Lowndes, *K.C.* and *Leach* for the Appellants.—It is a rule of Mahomedan law that a gift is not valid unless possession is given : Baillie's Digest of Moohummudan Law, Part I, pages 520, 521 Hamilton's Hedaya (1870 Edition), page 482, Wilson's Anglo-Muhammadan Law, paragraph 301. The Transfer of Property Act, 1882, having regard to section 129, has not the effect of abrogating that rule in the case of a gift by a registered instrument : *Mogulsha* v. *Muhammed Saheb* (1), *Ismal* v. *Ramji* (2). Section 123 of that Act could not be extended without the proviso in section 129 preserving the rules of Mahomedan law. The evidence shows that possession was not given. Although there was mutation into the name of the wife it is not proved that it was effected by the husband ; he kept the entire control of the property in his own hands and revoked the gift in 1919. The deed did not constitute a wakf as there was no reversion to charitable purposes. But even if it was a wakf, it was revocable, at any rate before possession had been given : Baillie, pages 549, 557 ; Wilson, paragraphs 361, 320 : *Muhammad Aziz-ud-din* v. *Legal Remembrancer* (3).

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(1) (1887) I.L.R. 11 Bom. 517. (2) (1899) I.L.R. 23 Bom. 682.
(3) (1893) I.L.R. 15 All. 321.

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E. B. Raikes for the Respondent. The rule of Mahomedan law as to gifts did not apply since when the deed was executed section 123 of the Transfer of Property Act had been extended to the district and section 129 had not been so extended. Section 123 made registration a sufficient completion of a gift of immovables. The Local Government could extend section 123 without extending section 129. *Reg.* v. *Burah* (1). There was however sufficient delivery of possession, since mutation of names was effected; there is no ground for holding that it was not effected by the donor. Any subsequent acts by him in the management of the property should be treated as having been done on behalf of his wife: *Amina Bibi* v. *Khatija Bibi* (2), *Emnabai* v. *Hajirabai* (3), further the deed really constituted a wakf; *Mutu Ramanadan Chettiar* v. *Vava Levvai Marakayar* (4), *Abdur Rahim* v. *Narayan Das Aurora* (5), over half the property referred to was to be devoted to charity. The definition of a "wakf" in the Wakf Validating Act, 1913, is not material to this question. Being a wakf it was complete when executed and no delivery of possession was needed: Baillie Bk. 9 C. 1, Ameer Ali, Ch. 7, section 1, *Doe* v. *Abdollah Barber* (6).

Sir George Lowndes, K.C., in reply referred to *Amrital Kalidas* v. *Shaik Hussain* (7).

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The judgment of their Lordships was delivered by—

SIR JOHN WALLIS.—The question whether Kallander Ammal, the plaintiff in this suit was divorced in the year 1918 by her husband Shaik Moideen, now deceased, and so lost her rights of inheritance in his estate, is dealt with in the

(1) (1878) L.R. 5 I.A. 178; I.L.R. 4 Cal. 172.

(2) (1864) 1 Bom. H.C. 157.

(3) (1888) I.L.R. 13 Bom. 352.

(4) (1916) L.R. 44 I.A. 21; I.L.R. 40 Mad. 116.

(5) (1922) L.R. 50 I.A. 84; I.L.R. 50 Cal. 329.

(6) (1838) 1 Fulton 345.

(7) (1897) I.L.R. 11 Bom. 492.

appeal which came before this Board in the principal suit brought by her against the present first and second defendants, who claim to have succeeded to the estate of the deceased as his widow and son. In the present suit the plaintiff seeks to recover from them certain lands in Burma of the estimated value of Rs. 6,000, conveyed to her by her late husband by a registered deed of gift dated the 20th July, 1914, which provided that out of the income remaining after the payment of the Government revenue she was to expend Rs. 450 every year for the charitable purposes mentioned in the schedule and to enjoy the balance ; and that after her death her heirs were to continue the annual payments of Rs. 450 and to divide the balance according to the Mahommedan law. The defendants pleaded that the gift was invalid according to Mahommedan law as the donor had never put the donee in possession, but had remained in possession until his death, and also that the gift had been revoked by the donor by a registered deed dated the 20th August, 1919. The District Judge held that the gift was not complete without possession, even if it should be regarded as a wakf, and that on the evidence possession had not been proved and dismissed the suit. The plaintiff appealed to the High Court, and Young, J., who delivered the principal judgment, began by considering the question whether the deed was a *wakfnama, constituting* a wakf within the meaning of the Wakf Act of 1913, or a mere deed of gift coupled with a trust. In the view their Lordships take of this case this question is immaterial, and they will merely observe that that is a definition for the purposes of the Act and not necessarily exhaustive, and that the question, when it arises cannot be considered exclusively with reference to it.

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The learned Judge next dealt with the question of possession, and observed that all the older High Courts were agreed before the passing of the Transfer of Property Act, 1882, that the rule of Mahommedan law requiring gifts to be perfected by possession was applicable in India, and that this rule was preserved by section 129 of the Act, which provided that nothing in the chapter relating to gifts should effect any rule of Mahommedan law. Notwithstanding this, the learned Judge proceeded to hold that in 1914, at the date of the deed in this part of Burma transfer of possession was not necessary, because the Local Government, in the exercise of the powers conferred upon them by section 1 of the Transfer of Property Act as amended to extend "the whole or any part of the Act," had only extended section 123 in this part of the Act and had not extended section 129. In their Lordships' opinion this view is based on a serious misconception. The power to extend any part of the Act to Burma did not authorise the Local Government to extend particular sections of the Act, so as to give those sections a different operation from that which they had in the Act itself read as a whole, and to abrogate in the area to which the extension applied a rule of Mahommedan law till then in force there as to which the Legislature had expressly provided that it was to remain unaffected by the Act. Nor is there any reason to suppose that the Local Government purported to do anything of the kind. The notification, which has been read to their Lordships, was intended to render registration and attestation compulsory in the case of transfers of immoveable property by sale, mortgage, lease or gift as provided in the Act, and effected this by applying the different

sections of the Act making registration and attestation compulsory in the case of these different kinds of transfers. The section relating to gifts was section 123, which provides that: "For the purpose of *making a gift of immoveable property, the transfer* must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses," and there is no reason to suppose that the Local Government intended to do more in the case of gifts by Mahommedans than to make such registration and attestation compulsory.

Having thus, erroneously, in their Lordships' opinion, held that transfer of possession was unnecessary, the learned Judge proceeded to consider a question which was not directly raised on the pleadings, whether the gift was bad for want of acceptance by the donee, and held that it was not, a finding which has not been questioned before their Lordships.

Arguments have been addressed to their Lordships on the questions dealt with in the judgment of the Trial Judge, whether this deed created a wakf and, if so, whether according to the Hanafi school, wakfs form an exception to the ordinary rule of Mahommedan law, which requires gifts to be perfected by possession and undoubtedly applies to wakfs among Shiahs. Their Lordships do not consider it necessary to consider these questions, because they are of opinion, differing from the Trial Judge, that possession is sufficiently proved to have been given, and that is sufficient to dispose of the case. If the wakf was perfected by transfer of possession, it has not been contended that the donor had any power to revoke it as he purported to do.

Their Lordships will now proceed to give their reasons for holding possession sufficiently proved.

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The plaintiff and her husband Shaik Moideen were Lubbais, that is to say, they belonged to a section of the Mahommedan community in the Madras Presidency who retain the vernacular and many of the customs of their Hindu ancestors, and are extensively engaged in trade, both in India and abroad. Shaik Moideen, after his marriage to the plaintiff forty or fifty years ago, lived with her for some time at Nagore in the Tanjore District, and then went across the sea to Burma and began to carry on business there as a money-lender, leaving his wife behind at the home in Nagore. He was very successful, and became possessed of considerable property, moveable and immoveable; and while his relations with the plaintiff remained friendly, his visits to her at Nagore took place at longer intervals, and of late years had almost entirely ceased. He married a second wife in Burma, who predeceased him and for many years before his death he had living with him in his house at Tawa, Ma Mi and Mahommed Eusoof, the first and second defendants in this suit, who claim to be his wife and son, and as such, on his death, took possession of the property left by him in Burma.

In 1914, when he was getting on in years, he was minded to found certain charities in Nagore, and appears to have decided that the best way to do so was to convey some of the lands he had acquired in Burma to his wife in Nagore and her heirs on trust to expend Rs. 450 in each year out of the annual income in Nagore on the charities mentioned in the schedule.

There is no reason for supposing that he was not desirous of founding the charity there and then, and it was only natural that he should have been anxious to perfect the gift by delivering possession

so as to put it out of the power of those who came after him to question it. Accordingly, we find that mutation of names was duly effected in the public records and the plaintiff entered as proprietress. The District Judge, however, has observed that the plaintiff has not proved that the mutation was effected at the instance of the donor, Shaik Moideen. It appears to their Lordships that it was not to be expected that the plaintiff, who was far away at the time in Madras, should have been able to obtain direct evidence of this so many years after, and that it was not necessary for her to do so. The reasonable presumption is that such a mutation of names would not have been made except on the application of one of the parties to the deed, in this case the donor, who was on the spot. As for the District Judge's alternative suggestion that the mutation may have been made by the Land Records Department from a copy sent to them of the registered deed of gift without notice to the deceased, nothing has been urged before their Lordships in its favour, and it appears to be negatived by the fact that the plaintiff's address is not taken from the deed of gift, which gives her Nagore address, but is entered as "Railway Station Tawa," her husband's address; and also by the fact that in the case of one parcel of land there is an additional entry stating that Shaik Moideen himself was in possession as the plaintiff's agent. It must therefore be taken that mutation was effected by Moideen himself and in the case of a gift of immoveable property by a Mahommedan husband to his wife, once mutation of names has been proved, the natural presumption arising from the relation of husband and wife existing between them is that the husband's subsequent acts with reference to the property were done on his wife's

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behalf and not on his own, as held *Amina Bibi* v. *Khatija Bibi* (1) and in *Emnabai* v. *Hajirabai* (2).

It follows, therefore, that the questions so much debated at the trial whether Shaik Moideen retained the deed of gift in his own custody or gave it to the plaintiff, and what became of it after his death, throw little light upon the case, and may be disregarded. That Shaik Moideen, whilst retaining the management of the lands in his own hands, regarded the plaintiff as being in possession, is shown by the admitted fact that in 1917 he got her to execute and register a power of attorney in favour of Mahommed Kassim, authorising him to manage the lands, and had the power sent to himself in Burma. It is then said truly for the defendants that he did not give the power to Mahommed Kassim, who was then a boy of fifteen living in his house and treated as an adopted son— there is no legal adoption among Mahommedans—or ever handed over the management to him, but there is nothing surprising in this. The natural explanation is that the creation of the power was a precautionary measure, and that Shaik Moideen was anxious to have it ready to hand over to one in whom he had confidence in the event of his becoming unable to manage himself : and he would probably have done so if he had not subsequently changed his mind and purported to revoke the deed of gift. With reference to the argument that Moideen executed other deeds of gift in favour of Kassim and others, in which possession was never given, it may be observed in the case of Mohammedans who have very restricted powers of testamentary disposition, the execution of such deeds with postponement of possession may well take the place of revocable legacies, the transfer of possession being dependent on the future conduct of the donees,

(1) 1 Bom. H.C. 157. (2) I.L.R. 13 Bom. 352.

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but that no such reasons for postponement existed as regards a charity of this kind.

Further, the plaintiff was clearly treated by Shaik Moideen himself as having been in possession and in receipt of the income of the lands when in 1919 he purported to revoke the deed of gift on the grounds that she had failed to utilise the properties handed over to her for charity, and stated that he himself would so utilise them in future. This is strong corroboration of the plaintiff's own evidence that her husband was in the habit of remitting monies to her for the performance of the charities, which must, in the circumstances, be presumed to have come from the income collected by him on her behalf from the lands which he continued to manage. The plaintiff says the money was sent to her by money orders and by other methods of remitting monies to India which are not unusual with persons in the position of the deceased. It is not surprising that the money orders are not now forthcoming, but there is one telegraphic order sent by Shaik Moideen for Rs. 75 for *subrat* one of the scheduled charities, which the District Judge has omitted to notice. No doubt the accounts of receipt and expenditure put forward by those in charge of the plaintiff's case do not carry conviction and have been rightly rejected. Like the stories that Mahommed Kassim had been in management under the power and that the plaintiff had herself leased out the charity lands to tenants, they are only another instance of the ill-judged attempts which are so often made in cases of this kind to improve a litigant's case by manufacture of evidence, but they do not affect the inferences in the plaintiff's favour arising from the admitted and clearly established facts of the case.

Their Lordships are therefore of opinion, though for different reasons, that the High Court was right in

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giving the plaintiff a decree, and that the appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors for Appellants : *Waterhouse & Co.*

Solicitors for Respondent : *T. L. Wilson & Co.*

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J.C.*
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Nov. 30

MA MI AND ANOTHER
v.
KALLANDER AMMAL (No. 2).

(On Appeal from the High Court at Rangoon.)

Mahomedan law—Divorce—Evidence—Secondary Evidence—Contents of Document—"Person who has himself seen it"—Indian Evidence Act (I *of* 1872), *ss.* 60, 63.

According to Mahomedan law a Mahomedan can divorce his wife whenever he desires. He may do so without a *talaknama* or written document and no particular form of words is prescribed. If the words used are well understood as implying divorce, such as "*talak*," no proof of intention is required; otherwise the intention must be proved. It is not necessary that the repudiation should be pronounced in the presence of the wife or even addressed to her.

After the death of a Sunni Mahomedan resident in Burma, it was alleged in a suit that he had divorced his wife. Evidence was given by witnesses that the deceased had read to them a document which was not produced at the trial but alleged to have been a *talaknama*, and there was other evidence of statements by him.

By the Indian Evidence Act, 1872, section 63 "Secondary evidence means and includes . . . . (5) oral accounts of the contents of documents given by some person who has himself seen it;" by section 60 "oral evidence must in all cases whatever be direct; that is to say—if it refers to a fact which could be seen it must be the evidence of a person who says he saw it."

Held, (1) that oral evidence of the contents of a document is admissible as secondary evidence under section 63 (5) only if the witness has himself read the document; and that consequently that the section did not render the evidence admissible in proof of the contents of the document.

(2) that the evidence that the deceased had used to the witnesses the word "*talak*" was not reliable, and that it was not proved that he told them that he had divorced his wife or indeed that he had any intention of effecting a divorce otherwise than by the execution and transmission of the document, which had not been proved.

(3) that accordingly the alleged divorce was not established.

Decree of the High Court (I.L.R. 2 Ran. 400) affirmed.

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* PRESENT :—LORD ATKINSON, LORD CARSON and SIR JOHN WALLIS.