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should contradict our whole practice and everything we have hitherto said or done in cases of this description." A certificate is not a matter of right, but of discretion. It is true such must be exercised on judicial principles; but those principles mark the duty of attending to the public interests and the claims of society, and I cannot hide from myself the wholesale fraud of which the insolvent appears to have been guilty. He was justly punished by this Court, but soon escaped its effects on the plea of ill-health. Had he suffered the entire period of imprisonment that my predecessor awarded him, I should have hesitated to give him an order under Section 60; but I have now no hesitation in refusing it to him, as I think that his conduct before and since his insolvency is such as to bar his having a claim to start free once more as a merchant of this city. The application is rejected, and the Insolvent must pay the costs of the opposing creditors.

[ORIGINAL CIVIL JURISDICTION.]

Suit No. 718 *of* 1870.

Feb. 21.

THE ADVOCATE GENERAL .....*Plaintiff.*

FATIMA' SULTA'NI BEGAM and another ...*Defendants.*

Muhammadan law—Wakf—*Founder's right to appoint manager*—*Manager chosen from specified class*—Akriba, *meaning of term*—*Wife of founder.*

Although, according to Muhammadan law, the founder of a *Wakf* has a right to reserve the management of it to himself or to appoint some one else thereto, yet when he has specified the class from amongst which the manager is to be selected (*e. g.*, from amongst his relations), he cannot afterwards name a person as manager not answering the proper description.

After the death of the founder the right to nominate a manager of the *Wakf* vests in the founder's vakils or executors, or the survivor of them for the time being.

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The term *Akriba* (relations), though more properly confined to relations by blood, will, when the context shows that it was intended to be used in a wider sense, be extended so as to include relations by affinity.

The wife or widow of the founder is not included amongst his *Akriba*.

BY a *Wakifnámá* bearing date the 17th of October 1861, Agá Háji Muhammad Hussen Shirazi declared that he had made over, for the use and benefit of a *Musjid* theretofore erected by him, near the Imám Wádá of the Mogals, at Babula Tank, certain buildings situate at Mazagon, consisting of two bungalows and a garden attached thereto, containing fruit and other trees. The terms of the *Wakifnámá*, so far as they are important for the purposes of this report, are set out in the judgment of the Court.

Agá Háji himself acted as warden and manager of the *Musjid*, and applied the rents of the Mazagon premises to the use and benefit of the *Musjid* until his death, which took place on the 29th of June 1869. He died without issue, and left a will, whereby he appointed his wife, the defendant, Fatimá Sultán Begam, and two Parsi gentlemen, respectively, his executrix and executors.

After the death of Agá Háji, his wife, Fatimá, entered into possession of the premises. Before the suit was filed one of the executors had died, and the other had refused to act under the will as executor. The plaint, which was filed by the Advocate General at the relation of Agá Nusrulá Alli *bin* Hyderalli Shirazi, the son-in-law of Agá Háji, and four other Muhammadans of the Shia faith, submitted that the above premises had been validly appropriated to the use and benefit of the *Musjid* according to Muhammadan law; charged that the defendant, Fatimá, had appropriated the rents of the charity-property to her own use, and prayed that it might be declared that the said buildings and ground situate at Mazagon had been validly appropriated according to Muhammadan law to the use and benefit of the *Musjid*; that an account might be taken of all moneys received by the defendant, Fatimá, in respect of the rent of the said buildings due since the death of Agá Háji; and that she might pay into Court the money found due from her in such manner as the

Court should direct, in order that the same might be applied for the use and benefit of the *Musjid;* that she might be restrained from receiving any moneys in respect of the rents of the buildings and ground; that a fit and proper person might be appointed warden; and that the buildings and ground might be conveyed and assigned, as the Court should direct, for the use and benefit of the *Musjid.*

The defendant, Fatimá, alleged that she, by reason of her relationship to the founder, was the trustee and manager of the premises, and, as such, entitled to receive and apply the rents thereof to the use and benefit of the *Musjid.* She also stated that the founder had in his lifetime verbally appointed her such trustee and manager, and in furtherance of such appointment had made her executrix of his will. She denied that she had misappropriated any portion of the rents or proceeds of the premises in question, or applied them to her own use.

The second defendant, Agá Futtah Alli, the eldest son of Mussidi Kásim, the eldest brother of Agá Háji, claimed, as such, to be appointed the warden and manager of the *Musjid.* At his own request he had been made a party, defendant, to the suit.

The cause came on for hearing before SARGENT, J., on the 11th of December 1871.

The *Honourable J. S. White* and *Scoble* for the plaintiffs and relators.

Anstey, Marriott, and *Latham,* for the defendant, Fatimá.

Atkinson, Serjeant, and *Webb,* for the defendant, Agá Fatte Ali.

The issues raised were—(1) Whether the defendant, Fatimá, was a fit and proper person to be appointed warden of the trust premises; (2) whether she had been verbally appointed such guardian subsequently to the *Wakifnámá;* (3) whether, if so, such appointment would be valid; (4) whether the second defendant was a fit and proper person, within the meaning of the *Wakifnámá,* to be appointed guardian.

Cur. adv. vult.

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SARGENT, J. :—This suit arises out of a *Wakifnámá*, written partly in Arabic and partly in Persian, executed by one Agá Háji Muhammad Shirazi on the 17th October 1861, by which, after reciting that he had built a mosque in this populous city of Bombay, he declares that he thereby makes a legal, firm, and clear endowment of the whole and every part of his garden, situated in the district of Mazagon, together with two bungalows therein comprised, in favour of the mosque, and that such endowment is made in such way that whatever income derived from the garden and two bungalows there may be remaining, after deducting their expenses, shall be expended in making the necessary repairs and in defraying the expenses of the mosque; viz., matting, oil for lamps, and the stipends of the Imám and the crier, and of a servant and other necessary expenses. And if after defraying the expenses of the mosque there should be any surplus, then that the surplus should be expended in defraying the expenses of the mourning days of the founder, the chief of the martyrs. And he adds that the guardianship of it (apparently meaning the mosque) rests with the endower during the term of his natural life, and after his decease it rests with any one of his, the endower's, relations who may be intelligent and of good reputation, provided he shall be resident in Bombay; otherwise the guardianship rests with any Shiraz merchant of good reputation.

Agá Háji Muhammad died on the 29th June 1869, having acted as guardian of the mosque and its endowment down to the time of his death, since which time it is admitted that the defendant, Fatimá Sultáni Begam, the widow of the endower, has, as a matter of fact, had the management and administration of the premises so appropriated. The relators by their present suit charge that the defendant, Fatimá, has appropriated the rents of the charity-property to her own use, and seek to have an account taken of all moneys received by her in respect of the same. That she may be restrained from further receiving the rents on account of such misappropriation, and that a fit and proper person may be appointed warden of the *Musjid*, or otherwise

to receive the rents of the said property, and that the same may be conveyed and assigned, as the Court may direct, for the benefit of the *Musjid*. The defendant, Fatimá Sultáni Begam, by her written statement, denies the appropriation of the rents to her own use, and claims to be continued in the management or administration of the charity-property as the trustee thereof, according to the construction of the *Wakifnámá* and the intentions of the donor declared and expressed in his lifetime, and in execution of the trusts of his will, by which she was named executrix, and whereof she has obtained probate; but that in any case, as one of the relations within the meaning of the provisions of the *Wakifnámá*, she is entitled, by Moslem law and the usage of Shias, to be preferred *cæteris paribus* to every other relative of the donor.

Subsequently, one Agá Fatte Ali *bin* Mussidi, nephew of the donor, and married to the donor's only daughter, was made a defendant, and filed a written statement by which he claims to be appointed manager and warden of the *Musjid*. The following issues were raised at the hearing—(his Lordship stated them, and continued):—Now, the clause in the *Wakifnámá* relating to the guardianship does not specify the subject-matter of that guardianship. The words are "taulyat an," *i. e.*, "superintendence of it." The official translation suggests the word "mosque" as intended by the pronoun "an" or "it." Grammatically speaking that is probably correct; but in any case the context and the object of the instrument itself can leave no doubt, I think, that the donor is providing for the appointment, after his death, of the officer commonly known as Mutawali. The term "taulyat" would appear to be a technical one as applied to mosques and their endowments, meaning, as stated in Richardson's Arabic Dictionary, their management and superintendence. In the answer to Case 8, at p. 340 of Macnaghten's Muhammadan Law, it is stated to denote the office of the Mutawali, whose duty it is to take charge of the property appropriated, and to attend to the distribution of the proceeds of the endowment. That the superin-

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tendence or management extends to the property, and is not merely confined to the surplus income referred to in the *Wakifnámá*, is shown, not only by the use of the technical term "taulyat," but derives corroboration from the language used by the donor in the deed of dedication of the mosque when speaking of the property which he contemplates being purchased as a *Wakf* for the *Musjid* out of any possible surplus there might be after providing for the building of the mosque; he provides in express terms for the management or superintendence of the property itself given as an endowment (using the same word "taulyat" as in the *Wakifnámá*.) This, he says, is to vest in himself during his life and after his death in the same persons with some slight change of description as are mentioned in the *Wakifnámá*; and he adds, he (the superintendent) is to spend the profits of the property in defraying the above-mentioned expenditure, including the keeping up of the property.

Now it is clear upon the authorities, both Suni and Shia, that the appropriator has a right to reserve the superintendence of the *Wakf* to himself, or appoint some one else. (See Baillie's Imameea, p. 214, and his Digest of Muhammadan Law, pp. 591—593.) I am, however, unable to find any authority for holding that when the donor has specified the class from whom the manager is to be selected, he can disregard his own trust-deed, and name a person not answering the proper description. He is bound, I apprehend, by the provisions of the *Wakifnámá*; and the appropriator's right of nomination of the person to succeed to the management on his death must, I think, be confined to the class mentioned in the *Wakifnámá*. Now, the donor subsequently made a will, by which, after appointing his wife and two Pársi gentlemen to be his vakils, he directs them to carry out the provisions of the clauses of his will, by the 4th of which, after alluding to the endowment of the garden and bungalows at Mazagon, the testator says:—"Therefore, out of whatever income of the same there may be yielded, outlays being first made for the expenses of all kinds that may be

incurred for the said garden and the expenses for such repairs and work as may be found (necessary) for the bungalow and the other buildings, the surplus which there may be shall duly be expended in accordance with all the conditions written in the writings made in the Mogal (or Persian) character and language relative to the expenditure of the said *Musjid.*" Now, although there are no words expressly appointing the Vakils to be managers of the property, this language might well be construed as impliedly vesting the management in them, were it not for the circumstance that two of the Vakils do not fall within the class mentioned in the *Wakifnámá*, and the well-established rule of Muhammadan Law, that neither vakils nor superintendents of endowment can act separately (Macnaghten, p. 71). The intention, however, of the testator may well have effect given to it by construing the words as directing them to do what was necessary to give effect to the endowment in accordance with the provisions of the *Wakifnámá*, viz., by appointing a manager or superintendent, and putting him in possession of the property, a power indeed which would appear to be vested by Muhammadan Law in the vakils *ex officio*. At p. 593 of Baillie's Muhammadan Law, it is said that when the superintendent dies, and the appropriator is still alive, the appointment belongs to him, and if the appropriator is dead, his executor is preferred to the Judge; and this rule was acted upon in the case reported at p. 17 of S. D. A. Bom., and referred to at p. 507 of the Appendix to Macnaghten.

The power of appointment having been thus vested in the executors on the donor's death, and there being no evidence before the Court of any such appointment having been made, (although, as a matter of fact, the defendant, Fatimá, has since her husband's death had the management of the property,) it remains to consider in whom, under the circumstances which have since occurred, the power of appointment is still vested. It appears that one of the vakils is dead, and the other has renounced probate, and by his affidavit states that he has never acted or taken any part in the administration of the estate, and the widow is, therefore, now the only

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executrix of the testator surviving and competent to act. At page 249 of Baillie's Digest of the Shia Law, it is said that if one of the executors should fall sick or become incapable of performing the duties of the office, the Judge must appoint a person in his place to act for him; but if one of the executors should die or become profligate, the Judge has no such power, and the remaining executor is empowered to act singly; the Judge having no authority while there is an executor of the deceased surviving and competent to act; but that the point is open to some doubt and difficulty. The nature of the difficulty is not mentioned. The learned editor, however, refers in a note to the doctrine of the Hanífites as being opposed to it. According to the Hidayah, Abu Hanífá and Muhammad hold that the surviving executor should lay the matter before the Judge, who, if he think proper, may make him sole executor. According to Abu Yusaf, he may act alone. Upon this state of the authorities there appears to be no sufficient reason for adopting a different rule, at least where the parties, as here, are Shias, from what prevails in English law, viz., that the office of executor survives and carries with it all the ordinary functions of the office, amongst which, according to Muhammadan Law, is the power of appointing a superintendent of a *Wakf* in the absence of any express provision. The question, however, has little practical importance, as this Court having now jurisdiction over the charity, such appointment must necessarily, according to the well-established practice, be made with the sanction of the Court.

There remains to consider who are the persons eligible for the post of Mutawali; in other words, who are the persons included in the term *Akriba*. [His Lordship then proceeded to discuss the meaning of the term *Akriba*, and decided that that term, like the term relations in English Law, though more properly confined to relations by blood, will, when the context shows that it was intended to be used in a wider sense, be extended so as to include relations by affinity, but the wife or widow of the founder is not included amongst the number.]

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A declaration was accordingly made that the defendant, Fatimá Sultáni Begam, was entitled to select a Mutawali of the mosque from the persons related to her late husband by blood or affinity, such selection to be sanctioned by the Court, and (in case the relators desired it) a decree for a reference to the Commissioner to take the accounts of the rents of the garden and bungalows, the defendant, Fatimá, to be charged an occupation rent during such time as she had been in occupation of the bungalows and garden, or either of them. The costs of the suit were also provided for.

Attorneys for the plaintiff, *Keir, Prescott, and Winter.*

Attorneys for the defendant, Fatimá, *Craigie, Lynch, and Owen.*

Attorneys for the defendant, Agá Fatte Ali, *Thacker and Chalk.*

[ORIGINAL CIVIL JURISDICTION.]

Appeal Suit No. 189.

March 16

T. F. PUNNETT, Official Liquidator of the Mercantile Credit and Financial Association (Limited) ..... *Appellant.*

VINA'YAK PA'NDURANG ..... *Respondent.*

Act XXVIII. of 1865, *Sec.* 24—*Final Discharge of Trader—Liability to future calls.*

An Insolvent Trader, who has obtained his discharge under Sec. 24 of Act XXVIII. of 1865, is not liable for calls made, after he has obtained his discharge, in respect of shares held by him in a Joint Stock Company, when the order for the winding up of such Company has been made prior to the time of the Insolvent Trader obtaining his discharge.

THIS was an appeal from an order of Sargent, J., made in Chamber on the 23rd of November 1871, whereby he made absolute a summons directing the name of Vináyak Pándurang to be struck out of the list of contributories of the Mercantile Credit and Financial Association (Limited).