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statements made to the trying Court, and secondarily, in a case tried by a Court of Session, the statements made to the Committing Magistrate.

Lastly, the Judge has used against the appellant the statement made by the co-accused in the Sessions Court. That statement is not a confession. Of course the Judge was bound to hear and record what the co-accused said but it ought to have had very little, if any, effect in determining, in the mind of the Judge, whether the appellant was or was not guilty. So little is it worth, in this case, that it was really superfluous to mention it amongst the circumstances which go to establish the appellant's guilt.

There has not been a proper trial of the appellant. He has been convicted largely on the strength of statements many of which ought never to have been heard or used, and, in my opinion, we are bound to reverse the conviction and acquit the appellant.

Conviction reversed.

R. R.

ORIGINAL CIVIL.

Before Mr. Justice Beaman.

1910. *March* 1.

JAINABAI AND ANOTHER, PLAINTIFFS, *v.* R. D. SETHNA AND OTHERS, DEFENDANTS.*

Mahomedan law—Wakf—Gift—Essential elements for validity—Power of revocation—General principles—Vested remainders.

In 1902 a Shia Mahomedan by deed conveyed certain immoveable property to himself and other trustees for himself for life and after his death for the payment of annuities to his widow and daughter and the balance to certain charities. Further clauses provided that on the death of his widow her annuity was to go to certain other charities and that on the death of his daughter a lump sum was to be given to her son. A further proviso reserved power to the settlor at any time to revoke all or any of the above trusts.

* Original Suit No. 792 of 1909.

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In 1908 he revoked the trust, and executed a mortgage of the property. In 1909 he died and receivers of his estate were appointed.

His daughter then filed a suit for a declaration *inter alia* that the revocation and subsequent mortgage were invalid, and that the original trusts still subsisted.

Held, that the conveyance in 1902 was invalid.

Looked at from the stand-point of the Mahomedan law-giver, a private trust would be no more than a private gift *inter vivos* through the medium of the third party, and therefore subject to all the conditions of a valid gift, but *quære* whether private trusts were known to Mahomedan law.

Banoo Begum v. *Mir Abed Ali*(1) discussed and distinguished.

ON 31st July 1902 Ebrahimbhai Hashambhai, a Khoja Mahomedan, executed a deed by which he purported to convey a certain immoveable property known as Dady Buildings, to himself and three other trustees to hold in trust to pay the net income to himself for life, and after his death annuities to his wife and daughter and certain sums to specified charities. After the death of his wife her annuity was to be set aside for the maintenance of four Khoja orphans, and after the death of his daughter a lump sum was to be given to her son. A final proviso reserved to the settlor the power at any time to revoke any or all the trusts therein mentioned. Owing to financial difficulty in June 1908 the settlor began to negotiate for a loan on the security of a mortgage of the property the subject of the above settlement. For that purpose he executed a deed of revocation, dated 18th July 1908, and nine days later, on 27th July 1908 he executed a mortgage of the property to Haji Alli Mahomed Haji Casum as security for a loan of Rs. 3,00,000. Upon the death of Ebrahimbhai Hashambhai in July 1909, one of his creditors brought an administration suit, and in that suit three receivers were appointed. On the 1st September 1909 Jainabai, the daughter of Ebrahimbhai, and her son filed the present suit against the receivers, the trustees of the settlement of (1902) and the mortgagee. The Advocate General was joined as a party defendant by reason of the charitable bequests contained in the trust settlement. The plaintiffs prayed for a declaration that Ebrahimbhai Hashambhai was not entitled to revoke the

(1) (1907) 32 Bom. 172.

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trust settlement of 31st July 1902, that the deed of revocation and the subsequent mortgage were invalid, and that the trust settlement was still valid and subsisting, and further prayed for the appointment of new trustees.

Lowndes, with *Strangman*, Advocate General, for the plaintiffs:—

It is admitted that the settlor was governed by Shia law. Under the Shia law a power to revoke is bad. See Amir Ali (3rd Edition), Volume I, p. 89: *Nasir Husain* v. *Sughra Begam*[1]. Section 53 of the Transfer of Property Act does not apply to Mahomedans, and therefore does not affect the rule of Mahomedan law that a gift by a person who is not in insolvent circumstances at the time of the gift cannot be avoided by future creditors. That a life interest can be created and the subsequent interest dealt with is clear from *Banoo Begum* v. *Mir Abed Ali*[2]. See also *Umes Chunder Sircar* v. *Mussummat Zahoor Fatima*[3]. It may be taken from these cases that the Courts have modified the strict Mahomedan rule as to the invalidity of gifts '*in futuro*'. In any case, where the donor stands in *loco parentis* to the donee, as here, no transfer of possession is necessary. See Wilson's Digest (3rd Edition), p. 324. Finally this is a good trust under sections 5 and 6 of the Trusts Act. There was sufficient transfer of possession to complete the trust, in the opening, of a special account in the settlor's books.

Setalwad, with *Raikes*, for the first, second and third defendants:—

The transfer was not sufficient. It is as necessary in the case of trusts as in the case of gifts. See *Moosabhai* v. *Yacoobbhai*[4]. Further the settlement was in reality a wakf, containing, as it did, dedications to charity. Taking the settlement, then, as a wakf, it is void because it does not fulfil the conditions required. See Baillie's Digest, p. 218.

Shortt, with *Koyaji*, for the fourth defendant:—

The best possession possible, actual or constructive, ought to have been given, but this was not done. No notice was

(1) (1883) 5 All. 505.
(2) (1907) 32 Bom. 172.
(3) (1890) 17 I. A. 201.
(4) (1904) 29 Bom. 267.

given to the tenants to attorn, and there was no transfer made in the books of the Municipality or Collector. See *Ismal* v. *Ramji*[1] and *Moosabhai* v. *Yacoobbhai*[2]. Further the donor was not here in *loco parentis* to the donees as has been argued; the trustees were the donees. With regard to the alleged modification of the strict rule as to the invalidity of gifts '*in futuro*' the cases cited do not show this. In both *Umes Chunder Sircar* v. *Zahoor Fatima*[3] and *Banoo Begum* v. *Mir Abed Ali*[4] the settlement was for valuable consideration. There was no question of a voluntary gift. See also *Vahazullah* v. *Boyapati*[5]. Thus, if regarded as a private gift, it must be void, as being conditional, '*in futuro*', reserving a power to revoke (see section 126 of Transfer of Property Act) and lastly as not completed by transfer of possession. But it may be regarded as a wakf, with provisions by way of family settlement: see Wilson, p. 346, and Mulla, Art. 144. If a wakf, it is again void because of the reservation of a power to revoke, and because the settlor has reserved part of the usufruct to himself. See *Hajee Kalub Hossein* v. *Mussumat Mehrum Beebee*[6]. The Trusts Act does not apply to wakf: see section 1 of the Act. If regarded as a testamentary or quasi-testamentary document, it is also void because it violates the Mahomedan law as to wills by which a testator cannot dispose of more than a third of his estate. Even if not void as a will, it has been twice revoked, (*a*) by deed of revocation, (*b*) by execution of the mortgage. Finally under 27 Eliz., c. 4, it is void as a voluntary settlement. In whatever light the document is regarded, the settlor as a free agent has reserved a power to revoke, and has actually revoked.

Mulla, with *Davar*, for the sixth and seventh defendants, submitted to the order of the Court.

Strangman, Advocate General, in reply:—

27 Eliz., c. 4, no longer applies to India. Its place has been taken by section 53 of the Transfer of Property Act, and even this does not apply here. See section 2 (*d*) of the Act.

(1) (1889) 23 Bom. 682.
(2) (1904) 29 Bom. 267.
(3) (1890) 17 I. A. 201.
(4) (1907) 32 Bom. 172.
(5) (1907) 30 Mad. 519.
(6) (1872) 4 N. W. P. H. C. Rep. 155.

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BEAMAN, J.:—This is a suit by the plaintiffs to enforce an alleged gift contained in a deed of 31st July 1902. The principal defendants are the receivers of the alleged donor's estate and the mortgagee. The deed, on which the plaintiffs rely, appears to be a voluntary settlement in common form containing the usual revocation clause. The gist of the document is that the settlor, Ebrahimbhai Hashambhai, gives the properties therein mentioned to himself and other trustees in trust (1) for himself for life absolutely, (2) upon his death to his widow, Rahmatbai, an annuity of Rs. 500 a month, (3) to his daughter Jainabai, plaintiff No. 1, an annuity of Rs. 750 a month, with various bequests to charitable objects. (4) On the death of the said Rahmatbai, her annuity to be devoted to other charitable purposes and on the death of his daughter Jainabai, an event which has not yet happened, a sum of Rs. 1,50,000 to be given to his grandson Mahomedbhai, the minor plaintiff No. 2, with power to the settlor Ebrahimbhai Hashambhai to revoke all the aforesaid bounties at his pleasure. In 1908, the settlor in the exercise of his power revoked the deed of 1902 and his co-trustees thereupon reconveyed to him all the settled properties. He, then, executed the mortgage, on which the defendant No. 4 relies. The parties are Shias. Those are the undisputed facts upon which they go to trial.

The plaintiffs contend that the gift contained in the deed of 1902 was perfected by the settlor opening an account of the rents and profits in the name of the new trust, and therefore became irrevocable at any rate so far as Jainabai and Mahomedbhai are concerned, as they are within the prohibited degrees of relationship.

There are a great many answers to the claim from which I will select six of the most effective which occur to me upon a recollection of the arguments.

(1) That the deed of 1902, upon which the plaintiffs rely, is a wakf and not a deed of gift, and that being so, is void *ab initio*, by reason of the founder having retained a life interest for himself in the dedicated property.

(2) If a gift, then bad, (*a*) because it is a qualified and a conditional gift, so far as the plaintiffs are concerned, only capable of taking effect *in futuro*, (*b*) because it was not perfected by actual delivery of possession of the thing given.

(4) If a trust in the English sense within the meaning of sections 5 and 6 of the Indian Trusts Act, then necessarily revocable.

(5) If an ordinary voluntary settlement, which in form it appears to be, then again certainly revocable, as containing a revocation clause to which effect has been given. And I may add under the Indian statute law void *ab initio*, as all voluntary settlements containing general revocation clauses of that kind must apparently be under section 126 of the Transfer of Property Act.

(6) That apart from its form, the deed of 1902 is in substance and reality a testamentary disposition, the settlor's plain intention being that the objects of his bounty should only obtain it after his death: and therefore like all other wills revocable during the testator's life-time.

I will now proceed to deal a little more in detail with each of these answers. According to all the best accredited text books on Mahomedan law, an ordinary gift *inter vivos* must be free from all pious or religious purposes. The deed of 1902 mixes up charities with private donations to the kinsmen of the settlor and it is therefore contended that read as a whole no separate gift can be isolated and cut off from the accompanying religious bequests. Considerations of this kind no doubt weighed with the Advocate General and decided him against pressing the claims of the various charities. For, it cannot seriously be argued that, in view of the life interest reserved by the settlor to himself, if this were a wakf, it would be a good and legal wakf. I am not, however, certain that the argument is so conclusive as the defendants appeared to think. It seems to me that gifts to private persons might be bestowed in the same deed which created charitable trusts and yet that the one might be quite separable and distinct from the other. When the Mahomedan lawyers laid it down that a private gift *inter vivos* to be legal and valid must be free from all

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pious or religious purposes, it is at least arguable that they did not mean that a donor might not, by one and the same act, give a part of his property for a definite private purpose involving no consideration of religion or piety and another part of the property, or even the same part of his property, assuming that the donees had exhausted their private interest in it, at the same time or thereafter in charity. Yet I feel that there is considerable force in the contention; and, having regard to the somewhat rigid and narrow views of the authors of archaic systems of law, I doubt whether, reading this document as a whole and noting how ultimately its effects are directed to the foundation of charitable endowments, a Mahomedan lawyer would not say that the whole of it was affected with the character of a wakf. If that view were adopted, it would be a short and safe cut to the conclusion I am asked to draw. I should, however, hesitate, notwithstanding the completeness and unanswerableness of this contention, once its main premiss is granted, to base my decision on this ground alone.

The second and the third answers pre-suppose that the instrument of 1902 was a deed of gift and not a wakf, and it is upon this hypothesis that the case has been most hotly contested.

As a general rule of Mahomedan law, it is, I think, unquestionable that an indispensable condition precedent to a valid gift is that it should be unqualified and *in præsenti*. The books are full of prohibitions, with simple illustrations against gift *in futuro*. In the present case, if we look at what was actually intended to be done under the deed of 1902, stripped of technical phraseology, it was this. The donor said:—"I will give this property to myself for my life and after my death I will distribute it" (in the manner I have described roughly above) and at the same time he reserved to himself in explicit terms a power to revoke the whole of the gift during his own life-time. Now it is the rule of early Mahomedan law that however abominable the revocation of the gift might be, that law recognizes it before actual delivery in all cases, and after delivery saving where the gift has been to a

relative within the prohibited degrees of consanguinity. Where the gift has been to a stranger or to relatives not within the prohibited degrees, the authorities say that the gift is revocable, even after delivery of possession but only (*a*) with the consent of the donee, or (*b*) by the decree of a Judge. The first of these exceptions clearly implies a re-gift by the donee to the donor and is not strictly speaking a revocation at all. The second, however, points equally clearly to the revocability of all gifts at the suit of the donor, even after possession has been given, unless the donee is within the prohibited degrees of relationship. Like so much else in the Mahomedan law, it is not very easy to understand the principle upon which this latter rule is founded or upon which the Judge would give or withhold the relief sought. Presumably his doing so would be something more than a mere formality going as a matter of course; and would depend upon what he considered to be the equities of the parties in the particular case before him. It is not easy, indeed I doubt whether it is possible, to keep a discussion of the defendants' two answers, on the supposition that this was a gift, wholly distinct. For modern case law has confused the originally simple notions of the Mahomedan lawgivers so much, both upon the indispensableness of the gift being unqualified, and *in præsenti* and actual possession of the thing being given, that the two answers constantly overlap, when reference is made to the authorities. It is first, however, desirable to have a clear view of the facts. Now it cannot be denied that the two plaintiffs are related within the prohibited degrees of consanguinity, nor can it be denied that immediately after executing the deed of 1902, the settlor, who, under that deed, not only reserved to himself a complete life interest in the property but was also the only managing trustee, opened an account of the rents and profits in the name of the trust, and it is strenuously contended for the plaintiffs that this was a sufficient delivery of seisin to satisfy the requirements of the Mahomedan law. Further, that if that were so, the gift having been completed by delivery of possession and the donees being the daughter

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and grandson of the donor, it became from that moment irrevocable. This legal result, it is contended, is in no way affected by the reservation in the deed of gift of a power of revocation or the postponement of the gift to the daughter and grandson to an uncertain future time, depending (1) upon the death of the settlor, and (2) upon the death of Jainabai. In my opinion this contention is unsustainable. Looking to the clear and positive principles of the Mahomedan law, I cannot believe that any gift, which is only to take effect after the death of the donor, and during his life-time is expressly declared to be revocable by him, could ever be a valid gift. The question might have been complicated, had the donor died without revoking the contemplated gifts. But even so, I should still have been of opinion, that as declared in the instrument of 1902, the gifts to Jainabai and the minor plaintiff were illegal and invalid. Then there is the further question whether possession was actually given or whether, indeed, having regard to the nature of the gift, it could have been given. The decision of the Privy Council in *Umes Chunder Sircar* v. *Mussummat Zahoor Fatima*[1] which was a case between Sunnis, and *Banoo Begum* v. *Mir Abed Ali*[2], where the parties were Shias, have gone as far, I think, as our Courts are ever likely to go in the way of stretching the rules of the Mahomedan law. The former of these cases decides that anything "like what we call in English law a vested remainder" may be the subject of gift valid according to the Mahomedan law. And our Court of Appeal in *Banoo Begum* v. *Mir Abed Ali*[3], quoting that judgment with approval, applied it with the less hesitation to Shias because the Court was supplied with translations of a series of excerpts from Arabic text-books of authority which, the learned Judges thought, put beyond question the fact that the Shia law had all along recognized gifts of future and limited estates resembling what we call vested remainders. It is not for me to question the authority of these decisions which are of course binding upon me. I may, however, point out that none of the texts cited in support of the conclusions arrived at by

(1) (1890) 17 I. A. 201. (2) (1907) 32 Bom. 172,

their lordships in *Banoo Begum's* case, as indeed a very cursory examination will show, can really be carried that length. All these texts deal with the giving of a right of residence, a life interest, or an interest for a limited period. One of them certainly speaks of a gift to a man and his descendants, but taking them altogether and in their natural contexts, it is submitted that their plain meaning ought to be confined to what was then in the contemplation of the writers, namely, a single qualified gift; qualified, that is to say, not with reference to any rights which he might have reserved to himself by way of revocation or curtailment but simply with reference to the duration of the gift in time; subject, again, to an exception in the case of gifts for residence which, while no doubt also limited in time by the life of the donee, are likewise limited in extent by the peculiar object for which the gift is expressed to be made. But none of these texts or observations to which my attention has been drawn in all the accredited Mahomedan law-books (with the exception of a single sentence in Amir Ali) can, I think, support the view that Mahomedan law-givers ever had in contemplation or intended to sanction the gift of a succession of independent and limited estates. I do not believe, speaking for myself, that any reputed Mahomedan law-book of Mahomedan lawyers contains any mention or had the faintest conception of anything so entirely artificial as the estates which our English law has created and recognized. As to the passage in Amir Ali, that is couched in the most sweeping and general terms and the learned author gives as his authority for it one of the texts quoted in *Banoo Begum's* case which I have just referred to. As a mere matter of academic argument, I may be permitted to doubt whether the most ingenious logic could reconcile the indispensableness of giving *de facto* possession *in præsenti*, to the validity of a gift *inter vivos* with the gift of a remainder possibly postponed fifty years and therefore not taking effect till long after the death of the donor, being nevertheless a gift valid in Mahomedan law. These cases are indeed plainly examples of the strenuous attempts our Courts are constantly making to expand the rigid rules and principles of archaic systems of oriental law to meet the requirements of a rapidly growing, progressive,

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and developing society. That attempts of that kind are inevitable, politic, in every sense desirable, is not less clear than that endeavouring to attain their objects by thoroughly consistent and logical reasoning is attended with the very greatest difficulty, even if it be really possible. It would be very easy to substitute the most complex and artificial products of advanced civilized jurisprudence for the extremely crude and simple notions of primitive people. But so long as we profess to respect and give effect to the latter, I confess for my own part that it is beyond my power to reconcile them by any process of completely logical reasoning with all that has preceded and is implied in the former. Yet even so it is not difficult I think to distinguish cases such as those I have referred to from the present case. For, if a man gives his house to A for his life and on his death to B for his life and on his death to C, it is at least possible for the donor as between himself and A the first term in the series of estates to comply with all requirements of the Mahomedan law. He may announce his gift, A may accept it and the donor may then put A in actual possession of the property. I may, however, observe that the illustration I have given is very different from cases of Omra and Sukna mentioned in the texts upon which the judgment in *Banoo Begum* is founded. What the old law-givers had then in contemplation was nothing more than the donor divesting himself of his property in favour of the donee for the time, on the expiration of which the property would automatically revert to the donor. And this principle is not, I think, affected by extending the gift in general terms to the descendants of the first donee. The donee and his descendants are then regarded as the single object of the benefaction, the only difference being that in the natural course of events the addition of descendants would protract the duration of the first gift and postpone its reversion to the donor. Coming back to our present case it will be seen at once that it differs in one very material point. For, the first donee is the donor himself; and it is, therefore, impossible, as in the first case I put, for him to comply in any way with those conditions which the Mahomedan law makes indispensable to a valid gift. And that being so, it could only be by a fictional process identifying him in some

way with the remoter object of the bounty that the gift could ever be valid at all. This difficulty has pressed very heavily on the learned and eminent counsel who argued the plaintiff's case with so much ability. It has been contended that inasmuch as this gift took the form of a trust, the donees technically at any rate were the trustees, including the settlor himself who was the managing trustee. Therefore, it is said, the only way in which actual seisin could be given was the way which the settlor took, that is to say, by opening a fresh account of the rents and profits of the property in the name of the trust instead of in his own private name. Now, while that might serve in certain cases to surmount the initial difficulty I have been considering, it does not appear to me to touch what is the substantial and real difficulty, falling partly under both the defendants' answers on this head. I mean of course that whatever the artificial legal construction of the settlor's position might be, in fact he had retained possession as he indeed intended to retain it in his own hands and for his own use as long as he lived. Further, if we are to borrow a technicality from the English law of trust to fortify this argument and that the trustees were the donees within the meaning of Mahomedan law and that one of them having assumed possession and management of the property, the gift was complete, then I do not see how we can escape from the further consequence that the donees themselves restored the gift to the original donor. If the plaintiffs seek to surmount that objection by invoking another rule of Mahomedan law, that where a person gives to one to whom he stands *in loco parentis*, his possession becomes in law the possession of the donee and the gift therefore irrevocable, the answer is again plain and conclusive. That special rule of law is only applicable in cases where the donor standing *in loco parentis* to the donee purports to give to the latter *in præsenti* but himself retains the actual physical possession. I insist upon the words *in præsenti* because that appears to be the very foundation of the rule. Here, it was not the intention of the donor to give this property immediately either to his wife, his daughter, or to his grandson, and it could only be where that intention synchronised with the donor retaining possession of the property given, that

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that possession converted by the intention would be regarded in law as constructively the possession of the donee. There is not, I believe, a single instance of that rule being applied where a father says, "I give my property to myself for my life and on my death to my son," for in such circumstances there can be no intention in the donor to part with the property during his life-time. The most that he can be said to surrender in such cases is the power of alienating the property, and that is not a thing of which possession can be given in any sense compatible with the principles of the Mahomedan law of gift. But these answers appear to me to be absolutely conclusive against the plaintiffs even on the assumption that the deed of 1902 was not a wakf but a deed of gift.

It was next contended that under sections 5 and 6 of the Indian Trusts Act, this was a good trust. With the utmost deference to the eminent and learned Judge who decided the case of *Moosabhai* v. *Yacoobbhai*[1], I do gravely doubt whether private trusts were known to Mahomedan law. I doubt whether, in any of the standard works upon that subject, private trusts will be found in any index. They are mentioned in Mulla's recent work but solely on the authority of *Moosabhai* v. *Yacoobbhai*. The point is perhaps of no great importance, for looked at from the standpoint of the Mahomedan law-giver, a private trust would be no more than a private gift *inter vivos* through the medium of the third party and therefore subject to all the conditions of a valid gift. But it has been argued in this case that inasmuch as the trust in the English sense does not conflict with any part of the Mahomedan law, if this is a good trust, its effect would be the same as a good gift and therefore the quality of irrevocability would attach to it. I am altogether unable to accede to this contention to which Mr. Lowndes committed himself, I must say, with some diffidence. It amounts, when analysed, to this: that while this may not be a good gift according to the Mahomedan law of gift, it is a good trust according to the English law of trust. There can be no question, however, that if we are to regard it strictly from that point of

(1) (1904) 29 Bom. 267.

view, it would like all other trusts be revocable. But then it is argued that this cannot be so because although merely valid as an English trust it has been made by Mahomedans and therefore takes on the whole the character of a Mahomedan gift, the beneficiary being within the prohibited degrees. One feature of that character is irrevocability, that is to say, that while it might be a bad gift in the eye of Mahomedan law because it was qualified, because it was *in futuro*, because possession was not given, yet it is a good trust. A good trust is revocable: a good gift to donees of a class is, amongst Mahomedans, irrevocable. This good trust would be a bad gift amongst Mahomedans but being a good trust and made by Mahomedans and the Mahomedan law having nothing to say upon such a subject, it must take effect as though it were a good and not a bad gift and so become irrevocable. That argument, however ingenious, appears to me to be thoroughly unsound. If it is only a trust because it fulfils the requirements of sections 5 and 6 of the Indian Trusts Act, then it is revocable and has been revoked. If it is anything more than that and seeking to enforce it upon that footing would bring it into conflict with any rule of the Mahomedan law which is the case here, then sections 5 and 6 of the Trusts Act have no application.

The fifth answer is that on the very face of it the deed of 1902 is a voluntary settlement in English common form. I have no doubt that it is, I have no doubt that it is something of which the early Mahomedan law-givers had not the faintest conception; therefore to provide for the legal operation and effect of which they could not possibly have made any provision. If it is no more than that, then it would of course in England be revocable since it contains the usual revocation clause. The Indian law appears to go further and under section 126 of the Transfer of Property Act it is noteworthy that all voluntary settlements containing a revocation clause appear to be *pro tanto* absolutely void.

Lastly, whatever this may be in form, for all practical purposes it really is a testamentary disposition of a part of the settlor's estate. No doubt modern ingenuity will seek ways of this kind

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of evading the rigid restrictions of the old law. But Courts will, I think, be wary against allowing Mahomedans under the guise of deeds of gifts to will away their property contrary to the provisions of their law. When a man says, "I give the whole of my property to myself for my life-time and on my death to my friend Z," were the Courts to validate such an intention whether wrapped up in the form of a trust or not, it would be lending themselves to defeat the Mahomedan law of wills. Apart from that consideration a will is of course revocable and therefore if, upon a true construction of the deed of 1902, it should appear to be in substance, whatever it may be in form, a testamentary disposition of property, it could, in the first place, take effect upon no more than one-third of the testator's estate, and in the next place, it would be open to him to revoke it at any time before his death.

These, I think, are reasons enough for my conclusion that the plaintiffs' suit fails and must be dismissed with all costs.

Suit dismissed.

Attorneys for plaintiffs:—Messrs. *Payne & Co.*

Attorneys for defendants 1, 2, 3, 6 and 7:—Messrs. *Matubhai, Jamietram and Madan.*

Attorneys for defendant 4:—Messrs. *Smetham, Byrne & Co.*

ORIGINAL CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Batchelor.

1909.

November 1.

IN THE MATTER OF THE LAND ACQUISITION ACT I OF 1894.

THE GOVERNMENT OF BOMBAY, APPELLANTS, *v.* ESUFALI SALEBHAI, RESPONDENT.*

Land Acquisition Act (I of 1894)—"Land"—Acquisition of outstanding interests where Government owns fee-simple.

PER CHANDAVARKAR, J.:—To acquire a land [Sc. under the Land Acquisition Act] is not necessarily the same thing as to purchase the right of fee-simple to it, but means the purchase of such interests as clog the right of Government to use it for any purpose they like.

* Reference No. 2 of 1906.
Appeal No. 34 of 1908.