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brought by a servant against the person liable as the master in whose service he had been employed, and the present is not such a suit. The plaintiff's cause of action is the withholding of the money which the defendant had received from the plaintiff's employers, the Government, for the purpose of discharging the wages due, and which he was thereupon legally and justly bound to pay over to the plaintiff. The suit, therefore, is to enforce the implied undertaking to pay over the money to the plaintiff which arose on the receipt of the money by the defendant. On this ground we give our opinion that the suit is not barred by Clause 2, Section I of Act XIV of 1859.

Appellate Jurisdiction (*a*)

Regular Appeal No. 75 *of* 1867.

GULAM HUSSAIN SAIB SAIYAD.....*Appellant.*

AJI AJAM TADALLAH SAIB KURAISHI.....*Respondent.*

Regular Appeal No. 25 *of* 1868.

AJI AJAM TADALLAH SAIB KURAISHI..... *Appellant.*

GULAM HUSSAIN SAIB SAIYAD.....*Respondent.*

Certain lands, choultries, and movable property had been, by instrument in writing, given to the brother of the donor and his heirs for the purpose, in perpetuity, of keeping in repair the choultries and affording strangers the charities of shelter and, if circumstances permitted, food also, as well as for supplying the wants of the donees—with clauses restraining alienation by them.

Held, that the instrument effected a transfer of the property to the donees subject to the trust of applying the profits of the lands &c., in perpetuity to certain charitable purposes and was not revocable whether the transaction be viewed as a pure trust or as a gift.

The power of revoking gifts is given under the Muhammadan law only in the case of private gifts for the donee's own use, no relationship existing between the donor and donee.

The rule of Muhammadan law that a Muttawalee, or Superintendent of an endowment is removable for mismanagement does not apply to the case of a trustee who has a hereditary proprietary right vested in him.

It is essential for the exercise by the donor of the power of removing a Superintendent that such power be specially reserved at the time of the endowment.

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THESE were Regular Appeals from the decree of A. W. Phillips, the Civil Judge of Chingleput, in Original Suit No. 4 of 1863.

(*a*) Present : Scotland, C. J. and Ellis, J.

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Miller and *Rangaiya Nayudu* for the appellant, the second defendant, in No. 75.

Handley for the respondent, the plaintiff, in No. 75.

Prichard for the appellant, the plaintiff, in No. 25.

Miller and *Rangaiya Nayudu* for the respondent, the second defendant, in No. 25.

The facts are fully set forth in the following

JUDGMENT:—These are cross appeals in a suit to recover certain property which the plaintiff claims title to under a wakufnama or pious gift for charitable purposes made to him on the 14th of June 1843 by Moulavi Mahomed Malik Assalmi Saib. There is no dispute as to the right of Assalmi Saib to dispose of the property or the genuineness of the written instrument. But the defendants rely in answer on a subsequent wakufnama or pious gift executed by Assalmi Saib in their favor on the 5th of March 1854, under which they entered into possession. This instrument, they allege, revoked the gift to the plaintiff and determined his right to the property, and was made in consequence of plaintiff's mismanagement and neglect of the conditions in the instrument under which he obtained possession. The Civil Court has found this second instrument to be genuine; and that the plaintiff committed malversation by cutting down and selling some fruit-bearing trees growing on the land, and on the authority of the opinion of the Muhammadan law officer to the effect that Assalmi Saib could legally deprive the plaintiff of the right to superintend the property for malversation, but not of the benefits derivable from the land, has decreed the dismissal of the plaintiff from the superintendentship of the property, but that he continues entitled to the produce thereof after deductions of the cost of necessary repairs and of improvements and the salary of a superintendent at the rate of 5 per cent. on the annual produce.

From this decree it is not surprising to find that there are cross-appeals. In both, however, the grounds of objection relied upon raise one substantial question, whether the instrument under which the plaintiff claims passed the

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property to him for his own benefit subject to the conditions and trusts therein declared for pious and charitable purposes and was irrevocable, or whether it was a wakuf *i. e.*, an instrument of endowment constituting the plaintiff simply the superintendent of the property, liable at any time to removal for mismanagement. The Civil Judge appears to have considered that the instrument was to some extent of both characters, for whilst the decree deprives the plaintiff of the management of the property it declares him entitled to a beneficial interest in the profits.

In regard to the construction of the instrument, we entertain a clear opinion. It begins with a description of the property and its boundaries which contains the statement that "there is a large choultry and behind it there "are two other choultries, and a house situated on the "road-side. All these buildings have been created by me." It then declares that the lands and buildings had been endowed for "pious uses in favor of my dear brother Hajee "Gulam Uzmut Oollah Khooraishee and his children to "be continued in perpetuity from generation to genera-"tion," and had been delivered over to their possession together with the articles endowed for pious uses which are in the said land and house, such as brass and copper utensils, &c., and further, that the whole had been dedicated for pious uses in their favor, and "so they ought not "to possess themselves of it as their own nor suffer others "to take possession thereof. They are neither to sell nor "give it as a gift nor to lend nor mortgage the said pro-"perty." Wherefore, it was required, that the persons in whose favor the endowment was made should take care of the land and premises, and out of the proceeds realized by them "supply their wants and also if necessary appro-"priate to the execution of repairs the same. They "should not let in the premises any one except good "men, and should any good and religious man come and halt "in it, they should if possible serve (feed) him as their cir-"cumstances at the time permit. They should not allow "any heretic and wicked man to put up at them nor "suffer any unlawful act to be done there."

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This plainly imports a disposition of the proprietary right to the plaintiff and his descendants partly for their own use and benefit and partly for the purpose of keeping in repair the choultries and affording the charities of shelter, and if their circumstances permitted it, food also but only to good and religious men. It is, we think, a transfer of the property subject to the trust of applying the profits of the land together with the use of the moveable articles to certain charitable purposes in perpetuity. Whether such a trust estate and partial appropriation can be considered a wakuf or pious endowment according to Muhammadan law is a point not free from doubt. (See Macn. Princ. Chap. X, Section 1, and the cases in the Appendix (title) endowments; Hamilton's Hidaya, Vol. 2, p. 334,) and at present it is not necessary to decide it as in any view of the legal effect of the disposition to the plaintiff, we think it was not revocable or resumable.

This is clearly so if it is regarded as a wakuf or pious endowment, and the law appears to be the same in regard to a gift of the proprietary right when there is the relationship between the donor and donee which the instrument in this case states (Macn: Princ: Chap. V, Section 13 and Appendix tit. gift pl: 20.) But even supposing no such relationship existed, the legal power of resumption seems to us not to be applicable. It appears to be given only in the case of a private gift for the donee's own benefit, and in the present case no distinction can be made as respects the use of the property or the application of its profits. The charitable trusts are attached to the property generally which must therefore be considered at least quite as much devoted to charitable purposes as given for the use and benefit of the plaintiff and his descendants. We are consequently of opinion, that the disposition to the plaintiff was not resumable, and is unaffected by the instrument under which the defendants claim.

Then, not being resumable, is there any ground for the contention that the plaintiff was removable from the possession and control of the property for mismanagement? There is no doubt that by Muhammadan law a "Muttawlli,"

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a superintendent or trustee of an endowment, is liable to dismissal, but the rule of law, we think, only applies to an officer so designated who holds possession of the property of endowments for the purposes of management, the security of the property, and the due application of its proceeds, and has no hereditary proprietary right vested in him (Macn : Princ : Chap. X, Sections 5, 6 and Prec : of endowments Cases 8 and 10. See also cases in App : pl. 46, 59, 60.) The extracts quoted by Mr. Miller from the works Doorub Muktar p. 530, line 7 and p. 536, line 3 and *Futamee* Aulumgeree, p. 509, line 5, it seems to us, relate to such an officer only.

The plaintiff, according to our construction of the written instrument, had an hereditary trust estate vested in him, and was, therefore, we think, not a superintendent or trustee whom the grantor Assalmi Saib could remove. But further there is authority for saying that the law makes it essential to the power of the grantor to remove such an officer that it should be specially reserved at the time of the endowment Macn : Princ : Chap. X, Cl: 5. This alone would probably have been fatal to the defence on the point of removal, notwithstanding the opinion of Alee Yoosoof to the contrary as stated in passage at p. 140 of the Book Ushbahoor Nazaya to which we were referred.

With reference to the objection that the suit was barred by the Act of Limitations, we need only observe that the evidence does not show adverse possession before 1854, and the suit was brought in 1863.

For these reasons we are of opinion, that the plaintiff is entitled to the property which passed to him under the instrument of the 14th June 1843 and is now in the possession of the defendants and to be put in possession of the same.

The decree of the Lower Court will, therefore, be reversed, and in the appeal by the plaintiff, the respondent (2nd defendant) must pay the appellant's costs, as also his costs in the Court below. In the cross-appeal by the 2nd defendant each party will bear his own costs.

Decree reversed.