APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Hayward.

SALEBHAI ABDUL KADER BASRAI AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* BAI SAFIABU AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

1911. *August* 23.

Limitation Act (XV of 1877), Article 123—Suit to recover legacy—Legacy not assented to by executor—Probate and Administration Act (V of 1881), section 112—Mahomedan Law—Shiahs—Wakf—Bequest for Gadi-ul-khum feast—Fattiah dinners—Valid bequest—Cypres.

Article 123 of the second Schedule of the Limitation Act, 1877, applies to a suit where the substantial claim is to recover a legacy, even though not assented to by the executor, and whether or no the suit involves the administration of the whole estate.

A Shiah Mahomedan directed his executors by his will to spend a portion of the income of his property upon the following charitable or religious objects: (1) The Gadi-ul-khum feast at Mecca; (2) The Gadi feast at Rehmanpura in Surat; and (3) A Fattiah dinner on the testator's and his wife's account. The Gadi feasts were to celebrate the appointment of Ali as successor of the Prophet.

Held that the first two bequests were valid, but the validity of the third bequest was doubtful.

Kaleloola Sahib v. *Nuseerudeen Sahib*(1), *Zooleka Bibi* v. *Zynul Abedin*(2) and *Biba Jan* v. *Kalb Husain*(3), followed.

Where the testator has indicated a general charitable intention in the bequest made by him and if these bequests fail, the Court can devote the property to religious or charitable purposes according to the *cypres* doctrine.

FIRST appeal from the decision of J. E. Modi, Subordinate Judge, First Class, Surat.

One Ismailji Dossabhai was married to Kulsambu, and had by her three daughters: (1) Fatma (defendant No. 1), Zenabu (defendant No. 3) and Ratanbu (who predeceased her father). Before his death, Ismailji made his will, of which he appointed Fatma as the sole executrix. Under his will, he set apart a third share of his property for the religious and charitable purposes enumerated in paragraph 4 of his will, set out in the

* First Appeal No. 209 of 1909.

(1) (1894) 18 Mad. 201. (2) (1904) 6 Bom. L. R. 1058.

(3) (1908) 31 All. 136.

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judgment. The remainder of his property he bequeathed to his heirs. The share which he bequeathed to Ratanbu was described as follows :—

To the children of my deceased daughter Ratanbu (her, *i. e.*) the deceased Ratanbu's share shall be given in equal parts and I appoint her children as (my) heirs. To them (their deceased mother's share) shall be duly given in equal parts.

The plaintiffs, the heirs of Ratanbu, filed this suit to recover the share bequeathed to them by Ismäilji.

Fatmabu (defendant No. 1) contended *inter alia* that the testator had no right to make Ratanbu's issue his heirs in the manner he had done and that the plaintiffs were not entitled to any share.

The Subordinate Judge held that the bequest to charity constituted valid Wakf; but he held that the suit was governed by Article 120 of the second Schedule to the Limitation Act (XV of 1877), and was barred.

The plaintiffs appealed to the High Court.

B. J. Desai, with *T. A. Gandhi*, for the appellants.

Weldon, with *Little & Co.*, for respondents Nos. 2b and 2d.

T. A. Gandhi for respondents Nos. 4 and 5.

BEAMAN, J.:—The plaintiffs sued the executrix and other heirs under the will of their deceased grandfather Ismailji to recover a legacy alleged due to them under the will of the said deceased Ismailji.

The defendants pleaded that the claim was time-barred; that the legacy was invalid to more than the extent of one-third of the estate owing to the want of assent of the other heirs; that the legacy could not be given effect to owing to more than one-third of the estate having been already left by a prior clause of the will in Wakf.

The original Court decided that the suit was time-barred; that the legacy was invalid to more than the extent of one-third of the property; that there was no assent of the other heirs and that the legacy could, therefore, not be given effect to as one-

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third of the property had been validly left by a prior bequest in Wakf. The original Court, therefore, dismissed the suit with costs.

On appeal it has been argued with regard to the question of limitation that the Article applicable was not Article 120 but Article 123 of the first Schedule of the Limitation Act. It has been contended in answer that the suit was really an administration suit or one for an account, falling under the general provisions of Article 120, as the legacy did not receive the assent of the executrix under section 112 of the Probate and Administration Act, V of 1881, and was, therefore, inchoate and could not be made the basis of a suit for a legacy. In support of that contention several cases were quoted; but after giving them our best consideration it appears to us that they do not support the contention. The most that can be deduced from them is that where there has been no assent of the executor then the suit must include a demand for the administration of the whole estate. The cases included those of *Cursetjee Pestonjee Bottliwalla* v. *Dadabhai Eduljee*[1], *Okhoy Coomar Bonnerjee* v. *Koylash Chunder Ghosal*[2] and *Rajamannar* v. *Venkatakrishnayya*[3]. It appears to us that the mere want of assent of the executrix cannot alter the substantial nature of the suit, which was to recover the legacy. Article 120 is merely an Article referring to suits for which there is no other provision in the Schedule. It is not an Article referring specifically to administration suits. Article 123 is, therefore, the Article applicable, where the substantial claim is to recover a legacy, whether or no the suit involves the administration of the whole estate. This suit must accordingly be held to have been brought within time as it was brought within the twelve years allowed by Article 123. It is unnecessary in this view of the case to deal with the further arguments based upon the minority of one of the parties and the alleged extension in favour of all of the period of limitation.

(1) (1896) 19 Mad. 445. (2) (1890) 17 Cal. 387.
(3) (1902) 25 Mad. 361 at p. 364.

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With regard to the question of the assent of the other heirs to the legacy it is sufficient to say that the matter has not been seriously pressed before us, as there was no evidence of the assent of *all* the heirs.

With regard to the question whether the prior bequest in Wakf was valid, it is necessary to consider in some detail the terms of the bequest occurring in paragraph 4 of the will as follows: --

"As to whatever may come to in respect of a third share that is in respect of a third portion and of any abovementioned property, and of such property, my executrix Bai Fatmabu shall duly do such act as may perpetuate my name and as may do good. In lieu of the said amount (? I have set apart) one house and a moiety of another house in Bombay the particulars whereof are mentioned in the abovewritten second clause. As to whatever income may be realised on the expenses relating to those houses being deducted the said income shall be appropriated towards the performance of the following works :—

"I have been giving Gadi-ul-khum feast at the holy Mecca through Mr. Abdul Ali Nakhuda. The same shall duly be given.

"I have been giving a 'Gadi' feast at Rehmanpura in Surat, the same shall be given.

"According to these particulars and agreeably to what is written above the same shall be done and as to whatever may remain over on that being done my said executrix shall give therewith a Fattiah dinner on my and on my wife Kulsambu's account, and I have given full authority to my said executrix . . . to do the abovementioned work. She shall do the same during her life-time and after her (decease) her children shall do the same."

The question of the validity of these bequests has been considered at considerable length by the learned Judge of the original Court from pages 8—11 of the printed judgment, and he came to the conclusion mainly it appears from certain *dicta* of Ameer Ali, that the bequests were good bequests as Wakf. It appears to us that the two first bequests at all events being for the celebration of the appointment of Ali as successor of the Prophet were properly held to be valid Wakfs. In paragraph 322 of Wilson's Anglo-Mahomedan Law, it is stated that "all works of religion, charity, or public utility, not condemned by the Mahomedan religion, are proper objects of Wakf" on the authority of the Hedaya.

But it is open to question whether the third bequest for Fattiah dinners "on my and my wife Kulsambu's account" is

a valid Wakf. It is pointed out by Wilson in paragraph 323A of his work that the Madras High Court has recently held such a bequest not to be a valid Wakf in the case of *Kaleloola Sahib* v. *Nuseerudeen Sahib*[1]. A similar question also arose in the case of *Biba Jan* v. *Kalb Husain*[2]. And in the case of *Zooleka Bibi* v. *Syed Zynul Abedin*[3], it was held by Tyabji, J: "that there is nothing in the Mahomedan Law to justify the tying up of property for the purpose of maintaining the tombs of ordinary individuals. It can only be done with respect to shrines and tombs of great religious teachers which are regarded with very considerable feeling of reverence and sanctity by various Mussulman Communities throughout the world."

But however that may be, it appears to us looking to the fourth paragraph of the will as a whole that the testator undoubtedly had a general charitable intention, and that consequently even if the third bequest in favour of the Fattiah dinner should fail, the property would have to be devoted to religious or charitable purposes according to the *cypres* doctrine. The property actually bequeathed in Wakf was the "one house and a moiety of another house in Bombay." It is not possible in this suit to decide exactly how that property should be devoted to religious or charitable purposes. That would be a matter for consideration and decision in separate proceedings properly instituted by those interested in the religious or charitable purposes on the principles stated in the Tagore Law Lectures for 1907, by Abdur Rahim, at p. 305:—"If, however, the specified objects be limited or happen to fail, but a general charitable intention is to be inferred from the words of the grant, the Wakf will be good and the income or profit will be devoted for the benefit of the poor, and in some cases, to objects as near to the objects which failed as possible. This rule is analogous to the doctrine of *cypres* of the English law." All that can be decided in this suit is that the "one house and moiety of another house in Bombay" were validly bequeathed in Wakf.

(1) (1894) 18 Mad. 201. (2) (1908) 31 All. 136.
(3) (1904) 6 Bom. L. R. 1058.

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That being so, the only question remaining to be decided is whether upon an administration of the whole estate there would remain any balance out of the one-third alone available for bequests to satisfy the legacy in suit after deducting the value of the two houses validly bequeathed in priority in Wakf. For this purpose it will be necessary to remand the case to the original Court for a complete administration of the estate.

We, therefore, reverse the decision of the lower Court upon these preliminary issues and remand the case for a complete administration of the estate, with reference to the foregoing observations and Order XX, rule 13 of the first Schedule of the Civil Procedure Code.

Costs to be costs in the administration.

Decree reversed.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Hayward.

1911. *August* 7.

TANAJI DAGDE (ORIGINAL PLAINTIFF), APPELLANT, v. SHANKAR SAKHARAM (ORIGINAL DEFENDANT), RESPONDENT.*

Civil Procedure Code (Act V of 1908), Order XLI, Rule 11—Appeal—Summary dismissal—Judgment not necessary—Lower appellate Court.

In dismissing an appeal under Order XLI, Rule 11, of the Civil Procedure Code (Act V of 1908), it is not obligatory upon the lower appellate Court to write a judgment.

SECOND appeal from the decision of H. S. Phadnis, District Judge of Khandesh, confirming the decree passed by K. G. Tilak, Subordinate Judge at Yaval.

The plaintiff sued to recover possession of certain land from the defendant, who contended that he was the real owner of the land and that the plaintiff was only a *benamidar* of his. The Subordinate Judge upheld the contention and dismissed

* Second Appeal No. 470 of 1910.