1932 *Present :* **Drieberg and Akbar JJ.**

UDUMALEVVAI *et al. v.* MUSTAPHA.

174—D. C. Batticaloa, 6,989.

Fidei commissum—*Muslim donation—Construction of* fidei commissum—*Roman-Dutch law.*

Where a deed of gift by which the donor (a Muslim) donated certain property to his sons contained the following provision:—"They (*i.e.*, the donees) shall possess and enjoy as their own from this day and in case any one of them happen to die without issue the shares will have to go to all my male children."

Held, that it created a valid *fidei commissum.*

BY three deeds of gifts a Muslim donated certain immovable property to his sons, the three plaintiffs and one Mustapha, who died intestate and issueless. The sole question was whether the deed created a *fidei commissum* in favour of the plaintiffs in respect of Mustapha's share, or whether that share devolved on the latter's heirs, represented by the defendant. The learned District Judge held that the deed created a valid *fidei commissum.*

H. V. Perera, for defendant, appellant.—Conceptions of Roman-Dutch law cannot be incorporated into Muslim deeds. Muslims are governed by Muslim law but they may adopt principles of the Roman-Dutch law. The present deeds can be properly construed under the Muslim law. There is no indication that parties intended to incorporate a *fidei commissum* into the donation. This is merely a gift with an invalid condition. A bad condition in a Muslim grant is no indication that the donor intended to grant on the basis of the Roman-Dutch law. There is no need to resort to the rules of any other system of law where Muslim law suffices. Otherwise you may have a bad Muslim gift the defects of which may be cured by resorting to the Roman-Dutch law. No *fidei commissum* can be created by a Muslim deed of gift unless the donor expresses a clear intention that he is making the grant on the basis of the Roman-Dutch law, *e.g.*, by the use of the words "under the bond of *fidei commissum*". Even if you apply the Roman-Dutch law there is no *fidei commissum* in this case. The operative words of a grant must be given greater effect than the *habendum.* Where there is a complete grant which is unconditional, the imposition of a condition in the *habendum* is bad. A person cannot derogate from his own grant.

Croos Da Brera for plaintiffs, respondents.—The *fidei commissum* is valid. For centuries *fidei commissa* have formed part of the customs

and usages of the Muslims. Only the personal law of Muslims has been introduced into this Colony. The *jus accrescendi* has been applied to Muslim deeds (*20 N. L. R. 225*). Under Ordinance No. 10 of 1931 the Roman-Dutch law is declared to be applicable. The issues raised make it clear that the parties in the lower Court recognized the intention to create a *fidei commissum* but were only in dispute as to its validity. The question of the validity of the deed was raised in the answer but not in the issues. It may be therefore presumed to have been waived. The deed must be interpreted according to the usages and customs of the Muslims in Ceylon. If the deed is good according to Muslim law, the validity of the *fidei commissum* has to be judged according to Roman-Dutch law (*Weeresekere v. Peiris*[1]). No express prohibition against alienation is necessary to create a valid *fidei commissum* (*Perera v. Perera*[2]). The presence of the word "assigns" is not obnoxious (*Wijetunga v. Wijetunga*[3], *Coudert v. Don Elias*[4], and *Mirando v. Coudert*[5]).

H. V. Perera, in reply.

July 11, 1932. AKBAR J.—

By three deeds (P 1, P 2, and P 3) a donor donated immovable property to his four sons, namely, the three plaintiffs and one Mustapha, who died intestate and issueless.

The whole question is whether under these deeds Mustapha's share went to his heirs-at-law represented by the defendant or to his brothers, the plaintiffs. Under P 1, the donor "for and in consideration of the natural love and affection which I have and bear unto my children . . . . do hereby give by way of donation" the properties mentioned. The rest of the deed is to this effect "they shall possess and enjoy the said properties as their own from this day for ever and in case any one of them happen to die without issue the shares will have to go to all my male children. I do hereby give away by way of donation the above-mentioned properties to my sons, the said K. Muhamado Mustapha and K. Muhamado Utumalevvai, and their heirs, executors, administrators, and assigns. They shall possess and enjoy the said properties as their own from this day for ever". P 2 and P 3 are to the same effect, except that the second clause is worded as follows:—"These properties shall be possessed and enjoyed by them as a gift during their lifetime and in the event of any one happening to die without any issues the same shall devolve on all my male children who are alive.

By paragraph 1 of the answer the defendant pleaded that the deeds did not create a valid *fidei commissum,* and that they were invalid according to Muslim law by reason of the conditions imposed in the deeds. In spite of this plea the parties went to trial only on the issue whether these deeds created a *fidei commissum,* implying that the parties admitted that the law to be applied in the case was the Roman-Dutch

[1] *32 N. L. R. 176.*
[2] *20 N. L. R. 463.*
[3] *15 N. L. R. 493.*
[4] *17 N. L. R. 129.*
[5] *19 N. L. R. 90.*

law. Mr. Perera argued that even under the Roman-Dutch law the deed did not create a *fidei commissum*. In this he is clearly wrong, for it has been held that no words prohibiting an alienation were necessary to create a *fidei commissum* (*Perera v. Perera*[1]). The clear intention of the donor as expressed in P 1, P 2, and P 3 was that each son's share if he died issueless was to vest in his brothers. The use of the word "assigns" occurs only at the end of the deed and cannot affect the clear intention of the donor (*Mirando v. Coudert*[2], *Wijetunga v. Wijetunga*[3], *Coudert v. Don Elias*[4]. Mr. Perera's second argument was that, in spite of the issue framed, the law applicable was the Muslim law because the parties were Muslims and unless there was a clear indication that the Roman-Dutch law was to apply, the presumption was that the donor intended that the Muslim law should apply, and that as Mustapha died intestate the contingent gift over was void under the Muslim law. I cannot accede to this argument, for the intention of the donor, as admitted by Mr. Perera, is clear. If this is so, why should we say that the donor intended that only the Muslim law should govern the deeds P 1-P 3, under which his intention would be defeated. I prefer to follow the tests proposed by the Supreme Court in *Weeresekere v. Peiris,*[5] namely, that the Muslim law must be first applied to see whether the gift is "complete as a gift under the Muhammadan law before the *fidei commissum* impressed on the object of the gift can be operative" (see also *Hamid v. Nachchiya*[6]). As Dalton J. said in the latter case: "In *Weeresekere v. Peiris,* this Court held that where a gift contained a *fidei commissum,* the validity of the gift must be determined by Muslim law, although the construction of the *fidei commissum* is governed by Roman-Dutch law." If we apply these tests, the gift is valid, for there can be no question that the seizing of the estate passed at once to the donees; we then apply the second test, namely, does the deed go on to create further successive interests which would be valid under the Roman-Dutch law in accordance with the intention of the donor. The rule of interpretation under this second test must of course, be the rules under the Roman-Dutch law. If I may say so with respect, I think these tests are the only ones applicable to a case like the one now under appeal, because that portion of the Muslim law of donations in force in Ceylon and the law of *fidei commissum* under the Roman-Dutch law are both applicable to Muslims and derive their force as law from inveterate custom and use, which have been recognized by our Courts of law. One does not stand on a higher footing than the other so far as Muslims are concerned, and the only reason why the Muslim law is first applied is the reason given by the Supreme Court in *Weeresekere v. Peiris* (*ubi supra*). As Garvin S.P.J. said: "A *fidei commissary* gift under the Roman-Dutch law is a gift, and before the *fidei commissum* can operate on the subject of the gift there must be a valid and complete gift—if, for instance, the gift fails for want of acceptance the *fidei commissum* of necessity also fails. Similarly, a *fidei commissary* gift

[1] *20 N. L. R. 463.*
[2] *19 N. L. R. 90.*
[3] *15 N. L. R. 493.*
[4] *17 N. L. R. 129.*
[5] *32 N. L. R. 176.*
[6] *Ceylon Law Weekly 268.*

between Muhammadan inhabitants of Ceylon must be complete as a gift under the Muhammadan law before the *fidei commissum* impressed on the object of the gift can become operative."

The appeal is dismissed with costs.

DRIEBERG J.—I agree.

Appeal dismissed.