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adopted son. On delivery of the deed to the donee there was an acceptance of the transfer within section 122 of the Transfer of Property Act, 1882, and thereupon the gift became effectual, subject to its registration as required by section 123."

Then it records that the case of *Atmaram Sakharam* v. *Vaman Janardhan*,[1] which was referred to by the High Court Judges, was approved.

It is not necessary to go over the facts of this case further than is stated above, but the following passage is directly in point. With regard to the proposal to prohibit the registrar from registering the deed as is made in this case, Lord Salvesen, on behalf of the Board, says (p. 95) :—

> " Registration does not depend upon his (the donor's) consent, but is the act of an officer appointed by law for the purpose, who, if the deed is executed by or on behalf of the donor and is attested by at least two witnesses, must register it if it is presented by a person having the necessary interest within the prescribed period. Neither death, nor the express revocation by the donor, is a ground for refusing registration, if the other conditions are complied with."

It would be a waste of words and time to go further than that judgment; it is sufficient to say that it appears to rule the present case.

Their Lordships will accordingly humbly advise His Majesty that the appeal should be allowed and the decree of the Subordinate Judge restored, with costs in the Courts below and before their Lordships.

Solicitors for appellant : Messrs. *T. L. Wilson & Co.*

A. M. T.

[1] (1924) 49 Bom. 388.

PRIVY COUNCIL

J. C.*
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February 21

MUSA MIYA AND ANOTHER (DEFENDANTS) *v.* KADAR BUX, SINCE DECEASED (PLAINTIFF) AND ANOTHER.

[On Appeal from the High Court at Bombay]

Mahomedan Law—Gift—Delivery of possession—Gift to minor by father or guardian.

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 case of a gift to a minor by his father, or other guardian. But this exception should be strictly

**Present:* Lord Shaw, Lord Carson and Sir Lancelot Sanderson.

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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.

Ameeroonissa Khatoon v. *Abedoonissa Khatoon*,[1] distinguished.

Decree of the High Court affirmed.

APPEAL (No. 104 of 1926) from a decree of the High Court (December 6, 1923) varying a decree of the Subordinate Judge of Dhulia.

The question for determination in the appeal was whether a Sunni Mahomedan who died in 1918 had made a valid gift of his property to his grandsons, the appellants.

The facts appear from the judgment of the Judicial Committee.

The Subordinate Judge held that the alleged gift was invalid for want of delivery of possession, but in his view certain letters constituted a will under which the appellants were entitled to so much of the property of the deceased (namely one-third) as under Mahomedan law he could dispose of by will. He decreed accordingly.

The present appellants and the plaintiff-respondent appealed to the High Court. The learned Judges (Macleod C. J. and Crump J.) held that the letters did not constitute a will, and that though they showed an intention to make a gift there was no valid gift as there had not been a delivery of possession.

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Sir George Lowndes K. C. and *Parikh* for the appellants :—Although in Mahomedan law delivery of possession generally is required to complete a gift, it is well established that no change of actual possession is needed in the case of a gift by a guardian to a minor who is in his charge; the possession of the guardian becomes possession on behalf of the minor : *Ameeroonissa Khatoon* v. *Abedoonissa Khatoon*,[1] Baillie's Digest,

[1] (1875) L. R. 2 I. A. 87 at p. 104.

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Bk. 8, ch. 5, pp. 538, 539, Wilson's Digest, para. 303. The present case falls within that exception, the minors had always lived with and been maintained by their grandfather, and he was their *de facto* guardian. Case 19 in Macnaghten's Principles, ch. 4, recognizes by R. 1 that a gift by a grandparent to a minor is valid against heirs, and R. 2 says that that is so even if the father is alive. The declaration of gift, which in the Hidaya (see Baillie, Bk. 8, ch. 1) is spoken of as " the pillar " of the gift, was in perfectly clear terms; the gift was completed by the subsequent possession of the grandfather on behalf of the minors.

The respondents did not appear.

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The judgment of their Lordships was delivered by SIR LANCELOT SANDERSON :—This is an appeal by Musa Miya *walad* Mahamad Shaffi, a minor, and Isa Miya *alias* Mahamad Ismailkhan *walad* Mahamad Shaffi, who were defendants Nos. 18 and 19 in the suit, against the judgment and decree dated December 6, 1923, of the High Court of Bombay, which varied the decree of the learned Subordinate Judge who tried the suit.

The suit was brought on January 6, 1919, by Kadar Bax Khaj Bax, who is now dead; his representatives are the first respondents in this appeal.

The plaintiff claimed as one of the heirs under Mohammedan law of one Abdul Rasul, a Sunni Mohammedan, a three-eighth share of the properties scheduled in the plaint and left by the said Abdul Rasul, who was his brother. He alleged that Abdul Rasul died, leaving him surviving as his heirs a widow, Sahebjan (who was the first defendant, and who is now dead), a daughter, Rahimatbi (who was the second defendant and who is the second respondent in this appeal), and his brother, the plaintiff: that according to Mohammedan law the widow was entitled to one-eighth, the daughter to one-half, and the plaintiff to three-eighths; he alleged that

the widow and the daughter and their tenants (defendants Nos. 3 to 17) were in possession of the above-mentioned property.

The widow and the daughter filed a joint written statement stating that in 1910 Abdul Rasul gave all his properties to his grandsons the appellants, who are the sons of his daughter Rahimatbi, under an oral gift, and informed their father, Mahamad Shaffi, of the same by a letter; that the grandsons were from their birth brought up by Abdul Rasul and lived with him; that on April 18, 1911, Abdul Rasul wrote another letter to Mahamad Shaffi informing him that the writer's grandsons should be the owners of his property after his (Rasul's) death; that the letter constituted the will of Abdul Rasul; that by virtue of the oral gift or in the alternative of the will, the grandsons have become owners of Abdul Rasul's property; that the grandsons through their father were in possession of the property; and that the plaintiff was not entitled to any relief.

The tenants (defendants Nos. 3 to 17) did not appear and are not parties to this appeal.

The appellants (defendants Nos. 18 and 19) were made parties to the suit on their own application. By their joint written statement they denied the right of Abdul Rasul's heirs to recover any part of his property, and supported the pleas raised by their grandmother and mother with regard to the gift and the will. They further stated that even after the gift they (the appellants) continued to live with their grandfather who managed the properties given to them, that their grandfather believed that his possession was for and on behalf of his minor grandsons, and that the gift to them was valid under Mohammedan law. In the alternative, they pleaded that the letter of April 18, 1911, from Abdul Rasul to their father constituted a will in their favour under Mohammedan law.

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The plaintiff, in reply, denied that there was any valid gift or will, and contended that the letters in support of the gift or will were not genuine.

The learned Subordinate Judge held that there was no valid gift in favour of the defendants Nos. 18 and 19. He, however, held that the letters, Exhibits 122 to 126, when read together, expressed an intention on the part of Abdul Rasul that his grandsons, the defendants Nos. 18 and 19, should have his property after his death, and that they constituted the will of Abdul Rasul. He decided that the will was invalid according to Mohammedan law for more than one-third of the property of the testator unless the heirs consented thereto after the death of the testator; he held that the defendants Nos. 1 and 2, viz., the widow and the daughter of Abdul Rasul, had given their consent, and consequently he made a decree in favour of the plaintiff for one-fourth share of the movable and immovable property specified in the decree; he directed a partition, and held that the defendants Nos. 18 and 19 were entitled to the remaining three-fourths share.

Both the defendants Nos. 18 and 19 and the plaintiff appealed to the High Court against the learned Subordinate Judge's judgment.

The two appeals were heard together.

The High Court dismissed the appeal presented by the defendants Nos. 18 and 19 and allowed the plaintiff's appeal to the extent that in substitution for the decree passed by the trial Court the High Court declared that the plaintiff was entitled on partition to a three-eighth share in the property left by Abdul Rasul, with the exception of certain property mentioned therein, to which it is not necessary to refer in detail.

The learned Judges came to the conclusion that the letters upon which the learned Subordinate Judge relied did not constitute a will of Abdul Rasul.

The learned counsel who appeared for the appellants in this appeal stated that he was not able to support the learned Subordinate Judge's judgment in respect of the will, so that the only point relied on in this appeal was that there was a valid gift by Abdul Rasul to his grandsons on or about October 1, 1910, viz., on the occasion when he is alleged to have given a feast and made an announcement of the gift of his property to his grandsons.

The question is still further narrowed, because the learned counsel agreed that there are concurrent findings of fact by the two Courts in India that there was no transfer of possession of the property by Abdul Rasul to his grandsons, defendants Nos. 18 and 19, or to anyone on their behalf, and the learned counsel did not dispute these findings.

The learned counsel, however, argued that in view of the facts of this case and the relationship between Abdul Rasul and his grandsons, the gift was complete without any transfer of possession, according to Mohammedan law, and that the possession and management by Abdul Rasul after the gift was on behalf of his grandsons.

Their Lordships have not had the advantage of hearing counsel on behalf of the respondents, but they are indebted to the learned counsel who appeared for the appellants, for drawing their attention to the evidence and to all the points which were material, whether they would weigh against or for the argument which the learned counsel presented.

There is no doubt that the case has to be decided according to Mohammedan law, and that the chapter on gifts in the Transfer of Property Act, 1882, is not applicable: see section 129.

Their Lordships are of opinion that a correct statement of the law on the question under consideration is to be

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found in the material clauses of chapter V of Macnaghten's "Principles and Precedents of Mohammedan Law," published in 1825. They are as follows :—

"(1) A gift is defined to be the conferring of property without a consideration.

"(2) Acceptance and seizin, on the part of the donee, are as necessary as relinquishment on the part of the donor.

"(4) It is necessary that a gift should be accompanied by delivery of possession and that seizin should take effect immediately or at a subsequent period by desire of the donor.

"(8) A gift cannot be implied. It must be express and unequivocal, and the intention of the donor must be demonstrated by his entire relinquishment of the thing given, and the gift is null and void where he continues to exercise any act of ownership over it.

"(9) The case of a house given to a husband by a wife and of property given by a father to his minor child form *exceptions* to the above rule.

"(10) Formal delivery and seizin are not necessary in the case of a gift to a trustee having the custody of the article given, nor in the case of a gift to a minor. The seizin of the guardian in the latter case is sufficient."

The statement of the law in Macnaghten's "Principles and Precedents of Mohammedan Law" was approved by the Judicial Committee in *Ameeroonissa Khatoon* v. *Abedoonissa Khatoon*.[1] After referring to the statement of the law made by the High Court their Lordships stated that :—

"Where there is on the part of a father or other guardian a real and *bona fide* intention to make a gift, the law will be satisfied without change of possession and will presume the subsequent holding of the property to be on behalf of the minor."

The defendants Nos. 18 and 19, grandsons of Abdul Rasul, were minors at the time of the alleged gift, and the real question in this appeal is whether the facts of this case bring it within the abovementioned exception, for, as already stated, the appeal has to be decided upon acceptance of the finding that there was no delivery of possession of the property by Abdul Rasul to his grandsons, and that there was no relinquishment of control by Abdul Rasul over the said property until his death.

[1] (1875) L. R. 2 I. A. 87 at p. 104.

The material facts of this case are as follows :—Abdul Rasul was an officer in the Forest Department; he retired about fourteen or fifteen years before the trial of the suit, which was heard in 1921. His only daughter, Rahimatbi, the mother of the defendants Nos. 18 and 19, lived with her father, Abdul Rasul, even after her marriage with her husband, whose name is Mahamad Shaffi.

It appears from the evidence of Mahamad Shaffi that, although he owned some lands at a place called Shahada, he was generally living with Abdul Rasul, and only occasionally at Shahada, and their Lordships think it must be taken as a fact that Rahimatbi, her husband Mahamad Shaffi, and her two children, the defendants Nos. 18 and 19, lived in the house of Abdul Rasul at one place or another, and that they were maintained by Abdul Rasul, if not entirely, at any rate, to a large extent.

In 1910 Abdul Rasul decided to make a pilgrimage to Mecca, and it is the case of the appellants that on October 1, 1910, viz., on the occasion of the 26th day of Ramazan, Abdul invited several persons to dinner, and that after the dinner he announced to the persons then assembled that as he was going to Mecca he had made a gift of his property to his two grandsons and made them the owners thereof, that this announcement was made known to the ladies of the household at Abdul Rasul's request, that Mahamad Shaffi was then at Shahada, and that Abdul Rasul wrote to him and informed him that "now both the children, Essen Mian and Moosa Mian, are the owners of my property."

There was no mutation of the names and no deed was executed.

Abdul Rasul was away on pilgrimage about three months and returned in January 1911. On his return, Abdul Rasul resumed the management of his property; the lands had been previously let to tenants, and

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apparently there was little, if anything, to be done in respect thereof in his absence.

Certain lands which belonged to Abdul Rasul had been purchased for him in the name of his brother, and in September 1913, two deeds of conveyance were executed and the property specified therein was conveyed to Abdul Rasul.

The learned Judge pointed out that " though there were several occasions on which Abdul Rasul could have put forth the ownership of the boys, he does not seem to have availed himself of any of them."

The correctness of this finding was not disputed by the learned counsel for the appellants.

Abdul Rasul died at Chopda in June 1918, and it must be taken as a fact that after his return from Mecca in January 1911, he remained in possession of the property and managed it until his death.

Their Lordships' attention has not been drawn to any evidence which would go to show that during that time Abdul Rasul in any way intimated that he regarded himself as a trustee for his grandsons or that he was in possession of the property on their behalf.

The suit was brought in January 1919.

The learned Judges of the High Court seem to have been of the opinion that there was no actual gift, though Abdul Rasul had expressed an intention to make a gift of the property to the grandsons.

The learned Judge, who tried the case, however, was apparently of opinion that Abdul Rasul had made the above-mentioned announcement of gift, but that the gift was not complete as there was no delivery of possession.

Though not deciding the point, their Lordships are of opinion that it may be assumed for the purposes of this appeal that Abdul Rasul did announce, on October 1, 1910, to his assembled friends that he had made a gift of his property to his grandsons.

The question remains whether, in the absence of any delivery of possession or any relinquishment of control by Abdul Rasul, that was sufficient to constitute a complete gift according to Mohammedan law. In other words, do the above-mentioned facts bring this case within the exception to the general rule, which has been hereinbefore referred to.

Their Lordships are of opinion that they are not at liberty to extend the exception, and giving to the words thereof their natural meaning they are of opinion that this case is not within the exception.

It is not a case of a gift by a father or mother to a minor; nor is it a case of a guardian making a gift to his charge or charges. It is true that Abdul Rasul seems to have maintained and brought up his grandsons from the time of their birth until his death; but during that time the father and mother of the two minors were also living with Abdul Rasul, with occasional visits by the father to his own land.

It is obvious that Abdul Rasul was a man of property and able and willing to support in his own house, his daughter, her husband and family.

Their Lordships are unable to hold that those facts are sufficient to constitute Abdul Rasul a guardian within the meaning of the exception, so as to make a gift by him to them complete without any delivery of possession or relinquishment of control over the property by him.

Considerable reliance was placed by the learned counsel for the appellants on Case XIX, Q. 2, R. 2, in the Precedents of Gifts given by Macnaghten in the 1825 edition.

In that case a reference is made to the Hidaya which runs as follows :—

"If a father make a gift of something to his infant son, the infant by virtue of the gift becomes proprietor of the same provided, etc. The same

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rule holds when a mother gives something to her infant son whom she maintains and of whom the father is dead and no guardian provided, and so also with respect to the gift of any other person maintaining a child under these circumstances."

In their Lordships' opinion this precedent does not support the appellants' case; on the contrary, it seems to be against their contention.

The rule applies to the case of a mother making a gift to her infant son whom she maintains *only* when the father is dead and no guardian has been provided.

The rule applies also to the gift by any other person maintaining a child "*under these circumstances*," i.e., when the father is dead and no guardian has been provided. This seems to imply that when the father, who is the natural guardian of his infant children is alive and has not been deprived of his rights and powers of guardian, the abovementioned rule will not apply.

At all events it may safely be said that the conditions contemplated in the aforesaid rule cannot be found in this case, because the father of the minors was alive, and was actually living with his wife and children in the house of Abdul Rasul, and was in a position to exercise his rights and powers as a parent and guardian, and to take possession of the property on behalf of his children.

It was not denied that if the alleged gift by Abdul Rasul to the grandsons was not complete according to Mohammedan law, the share decreed by the High Court to the plaintiff was correct.

For these reasons their Lordships are of opinion that the appeal should be dismissed, that as there was no appearance for the respondents no order for costs should be made, and they will humbly advise His Majesty accordingly.

Solicitors for appellants: Messrs. *T. L. Wilson & Co.*

A. M. T.