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CHWA HUM HTIVE v. KING-EMPEROR.

BAGULEY, J.

giving too much weight to technical points in the trial of a criminal case was emphasized, by his Lordship the Chief Justice, when those technicalities can in no way cause a failure of justice, and it must be remembered that the acquittal of a guilty accused is just as much a miscarriage of justice as the conviction of an innocent person. If the appellants were in possession of the opium and cocaine, the subject-matter of the present case, it would be a lamentable failure of justice if they were to be held entitled to an acquittal merely because the Excise Inspector wrote the names of the search witnesses in the search list, instead of the search witnesses signing their own names. It is admitted in the present case that there were irregularities in connection with the search, but, nevertheless, if the fact that these articles were found in the possession of the appellants is proved their conviction must follow.

His Lordship then proceeded to consider the case on the merits, and dismissed the appeal.

APPELLATE CIVIL.

Before Mr. Justice Das.

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Dec. 14.

SUNA MEAH

v.

S. A. S. PILLAI AND OTHERS.*

Mahomedan Law—Gift—Delivery of possession—Minor donee—Delivery to guardian—Exception—Grandfather's gift to grandson.

According to Mahomedan law, to make a valid gift it is necessary to make over possession of the property to the donee. If the donee is a minor then possession must be made over to a person who is the natural guardian of the minor. The only exception to the rule as to delivery of possession is in the case of a gift to a minor by his father or other guardian. It cannot be extended to a gift by the grandfather to his minor grandson if his father is alive and is

* Civil Special Second Appeals Nos. 63 and 64 of 1932 from the judgments of the District Court of Myaungmya in Civil Appeals Nos, 86 and 85 of 1931.

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SUNA MEAH v. S. A. S. PILLAI.

not deprived of his right and powers as guardian, even though the minor be living with the grandfather.

Musa Miya v. *Kadar Bux*, I.L.R. 52 Bom. 316 (P.C.)—*followed*.

DAS, J.—The appellant filed the present suit claiming that a piece of land attached by the 1st respondent belonged to him alleging that his maternal grandfather, Khalifa, had made a gift of the land to himself and his brother Manu Meah. In support of his claim he produced a registered deed, dated the 28th of June 1910, by which Khalifa purported to make over to his two grandsons a piece of land belonging to himself. It is admitted that at this time the two grandsons were minors and that no one was appointed by the grandfather as their guardian to take possession of the land on their behalf. It is in evidence also that about that time the old man had been making over his other properties to his other children, and that he did not make over any property to his own daughter. The witness called on behalf of the plaintiff to prove the gift states that the grandfather's intention was to make over this piece of land to his own daughter but to put it in the names of her children to prevent her from squandering the property. To my mind it seems clear that the grandfather did not intend to, and did not, as a matter of fact, make a gift of this piece of land to his two grandsons. In order to perfect a gift by a Mahomedan it is necessary to make over possession of the property to the donee. If the donee is a minor then possession must be made over to a person who is the natural guardian of the minor. In this connection I may cite the case of *Musa Miya* v. *Kadar Bux* (1) in which it was held that

" the general rule of Mahomedan law that a gift is invalid in the absence of delivery of possession is subject to an exception in the

(1) (1928) I.L.R. 52 Bom. 316 (P.C.).

case of a gift to a minor by his father, or other guardian. But this exception should be strictly construed. It does not extend to a gift by a grandfather to his minor grandsons if their father is alive and has not been deprived of his right and powers as guardian, even though the minors have always lived with the grandfather and have been brought up and maintained by him."

In the present case it is admitted that the father of the minors was alive and that he would be the natural guardian of the minors. It is not alleged that the property was made over to the father on behalf of the minors as their natural guardian. All that is alleged in this case is that the mother took possession of the property and managed the same and disposed of it. But the mother was not the natural guardian of her sons and it cannot be said that she was in possession of the property as the guardian of her sons. If the property had been made over to her and put *benami* in the names of her sons then she would naturally be in possession of the property and damage the same. I am not, therefore, convinced that there was any gift of this property to the grandsons, and, even if there had been a gift, it had not been perfected by making over possession. It is not necessary for me to go into the question of Mushaa but I am inclined to think that a gift of a piece of land capable of partition to two persons jointly is property covered by the doctrine Mushaa and, therefore, not valid.

The appeals are, therefore, dismissed with costs.