1936 *Present :* **Macdonell C.J., Dalton S.P.J., Poyser and Koch JJ.**

ZAINABU NATCHIA *v.* USUF MOHAMADU.

320—D. C. Puttalam, 4,432 & 22—D. C. Puttalam, 4,468.

Muslim law—Deed of transfer on marriage—Property transferred as and for kaikuli—Absolute transfer to husband—No trust in favour of the wife—Meaning of kaikuli.

Where a deed of transfer, reciting an intended marriage between Muslims and the intention of the transferor (the parent) to give *kaikuli*, prior to marriage, according to the Muslim religion payable to the bridegroom at an agreed sum, proceeds, as and for a transfer of this sum, to grant, sell, set over, and deliver immovable property to the bridegroom, his heirs, executors, &c.; and adds that the said property together with all the right, title, and interest, the bridegroom and his heirs, executors, &c., shall possess and enjoy for ever,—

Held, that the transfer gave full dominium in the property to the bridegroom unaffected by any trust in favour of the bride.

Semble, in the Muslim law *kaikuli* is a sum of money given by the parents of the bride to the intended husband, which the husband possesses and owns but which he has to pay over to the wife, if she demands it, or to her heirs, on death.

Meerasaibu v. Meerasaibu (*21 N. L. R. 221*) and *Pathumma v. Cassim* (*2 C. W. R. 263*) referred to.

[1] *(1887) 8 S. C. C. 99.*

THESE were two appeals from the District Court of Puttalam referred by Akbar and Koch JJ. to a Bench of four Judges. The question was whether a Muslim deed of transfer of property given at marriage to the bridegroom created a trust in favour of the bride.

In the first case the parents of the bride, the plaintiff, executed on July 11, 1925, a deed styled as follows: "No. 6,077—Kaikuli Transfer" the relevant parts of which are given in the headnote. The deed was accepted by the bridegroom, the first defendant. Thereafter the first defendant mortgaged the property with the second and third defendants. The second defendant put the bond in suit, obtained decree, and with the permission of Court purchased the land. The plaintiff now sued for a declaration that she is entitled as beneficial owner to the property conveyed by deed No. 6,077 and to a declaration that the deed created a trust in her favour.

In the second case the parents of the bride (the plaintiff), executed a deed in similar terms in favour of the bridegroom the first defendant. There was no acceptance but the first defendant entered into possession of the property. Thereafter he mortgaged the property with the third defendant who put the bond in suit and advertised the property for sale. The plaintiff thereupon brought this action asking that she be declared entitled to the property as beneficial owner and for a declaration that the deed created a trust in her favour.

The learned District Judge held that the transfer was in consideration of marriage and that although the word *kaikuli* was used in the deed no trust was created and that the husband was the absolute owner of the property.

L. A. Rajapakse (with him *Ismail* and *B. P. Peiris*), for plaintiff, appellant.—For the meaning of *kaikuli* see *Vand. 162.* It must be restored to the wife's heirs or the wife if demanded. It constitutes a fund for her own exclusive benefit and is a first charge on the husband's property. Husband is only trustee of property for the wife. The term is incorrectly used in *Pathuma v. Cassim*[1], but it was held that there was a trust. See also *Pathuma v. Idroos*[2]. The term *kaikuli* is a technical term with a well-recognized meaning. In this case there is an express declaration made by the transferee that it is held in trust. The intention of the transferor is to be gathered by a reference to the terms. The document must be read as a whole. The property is not given absolutely. The occasion for making the transfer is stated. *Kaikuli* is a term understood by both grantor and grantee. The recital in the deed is that it is *kaikuli.* It is accepted on the basis that it is *kaikuli.* Normally the operative part governs a deed. It is only if there is ambiguity that you refer to the recitals. The intention was to vest the full legal estate. The trial Judge relies on *Meera Saibo v. Meera Saibo*[3]. In that case the property was given on account of the marriage, not necessarily as *kaikuli.* Also the transfer was made after the marriage. *Kaikuli* is given before marriage. The use of the words "heirs, executors, &c." does not exclude

[1] *21 N.L.R. 221*

[2] *31 N. L. R. 230.*

[3] *2 C. W. R. 263.*

the beneficial interest being assigned to another. (*Wace v. Mallard*[1], *Shovelton v. Shovelton*[2], *Wright v. Wilkin*[3].) Where there is no express trust a declaration by the transferee that the property was in trust is sufficient to constitute a trust. (*Gardener v. Rowe*[4].) There is a declaration made by the first defendant in his answer.

H. V. Perera (with him *F. A. Tisseverasinghe* and *G. E. Chitty*), for second and third respondents.—The term *kaikuli* is not found in the text books. It means a bribe. The word suggests something given as an inducement to marry. *Kaikuli* is for the husband's own use. That is the evidence of custom in the case. The reported cases have confused *kaikuli* with *maggar* and applied the same principles to both. *Maggar* becomes payable on the consummation of the marriage. The meaning of *kaikuli* is irrelevant to the case. The only issue is whether the deed creates a trust. No other trust is alleged. Sections 84 and 94 of the Trusts Ordinance do not apply to this case. The appellant relies on the use of the word *kaikuli* in the recitals. It is not used in the operative part. This gives without limitation the full legal and beneficial rights. Whatever the word *kaikuli* may mean in the recitals the operative part must govern the deed.

Rajapakse, in reply.

Case No. 22—D. C. Puttalam, 4,468.

N. Nadarajah (with him *E. B. Wikremanayake*), for plaintiff, appellant.

H. V. Perera (with him *F. A. Tisseverasinghe* and *Chitty*), for defendant, respondent.

Cur. adv. vult.

March 11, 1936. MACDONELL C.J.—

The point raised in these appeals was the same in each and was sent by Akbar and Koch JJ. to a Bench of four Judges for decision, namely, whether the deed in each case created a trust in favour of the plaintiff. The appeals raise a question as to the meaning of *kaikuli* among the Muslims of Ceylon.

In the first case, No. 320/33, the parents of the bride, the plaintiff, wishing to give her in marriage to a Muslim, executed on July 11, 1925, a deed headed as follows: "No. 6,077—Kaikuli Transfer", which proceeds to say: "Know All Men by these Presents that I (father of the bride) of Puttalam having agreed to give my daughter (plaintiff) to (first defendant) bachelor as early as possible, and the *kaikuli* prior to marriage according to the rights of our Muhammadan religion payable to the bridegroom having been agreed upon by me at Rs. 1,000, as and for a transfer of this sum of Rs. 1,000 I do hereby grant, sell, set over and deliver the property appearing below unto the said bridegroom (first defendant) and to his heirs, attorneys and assigns" Then follows a description of the property transferred, and the deed goes on "that the said property and all things belonging thereto together with my right,

[1] (*1852*) *21 L. J. Ch. 355.*
[2] *32 Beavan 143.*
[3] *2 B. & S, 232.*
[4] *2 Simon & Stewart 346.*

title, and interest in respect of the same the bridegroom (first defendant) and his heirs, attorneys and assigns shall from date hereof possess and enjoy for ever". There follows the usual recital that the property has not been encumbered and a covenant for further assurance, and then follows the acceptance clause, "and I the aforementioned bridegroom (first defendant) have with full consent accepted the aforesaid property as for the *kaikuli* Rs. 1,000 which this person agreed to give me".

The deed was notarially executed and the marriage took place. Thereafter the first defendant mortgaged the property conveyed by deed No. 6,077 to the second and third defendants, and the second defendant put the bond in suit, obtained a decree, and, with the permission of the Court, purchased the land at the sale consequent on the decree. The plaintiff, the wife, now sues for a declaration that she is entitled as beneficial owner to the property conveyed by deed No. 6,077, and to a declaration that that deed creates a trust in favour of her, the plaintiff, and that the said land is held by the first defendant upon the said deed for the use and benefit of the plaintiff. When this action came on for trial issues were framed but no evidence was led, and the plaintiff's claim was dismissed in a judgment in which the following is an important passage: "In all the cases where the wife's claim to *kaikuli* has been allowed, the *kaikuli* claim was money and in such cases proof was always procurable to prove that the money was 'in charge of' the bridegroom 'in trust' for the bride who had the right to demand it at any time. Following the case of *Meera Saibo v. Meera Saibo*[1], I would hold that the deed No. 6,077 was a transfer to the first defendant in consideration of marriage and that although the word *kaikuli* was used in the deed no trust was constituted either express or implied . . . . A very reading of the deed seems to indicate that the parties to the deed did not understand *kaikuli* to be anything other than the absolute property of the husband".

In the second case, S. C. No. 22/34—D. C. Puttalam, No. 4,468, the parents of the bride, the plaintiff, all being Muslims, intending to give her in marriage to the first defendant, also a Muslim, executed on January 13, 1920, the following deed, P 1, which is headed as follows: "Transfer Deed of Kaikuli, No. 4,524, Amount Rs. 2,750" and then proceeds to say as follows: "Know All Men by these Presents that as we (the parents) of Puttalam town have agreed to give our daughter (the plaintiff) in marriage to (first defendant) as soon as possible, we have agreed to pay as *kaikuli* to the bridegroom (first defendant) by the said marriage, according to the rights of our Muhammadan religion, the sum of Rs. 2,750. For this sum of Rs. 2,750 we do hereby set over and assign as transfer the under-mentioned property unto the said bridegroom (first defendant), his heirs, executors, administrators and assigns". There follows a description and extent of the property referred to, and it then proceeds as follows: "We do hereby make known that the (first defendant) his heirs, executors, administrators and assigns shall from the time of the said marriage possess the aforesaid property and all things belonging, connected, used or enjoyed thereto together with all our right, title and interest therein, that the said property has not been encumbered or

[1] *2 C. W. R. 263.*

alienated in any way, that it is my own and that if any dispute or irregularity arise regarding this we shall settle the same". The deed was notarially executed. It contains, as will be seen, no acceptance clause but it is common cause that the bridegroom went into possession in accordance with the deed and that the marriage duly took place. Thereafter the bridegroom, first defendant, mortgaged the property conveyed to him by deed No. 4,524 to the third defendant for money lent to him by the third defendant, taking (it would appear) at the same time a guarantee from second defendant of his debt to the third defendant. The third defendant mortgagee put his bond in suit, obtained judgment threon and advertised the property for sale. The plaintiff wife thereupon brought this action on February 27, 1933, asking that she might be declared entitled to the property as beneficial owner and for a declaration that the deed No. 4,524, quoted from above, created a trust in favour of her the plaintiff and that the land was held by the first defendant upon the said deed for the use and benefit of the plaintiff. When the case came on for trial the plaintiff called no evidence and the second defendant called the local Marikar who proved that, at any rate at Puttalam, *kaikuli* is always looked upon as the absolute property of the bridegroom and that the wife has no claim to it. That, he said, was the acknowledged custom at Puttalam, and he went on to say that even in cases of divorce the *kaikuli* is never demanded by the bride or her parents and is never repaid by the husband. He adds, "What is demanded by the wife and insisted on by custom is that *maggar* which the husband has got to pay to the wife. The *maggar* which is promised by the husband to the wife depends on the *kaikuli* given to him, the *maggar* being always double the *kaikuli*. The reason is that in case the wife is discarded she kept back her *maggar* as a penalty . . . . *Kaikuli* is not necessary for a marriage; *maggar* is essential. Without *maggar* there cannot be any marriage. What I have stated above is the universal custom in Puttalam. *Kaikuli* is not mentioned in our religious books; it is regulated by custom only. I have not heard of any case of *kaikuli* being considered property of the bride or held in trust for her by the bridegroom. There is no such custom. Wherever there is *kaikuli* the *maggar* is always double. When there is no *kaikuli* the *maggar* may be anything according to the means of the parties". The Marikar does not seem to have been cross-examined on this opinion of his as to local custom. The learned Judge who had already decided the earlier case No. 320/33 D. C. Puttalam, No. 4,432, gave a judgment to the same purport in this case, basing himself on the *Meera Saibo case in 2 C. W. R. 263*; he also accepted the evidence of the Marikar quoted from above. He accordingly dismissed the plaintiff's action.

It is from the two decisions of the same learned Judge to the same effect that the present appeals were brought, and it will be seen from the above recital of the facts that the facts are substantially the same in each case and that the trial of the two cases only differs in that there was evidence of local custom as to *kaikuli* in the second case but no such evidence in the first one.

The argument for the appellant was this. *Kaikuli* is given by the bride's parents to the bridegroom to be held by him in trust for the bride. The mortgagee in each case is affected with knowledge of the *kaikuli* deed

through which alone the bridegroom came to be the owner of the land mortgaged, and as each deed describes itself as a *kaikuli* deed the mortgagee took a bond with full knowledge that he was taking it over *kaikuli* property, that is property impressed with a trust, and that therefore he must hold that property in trust for the plaintiff, the wife. This argument necessitates an examination of the authorities on *kaikuli.*

It is a legal conception unknown to the ordinary Muhammadan law and no mention of it is to be found in such recognized authorities as *Ameer Ali* or *Tyabji,* and it seems to be a feature of Muslim marriages known only in Ceylon. *Kaikuli,* we are told, is a Tamil word and in *Winslow's Tamil Dictionary* it is translated (1) " a bribe ", and (2) " among Moormen money from the father-in-law and mother-in-law to the bridegroom ". It is therefore a word which doubtless has a local significance in Ceylon (probably on the Malabar Coast also), but is not a term of art beyond what decided cases have said to be its meaning. It is referred to in a case in Marshall but examination of that case shows that it really decided nothing on the point. The case which does go into it at greatest length is one reported in *Vanderstraaten at page 162, D. C. Colombo, 3107,* decided in 1871. The report begins by quoting from the judgment in the Court below as follows: "The point reserved for consideration was whether after the dissolution of a Muhammadan marriage by the death of the wife, the surviving husband is bound to account to her heirs for money which formed the 'Kaicooly' gifted by her father as dower at the time of the marriage . . . . On the marriage of Muhammadans it is usual for the bride's father to contribute or to stipulate for payment of a certain sum which is called the 'Kaicooly', while the bridegroom contributes or stipulates for a certain other sum called the 'Magger'. The aggregate amount, although it remains in the hands of the husband and under his control and management, only does so, until it is demanded from him by the wife, and it forms a settlement intended exclusively for her sole personal benefit, independent of her husband and children and all others. It is payable to her heirs at her death if she has not previously received it, and forms a first charge on the husband's property. It is also payable to her on divorce, but not only so, it has been decided yesterday after careful examination of the authorities it may be demanded by her at any time, even during the subsistence of the marriage . . . . . It follows from all this that although the dower may be permitted to remain in the husband's custody during the pleasure of the wife, it is only as a temporary depositee or trustee of her private and separate property, and that if she has not demanded or received it from him, or expressly disposed or authorized the disposal of it during her life, it passes to her heirs, and even seems to form a preferent debt on the husband's property unless she has without case deserted him ". The report then simply says that in appeal this judgment was affirmed. It is said to have been a judgment of the whole Court which at that time consisted of three Judges only and it is perfectly clear that by "*kaikuli*" was meant a sum of money. The order of the Court below was that a certain sum was to be appropriated to the deceased wife's heirs as *kaikuli* and another sum of money as *maggar.* There is nothing in the report suggesting that *kaikuli* could be land.

Another case cited was that reported in 1877 (*Ramanathan 65*), where the Supreme Court held that the effect of the case in *Vanderstraaten* was that it only establishes the right of a Muhammadan wife to preference in respect of her *maggar* and *kaikuly* upon the unencumbered effects of her husband.

The next case to be mentioned is that of *Meera Saibo v. Meera Saibo* (*supra*) decided in 1916. This was a case where the surviving husband claimed as against the intestate heirs, *i.e.*, the parents, a halfshare of certain lands given by the parents as dowry after the marriage to the wife who had died intestate and childless. The material parts of the dowry deed are as follows: "We (the defendants) on account of the marriage that has taken place between (plaintiff) and (the wife) and for the sum of Rs. 750 *kaikuli* or dowry money agreed to be given to (the plaintiff husband) and for dowry, do hereby give, grant and set over to them both the property herein described as dowry". (The two lands were then described, and the deed proceeds) "Out of the property thus described the first property for the *kaikuli* money of the plaintiff husband and the second property for their dowry are given as dowry and so they shall this day take charge of them and they and their heirs, executors and administrators shall have the full right for ever freely to possess them." The judgment of the Court was delivered by de Sampayo J. who points out that the deed was drawn by a Tamil Notary and that he did not, for a Notary, quite appreciate the significance of the words he was using. He goes on to say, "The word *kaikuli* has a special meaning in Muhammadan law but neither the Notary nor the parties were aware of it, and it certainly seems to me that the word has been used in a sense quite different from its ordinary signification. Now *kaikuli*, properly speaking, is a marriage gift made to the bride by her parents and is handed to and remains in the charge of the husband during the subsistence of the marriage and may be claimed from him by the wife or her heirs under the same circumstances as *maggar* which is contributed by the husband himself". He refers to the case in *Vanderstraaten at page 162* and then proceeds, "Kaikuli undoubtedly is a gift to the husband and 'forms a settlement intended exclusively for her own personal benefit independent of her children and all others' (*Vanderstraaten 162*). The husband has only the control and management of the subject of the gift until it is demanded by the wife or her heirs". He then proceeds to say that the deed under discussion seems to show ignorance of the proper meaning of the terms used. He continues, "I think that the only reasonable conclusion to draw from the language used is that a gift to the husband himself had been promised at the marriage. This kind of marriage gift or 'dowry' to the husband on marriage is common to most communities in Ceylon. It is the price paid to the man for marrying the donor's daughter. That this is so in the present instance is made more clear by what follows in the deed itself, for it distinguishes the 'dowry' meant for both husband and wife from the *kaikuli* meant for the husband alone, inasmuch as it expressly states that the first land is 'for the *kaikuli* money of the husband' and the second land for the 'dowry' of both . . . . Moreover, as the learned District Judge observes, the reference to 'their heirs, executors and administrators' negatives the idea that the gift, so far as the husband was concerned, was

an impersonal one, if the point raised by the defendants may be so put, or was only for a temporary purpose. I accordingly think that, though the word *kaikuli* was used in the deed, it is so used incorrectly, and that the plaintiff was in fact intended to be an actual beneficiary to the extent of half the property gifted by the deceased". The learned Judge then goes on to discuss another point that had been raised, namely, could a gift to two persons be under any circumstances construed as a grant to one of them, and decides that the provisions of Ordinance No. 7 of 1840 were decisive that it could not. He then goes on to ask, must the husband be considered a trustee of the half interest in the land which he claimed in the case? He proceeds again, "We are of course familiar with resulting trusts which arise from circumstances of fraud and which in a proper case will be recognized by the Court, but this is not a case of that kind. The rule of Muhammadan law stated in the text books and in the judicial decisions, to the effect that *kaikuli* may be re-claimed from the husband, is not of any assistance in the present case. *Kaikuli*, as we know, generally consists of money. The very definition of the term given in *Vanderstraaten* (at page 162) describes it as a sum of money and I believe that in the *kadutams* or marriage agreements in vogue among the local Muhammadans the amount is expressed in the denomination peculiar to them as so many 'kalanjees of gold'. When *kaikuli* is in the shape of money, the matter of reclaiming it from the husband involves no legal difficulty. But when it assumes the form of immovable property conveyed to the husband on a duly executed notarial instrument, the law appears to me to step in and to present a different aspect". He later refers to the case of *Packeer Bawa v. Hassen Lebbe*[1], which he says, "is a still stronger case because there the lands were given 'in dower' on the occasion of the marriage itself. The Court said that the word 'dowry' was not conclusive as to the character of the gift, and Hutchinson C.J. observed, 'it is styled a 'dowry deed', but 'dowry' is not always among Muhammadans any more than among Christians given either to the wife alone or to the husband alone or to them jointly. There is no law to prevent the donor from making provision in a dowry deed for the husband and children as well as for the wife". After this quotation from the case at *4 A. C. R. 61*, de Sampayo J. proceeds, "These remarks apply with great force to the present case, for notwithstanding the use of the words 'kaikuli' and 'dowry' in the deed under consideration it is very plain that the donor intended to make and did in fact make provision for the husband as well as for the wife. The question will always be one of construction of a particular deed, and I should like to add that, in view of the Ordinance 7 of 1840, which would prevent a person from claiming the whole land where the deed in fact gives him only a share and from claiming anything where nothing is given to him, the rule of construction should be stringent and the supposed intention of the parties should not be made to over-ride the ordinary effect of the deed".

Two of the other cases cited to us may be mentioned, firstly, *Pathumma v. Cassim*[2]. This was again the judgment of de Sampayo J., where the plaintiff wife sued the defendant husband for the sum of Rs. 150 as *maggar* and for a sum of Rs. 150 given by her parents to the defendant

[1] *4 A. C. R. 61.*

[2] *21 N. L. R. 221.*

husband for *kaikuli.* The learned Judge says, "Dowry or *kaikuli* is held in trust by the husband for the wife and cannot be withheld on the ground that it has been spent for the sustenance of the marriage". It may be that the phrase "dowry or *kaikuli*" is lacking in precision in that the two terms are not synonymous, *kaikuli* being rather a species of the genus dowry with legal incidents peculiar to itself, but the passage quoted, if applied to *kaikuli,* is in accordance with the earlier authorities. Another case cited was *Pathumma v. Idroos*[1], where my brother Dalton refers to the case in *21 N. L. R. 221* and to the possible confusion in the words used in that judgment, and then proceeds, "It is clear that *maggar* is a payment by the husband to the wife on the marriage, which he calls dowry money and which remains in the husband's hands, while the *kaikuli,* which he calls dower, is a payment by the parents of the bride *to* the husband". This, he says, is held in trust by the husband for the wife, both *maggar* and *kaikuli* being recoverable by the wife in the eventualities set out.

The gist of these cases seems to be this. *Kaikuli* is a sum of money given by the parents of the bride to the husband, or intended husband, which the husband possesses and owns but which he has to pay over to the wife, if she demands it, or to her heirs, if she is dead. He is, if we wish to put it so, a trustee of the *kaikuli* for his wife or for her heirs.

Now it is to be noticed that *kaikuli* seems to mean money and not anything else. The original way of expressing it seems to have been to give as and for *kaikuli* so many "kalanjees of gold", some obsolete currency but clearly a payment of money. I do not think any case was cited to us which showed that if land was given to the bridegroom as representing *kaikuli,* that land could be followed into the hands of a third party if the husband alienated it. But it will be objected, decided cases have established that the husband holding this *kaikuli* is trustee for his wife or her heirs, and that in the present case the mortgagee and any purchaser on a mortgage decree, had full knowledge of the fact that the property mortgaged or purchased was a *kaikuli* property and therefore subject to a trust. The mortgagee or purchaser would take then with full knowledge of the trust and could not in conscience be allowed to hold it as against the wife or her heirs cestuique trust.

This then brings us to the question as to whether the deeds in these cases or either of them do constitute a trust. In case S. C. No. 320/33—D. C. Puttalam, No. 4,432, the deed P. 1. recites an intending marriage and the intention to give "the *kaikuli* prior to marriage, according to our Muhammadan religion, payable to the bridegroom agreed upon by me at Rs. 1,000"; the recital seems clear enough. The deed goes on, "As and for a transfer of this sum of Rs. 1,000, I do hereby grant, sell, set over, and deliver the property appearing below unto the said (bridegroom) and to his heirs, attorneys and assigns", and the deed then describes the property referred to and adds, "that the said property and all things belonging thereto together with my right, title and interest in respect of the same, the bridegroom and his heirs, attorneys and assigns shall from date hereof possess and enjoy for ever"; a species of repetition of the *habendum* in rather fuller language but agreeing entirely with the first

[1] *31 N. L. R. 230.*

and earlier *habendum*. This is the operative part and again it seems perfectly clear. It is a transfer complete and unqualified of the full dominium of the property described later in the deed. If the recitals show an intention to create a trust (let that be conceded), and the operative part is a clear and unqualified transfer of the dominium, and it can hardly be disputed that it is, then it is necessary to apply the well understood rules on this point ; *per* Lord Esher M.R., in *Ex parte Dawes*[1], "Now there are three rules applicable to the construction of such a question. If the recitals are clear and the operative part is ambiguous, the recitals govern the construction. If the recitals are ambiguous and the operative part is clear, the operative part must prevail. If both the recitals and the operative part are clear but they are inconsistent with each other, the operative part is to be preferred". Now conceding that the recitals do clearly show the intention to create a trust, then since the operative part equally clearly confers an unqualified dominium, they are, in the words of the judgment just cited, inconsistent with each other and the operative part must prevail.

In the other case, S. C. No. 22/34 D. C. Puttalam, No. 4,463, the deed P. 1. therein contains a recital of an agreement to give a daughter in marriage and a further agreement "to pay as *kaikuli* to the bridegroom . . . . by the said marriage, according to the rights of our Muhammadan religion, the sum of Rs. 2,750"—again the recital is clear. Then follows the operative part, "For this sum of Rs. 2,750 we do hereby set over and assign as transfer the under-mentioned property unto the said bridegroom, his heirs, executors, administrators and assigns", and, as in the other deed, so this one, proceeds after describing the property to make a species of second *habendum,* as follows, "We do hereby make known that the said bridegroom, his heirs, executors, administrators, and assigns from the time of the said marriage possess the aforesaid property and all things belonging, connected, used, or enjoyed thereto, together with all our right, title, and interest therein". The two *habendums,* if one can call them so, agree entirely, though, as in the former deed, perhaps the second *habendum* may be considered as emphasizing the rights which the bridegroom took under the deed.

I doubt it can be said that in either of these deeds the operative part is in the least degree ambiguous, and if that is so, the operative part must prevail, since in each it is inconsistent with the recital. In each of the two cases, then, the bridegroom took an unqualified dominium in the immovable property conveyed, and the persons who dealt with him for that property—mortgagee or purchaser under the mortgage decree—did so unaffected by any trust.

Suppose, however, it be argued that in each of these deeds the operative part is not unambiguous, since each deed after reciting the intention to give or pay a sum of money as *kaikuli,* goes on to say, that in S. C. No. 320/33, "as and for a transfer of this sum of Rs. 1,000 I do hereby grant" and that in S. C. No. 22/34, "for this sum of Rs. 2,750 we do hereby set over and assign", and that each deed by the phrases "for a transfer of this sum", "for this sum", incorporates into its operative part the notion of *kaikuli*—stamping the land granted with the character of

[1] *17 Q. B. D. at p. 286.*

kaikuli if one may so put it—I would answer that I doubt you can read into the words "for this sum" any such meaning so as to make the operative part ambiguous. Each deed promises the bridegroom a sum of money as *kaikuli,* which sum of money if given in money would (it may be conceded) be impressed with a trust, and then each deed goes on to give the bridegroom not a sum of money but a piece of land in the fullest possible *dominium* ; the grant of full *dominium* in the operative part contradicts any notion of trust that there may be in the recital. In effect, each deed seems to say, we promise a sum of money under a trust (*kaikuli*) but we actually give a piece of land out and out unfettered by a trust. The words "as and for a transfer of this sum", "for this sum" are best interpreted as in the nature of a copula, connecting words linking grammatically the recital which has gone before to the operative part that follows ; I cannot see that they qualify that operative part so as to make it ambiguous. If those words are simply, as I read them to be, a grammatical connection, then they do not qualify or render ambiguous the operative part which in each deed says in as plain language as can be wished that the donee is to have full dominium of the land, and, as if that were not enough, proceeds in each deed to repeat that grant in what I have called a species of second *habendum.*

For the appellants it was pressed upon us that "where portions of the deed are inconsistent, we ought to give effect to that part which carries out the intention of the parties"—an argument which seems to beg the whole question. Certain cases were however cited to us. One of these was *Walker v. Giles*[1]. The facts there were that certain shareholders in a building society had paid up a portion of the calls on their shares and as security for the balance they conveyed certain lands of theirs to trustees, upon trust to permit the shareholders so conveying to receive the rents until default in payment of their contributions, and with power to the trustees to appoint a collector of the rents if the shareholders did make default in their contributions, also a power of sale in that event. But the deed also went on to set out an agreement by which the shareholders agreed to become tenants of the trustees of the lands conveyed under a named yearly rental. In effect, the deed contained two operative clauses at variance with each other, and the Court before which it came for interpretation refused to give effect to the second operative part, the agreement to become tenants of the trustees, as inconsistent with the general scope of the deed—really, as being inconsistent with the earlier operative part. *Walker v. Giles* (*supra*) does not seem to me to support the argument put to us. Another case cited to us was *Vasonji Morarji v. Chanda Bibi*[2], in which the Privy Council laid stress on the necessity of "putting a liberal construction upon deeds executed by natives of India". In that case, the recitals in the deed were as clear as possible to the effect that there were debts and that the only way to discharge them was for the widow to sell a portion of the property of her deceased husband. The operative part, it was argued, only conveyed the widow's life interest and not the *dominium* but the Privy Council held—see page 379—that there were passages in the operative part which could be construed as referring to a conveyance of the full *dominium* and not of the widows' life

[1] *6 C. B. 662 ; 136 E. R. 1407.*

[2] *37 Allahabad 369.*

interest merely. As interpreted by the Privy Council the deed was one where the recitals prevailed because they were clear while the operative part was not clear. I do not think this case helps the appellants.

It will be remembered that in the second of the two cases S. C. No. 22/34 —D. C. Puttalam, No. 4,468, expert evidence was taken to the effect that according to the local custom of Puttalam, and apparently of the neighbourhood also, *kaikuli* is looked upon as the natural property of the husband, and the wife has no claim thereto. Only one witness deposed to this. It is perfectly true he was not cross-examined for the plaintiff but if a decision was to be based on his evidence it might have been as well that the Court asked him questions and also that the Court should have insisted on further evidence being called. It is not necessary, as it seems to me, for the purpose of the appeal in S. C. No. 22/34, to decide on the effect of this evidence. I think the appeal in which the evidence was given, as also the other one, can be determined on other grounds, namely, those given above. For these reasons I am of opinion that these appeals must be dismissed with costs.

DALTON S.P.J.—I agree.

POYSER J.—I agree.

KOCH J.—I agree.

Appeal dismissed.