1915.

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applicant could have been under no real misunderstanding as to the authority behind it. We think, therefore, that the contention is little better than quibbling and no substantial effect ought to be given to it.

All the requirements of section 83 have been sufficiently complied with. The applicant was liable to be transhipped. He was ordered to tranship, if not actually by, still in the presence of, the Chief Officer and obviously with his sanction and approval. And we take it that he knew perfectly well that the order came to him weighted with that authority which, by his own agreement, he was bound to acknowledge and obey.

We are, therefore, satisfied that no injustice has been done to the applicant and that the conviction and sentence which are made the subject of this revisional application ought not to be disturbed. We, therefore, discharge the rule.

Rule discharged.

R. R.

ORIGINAL CIVIL.

Before Mr. Justice Macleod.

AMIRBIBI (PLAINTIFF) *v.* AZIZABIBI AND OTHERS (DEFENDANTS).*

Mussalman Wakf Validating Act (VI of 1913), section 3—Construction of Statute—Whether effect retrospective—Wakf—Mahomedan Law.

1914.

September 19.

The Mussalman Wakf Validating Act, 1913, has no retrospective effect and consequently the old law applies to wakfs created before the passing of that Act.

ONE Shaik Abdulla bin Shaik Ibrahim died on the 14th of August 1906 leaving him surviving as his only

* O C. J Suit No. 29 of 1914.

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heirs according to Mahomedan Law, his two daughters Amirbibi and Azizabibi. Prior to his death the said Shaik Abdulla on the 23rd of March 1901 executed a deed-poll by which he declared in effect that he held certain immoveable property belonging to him in Huzaria Street in wakf, as a Mutavali or trustee, upon certain trusts. The plaintiff Amirbibi filed this suit against her sister Azizabibi and her sister's son praying for a declaration that the said deed-poll was void and of no effect and that the immoveable property therein mentioned belonged absolutely to the plaintiff and her sister, the first defendant, as sole heirs of the said Shaik Abdulla.

The Advocate General was made a party to the suit as the said deed-poll purported to create certain religious and charitable trusts.

Mirza and *Mulla* for the plaintiff and first defendant.

Second defendant in person.

Jardine (acting Advocate General) for the third defendant.

MACLEOD, J.:—One Shaik Abdulla bin Shaik Ebrahim, a Sunni Mahomedan, died at Bombay on or about the 14th of August 1906 leaving him surviving as his only heirs according to Mahomedan Law two daughters Amirbibi and Azizabibi. By a deed-poll dated the 23rd March 1901 the said Shaik Abdulla declared in effect that he held certain property belonging to him in Huzaria Street in wakf as a Mutavali or trustee upon the trusts following, *viz.*:—

"(*a*) Out of the net rents of the said property to feed five fakirs every friday night, to pay for reading the Koran every month and for Fatiha ceremonies in the months of Mohram, Rabinlakhar, Rajab and Ramzan and for offering every month oil two and half seers for lighting the Masjid situated in Huzaria Street.

"(*b*) To pay the balance of the said rents to his daughters and any other child that might thereafter be born to the settlor in equal shares for their maintenance and the maintenance of their children therein named, and after the death of his daughters to pay the same to the second defendant and the said Yakubkhan and Dawoodkhan and their descendants generation after generation, as well as the settlor's descendants, male or female, generation after generation.

"(*c*) On failure of descendants to use the balance of the said rents for the benefit of the settlor's community or for meritorious acts or for the use of the said Masjid, as the trustee for the time being might think proper."

The annual gross income of the property is said to be Rs. 960 and the annual net income about Rs. 800. The amount required for the purposes set forth in sub-cl. (*a*) of para. 2 of the plaint is said to be about Rs. 64.

The plaintiff as one of the daughters of the deceased has filed this suit against her sister and her sister's son and the Advocate General, praying that it may be declared that the said deed-poll is void and of no effect and that the plaintiff and the first defendant, as the sole heirs of the said Shaik Abdulla, are absolutely entitled to the said immoveable property.

The deceased had executed a similar deed-poll in respect of another property on the same day and that deed-poll was the subject-matter of Suit No. 857 of 1911 in which a decree was passed on the 13th February 1912 by Mr. Justice Beaman, by which it was declared that the deed of settlement mentioned in the plaint was null and void except as regards the charities mentioned in Ex. B to the plaint. The decree further ordered that plaintiff and the first defendant should invest a certain sum to provide for those charitable purposes, and

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declared that when they had so done they would be absolutely entitled to the immoveable property mentioned in the deed.

It cannot be doubted that under the decisions of the Privy Council, the deed in this suit would have to be declared to be void except as regards the charities mentioned in sub-cl. (*a*) of para. 2 of the plaint. But it has been contended that those decisions no longer apply, now that the Mussalman Wakf Validating Act VI of 1913 has been passed. It is argued that the effect of that Act is retrospective and that all deeds of wakfs hitherto created which might be declared void and of no effect, if brought before the Courts, are now made good, and there is some ground for that argument in the preamble of the Act. But there is a distinct conflict between the preamble of the Act and the Act itself. The preamble runs as follows :—

"Whereas doubts have arisen regarding the validity of wakfs created by persons professing the Mussalman faith in favour of themselves, their families, children and descendants and ultimately for the benefit of the poor or for other religious, pious or charitable purposes ; and whereas it is expedient to remove such doubts ; It is hereby enacted"—

A preamble sets forth the reason for the particular Act of the Legislature and foreshadows what is intended to be effected by the Act. But to see what has been actually effected by the Act, one must look to the Act itself, and the Act seems to have failed entirely to produce the effect which, it might be gathered from the preamble, was intended, that is to say, intended according to the construction put upon it by the Advocate General. The word "created" in the preamble might be read as including not only wakfs to be created in the future but also wakfs already created in the past.

It may have been the intention to validate all wakfs which could be set aside under the previous decisions of the Privy Council when they came before the Courts, or it may have been intended that if such wakfs were created in future, they would under the Act be held good. These are the alternative constructions which can be applied to the preamble. Then turning to the Act itself, it curiously enough does not provide, as is usually the case, for the date on which the Act shall come into force. Therefore I presume the Act came into force on the day it received the assent of the Governor General in Council. The Act refers solely to wakfs which shall be created in the future. Section 3 says: "It shall be lawful for any person professing the Mussalman faith to create a wakf, which in all other respects is in accordance with the provisions of Mussalman law, for the following among other purposes :—"

There is nothing in the Act about wakfs which are already in existence when the Act was passed, and there is nothing in the Act which enables me to hold that the provisions of the Act shall apply to such wakfs; and therefore, in my opinion, whatever the intention of the Legislature may have been, it has by this Act only enabled Mahomedans in future to create wakfs by deeds which, under the previous decisions, would be liable to be set aside, as contrary to the provisions of Mussalman law, and therefore as regards this wakf which was created in March 1901 the old law applies. As the deed is clearly intended to effect a permanent settlement of the property on the settlor's descendants and the ultimate gift to charity is purely illusory, the deed must be set aside except as regards the charities referred to above which can be given effect to.

It has been arranged between the Advocate General on the one hand and the plaintiff and the defendants on the other hand that Government Promissory Notes of the

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nominal value of Rs. 2,400 should be purchased and should be settled in trust to provide for those charitable purposes. After that has been done the property will be declared the absolute property of the plaintiff and the first defendant.

Costs will come out of the settled property, those of the third defendant as between attorney and client.

Order accordingly.

Attorneys for the plaintiff : Messrs. *Sabnis and Goregaonkar.*

Attorneys for the respondent : Messrs. *Little & Co.*

M. F. N.

ORIGINAL CIVIL.

Before Mr. Justice Beaman.

1914.

December 18.

TRIBHOVANDAS NAROTAMDAS, PLAINTIFF *v.* ABDULALLY HAKIMJI PAGHDIVALA AND OTHERS, DEFENDANTS.*

Civil Procedure Code (Act V of 1908), Order XXII, Rule 10—Lease, forfeiture of—Insolvency of a defendant—Vesting of his estate and effects in the Official Assignee—Refusal of Official Assignee to defend the suit—Inability of defendant to defend independently of the Official Assignee—Practice.

In a suit by the lessor against the lessee for forfeiture of a lease by reason of breaches of covenant, no cause of action survives against a defendant who has become insolvent and whose estate has vested in the Official Assignee. If in such a case the Official Assignee refuses to defend a suit affecting the estate of the insolvent, the latter cannot defend independently of the Official Assignee.

THE plaintiff filed this suit as a short cause against the first defendant alone praying for a declaration

* O. C. J. Suit No. 102 of 1913.