1931

Present: **Lyall Grant J. and Maartensz A.J.**

ABDUL CADER *v.* UDUMA LEBBE.

380—D. C. Kalutara, 14,746.

Fidei commissum—*Deed of gift to two brothers—Equal undivided shares—Property to vest in their lawful children on the death of both—Death of one—Rights of heirs.*

Where husband and wife gifted a property, subject to a *fidei commissum* to their two sons in equal undivided shares and, where the deed of gift provided that on the death of both of them, the property should vest in their lawful children in undivided shares,—

Held, that on the death of a donee, without issue, his half-share passed to his heirs, subject to the right of the surviving donee to possess it during his lifetime.

APPEAL from a judgment of the District Judge of Kalutara.

N. E. Weerasooriya (with him *Rajapakse*), for defendant, appellant.

Tisseverasinghe, for plaintiff, respondent.

June 29, 1931. MAARTENSZ A.J.—

This was an action for declaration of title to a land called Delgahawatta.

The land admittedly belonged to one S. L. M. Abdul Cader who, with his wife Patta Muttu Natchia, gifted it to their two sons, the plaintiff and Abdul Cader Mohammadu Haniffa, by deed No. 1,230 dated October 20, 1906 (P1) subject to certain conditions and reserving a life interest to the donors. Both donors are dead. Abdul Cader died on November 15, 1918, the date of his wife's death was not proved.

Mohammadu Haniffa died on June 8, 1919, leaving a widow, who died on December 9, 1927.

The interest in dispute is the share gifted to Mohammadu Haniffa. The plaintiff claims it under a *fidei commissum* created by the deed of gift No. 1,230, the defendants claim it as heirs of Mohammadu Haniffa's widow.

The issues decided by the District Judge were—

(1) Is the deed of gift (P1) void for want of acceptance?

(2) Did the deed create a single *fidei commissum* in respect of the property conveyed?

These issues were answered in favour of the plaintiff and he was declared entitled to the entirety of the land in dispute.

The defendants appeal from this decree.

In appeal, appellants' counsel sought to establish that the deed of gift, the parties to which were Muslims, was void because there was no evidence of delivery of possession to the donees.

I am of opinion that it is not open to the appellants to raise this question as it cannot be brought within the purview of any issues tried in the District Court. As observed by the District Judge the fact that the parties to the deed were Muslims appears to have been overlooked at the trial. The District Judge discussed the question of possession and decided in favour of the plaintiff, but it was a question outside the issues tried by him.

The questions for decision in this appeal, therefore, are:

(1) Is the deed of gift (P1) void for want of acceptance?

(2) Did the deed create a valid *fidei commissum*?

(3) Did the deed create a single *fidei commissum*?

The deed of gift was accepted on behalf of the donees, who were minors, by their brother-in-law, and I am of opinion that there was a sufficient acceptance of the deed to render the donation valid.

The contention that the deed did not create a valid *fidei commissum* is, in my opinion, an unarguable one.

The operative clause is expressed as follows:

"We the said Siddi Lebbe Marikkar Sehabdul Cader and Uduma Lebbe Marikkar Pathumma Natchia of Horetuduwa aforesaid, husband and wife, respectively, having valued the said premises at Rs. 10,000 of Ceylon currency, in consideration of the natural love and affection which we bear towards our two sons Sehabdul Cader Mohamadu Aniffa and Sehabdul Cader Mohamadu Majidu, both of Horetuduwa aforesaid, and for diverse other important causes us hereunto moving, do hereby convey and transfer the said premises to our said two sons subject to the following conditions."

The relevant condition which follows runs thus:—

"We the said two donors do hereby direct that the said two donees shall not be entitled to sell, gift, mortgage, lease or in any manner alienate the whole of the premises hereby donated."

The persons in whose favour the prohibition was imposed are designated in the last clause of the deed which is as follows:

> " And the land hereby donated together with all trees, plantations and everything else belonging thereto shall vest from this date in the said donees, namely, Sehabdul Cader Mohamadu Haniffa and Sehabdul Cader Mohamadu Majidu in equal undivided shares, and they shall be entitled to peacefully possess the same subject to the life interest and the conditions above recited, and after the demise of both the said donees Sehabdul Cader Mohamadu Haniffa and Sehabdul Cader Mohamadu Majidu, everything hereby donated shall vest in their lawful children in undivided shares, and they (the said children) are hereby granted full authority to peacefully possess and to dispose of the same according to their free will."

There is nothing in the clauses quoted to negative the intention of the donors to burden the property gifted with a *fidei commissum* in favour of the children of the donees.

Appellants' counsel contended that the intention was negatived in the following clause:

> " Declaring therefore, that not only we the said two donors have not heretofore done or committed any acts whereby this donation may be impeached or encumbered but we shall not raise or cause to be raised any dispute with regard to this donation we have hereby conveyed all our right, title, and authority in and to the said property hereby donated unto the said two donees and their lawful heirs, executors, administrators, and assigns."

I am quite unable to agree to this contention. The clause relied on is neither an operative clause nor a habendum. It is, in my opinion, merely a declaration by the donors that they have not done anything whereby the deed of gift may be impeached and that they will not hereafter dispute it.

The particular words relied on are the words " we have hereby conveyed . . . . unto the said two donees and their lawful heirs, executors, administrators, and assigns " is merely descriptive of the deed and should, in my opinion, read " whereby we have conveyed . . . . . &c. "

I accordingly hold that deed No. 1,230 contained a valid *fidei commissum*.

The question whether the deed contained one *fidei commissum* or two is a more difficult question. Little assistance can be gained from the cases in the books for none of the instruments construed in them are in precisely the same terms as the deed in question.

It was held in the case of *Carlina v. Juanis*[1] that the intention of the donor must be determined in each case.

[1] *(1924) 26 N. L. R. 129.*

In the case of *Perera v. Silva*[1] and *Carron v. Manuel*,[2] in which the same will was construed, the testator and testatrix had, by their joint will, devised one-half of their property to the sisters of the husband, namely, Lucia and Maria and the other half to the sisters of the wife Helena and Phillippe subject to a *fidei commissum* in favour of their lawful issue who were to take without any restriction.

Maria died without issue, and it was held that her share devolved on her husband. The *ratio decidendi* was that the testator and the testatrix clearly intended to benefit the lawful issue of each institute as well as the institutes themselves and that neither expressly nor by implication did the will indicate that on the death of one of the institutes the survivors are to take by substitution.

This decision was followed in the case of *Fernando v. Rosalina Kunna.*[3] The *fidei commissa* considered in these three cases differed from the *fidei commissa* created by the instruments construed in *Vansanden v. Mack*,[4] *Tillekeratne v. Abeysekere*[5] and *Carlinahamy v. Juanis* (*supra*) in this respect. In the former cases the *fidei commissum* terminated with the institutes, in the latter it extended to the substitutes. The extension largely determined the intention of the donors in the latter cases.

The deed " P1 " is similar to the instruments considered in the first group of these cases in that the *fidei commissum* comes to an end with the substitutes. To distinguish it from these instruments reliance was placed on the fact that the children were to succeed after the death of both donors and on the words " shall vest in their children in equal shares". It was argued that the donors intended to create one *fidei commissum* because (i) the surviving donee was entitled to possess the whole till his death and (ii) the children of the donees were to take in equal shares, that is to say, *per capita* and not by representation which would have been the appropriate form of inheritance if the donors intended to create two *fidei commissa*.

On the other hand it was contended as regards the first part of the argument that the donors only intended to allow the surviving donee a right of possession until his death and as regards the second that the words relied on must be read with the preceding passage that the land should rest in the donees in equal undivided shares and, that read with this passage, it was the intention of the donors that the children of the respective donees should inherit equal shares in each undivided half vested in the respective donors.

I think the appellants' contention must prevail. The dominant clause vests each donee with an undivided half share. That being so the children of each donee will become entitled to an undivided half whether the children of each donee are equal in number or not and when one donee died without issue after, apparently the donors, the half share

[1] *(1916) 16 N. L. R. 474*
[2] *(1917) 17 N. L. R. 407.*
[3] *(1925) 27 N. L. R. 503*
[4] *(1895) 1 N. L. R. 311.*
[5] *(1897) 2 N. L. R. 313.*

belonged absolutely to his estate and passed to his heir at law, as regards title at once. Possession does not pass till after the death of the surviving donor.

I accordingly set aside the decree appealed from and declare the plaintiff entitled to an undivided half share of the land and to possession of the whole with the damages as agreed. I think each party should pay his own costs here and in the Court below.

LYALL GRANT J.—I agree.

Set aside.