1931 *Present:* **Macdonell C.J. and Lyall Grant J.**

RAFEEKA *et al. v.* MOHAMAD SATHUCK.

80—D. C. (Inty.) Colombo, 35,824.

Muslim law—Deed of gift—Possession by donor—Minority of donees—Attornment to natural guardian—Delivery of possession—Validity of gift.

Where the grandmother of Muslim children who were minors gifted certain premises to them and remained in possession, paying rent to their mother for and on their behalf,—

Held, that there had been sufficient delivery of possession of the premises—by attornment to the children through their natural guardian—to constitute a valid donation under the Muslim law.

APPEAL from a judgment of the District Judge of Colombo.

Keuneman, for defendant, appellant.

Nadarajah (with him *Abeyesekere*), for plaintiffs, respondents.

February 5, 1932. MACDONELL C.J.—

The parties in this case are the same as in the action *Rafeeka et al. v. Mohamed Sathuck* [1] decided by my brother Garvin and myself on November 18, 1931, and the facts so far as material are as follows:— Mohamed Zain died on January 9, 1925, being then the owner of an undivided one-half share of the premises in dispute, 56, New Moor Street, Colombo, and prior to his marriage to Fatheela he had lived in those premises. After his marriage he went with his wife to live at 94, Messenger street, Colombo, and his mother Saffra Umma occupied 56, New Moor street. The mother Saffra Umma paid her son, the deceased Mohamed Zain, Rs. 25 a month which were actually used by him in paying the rent of 94, Messenger street in which he lived. The only receipts produced were made out by the landlord to Mohamed Zain in his name. There is evidence from which the learned trial Judge inferred that these Rs. 25 per mensem were paid to him by his mother Saffra Umma as rent for his share, one-half, of the premises 56, Messenger street, of which she was in occupation, and I do not think one can say that that inference was wrong. The mother Saffra Umma was his tenant, then, of his half share in 56, New Moor street. He died, as has been said, on January 9, 1925, intestate, leaving his widow Fatheela and five minor children, plaintiffs in this action, and his widow Fatheela administered his intestate estate under letters granted her on August 8, 1927, in testamentary suit No. 2,714, P 10. Thereafter by notarial deed No. 684 of October 21, 1927, P 11, she as administratrix conveyed her deceased husband's half share of the above-mentioned premises to the heirs thereunder, viz., to herself, to the deceased's mother Saffra Umma, and to her own minor children the 1st to 5th plaintiffs aforesaid, for the share to which each was respectively entitled on the intestacy. On the same day, October 21, 1927, she joined with Saffra Umma in conveying by notarial deed No. 686, P 12, all their right, title, and interest in their shares in the said premises " as a gift absolute and irrevocable " to Fatheela's five minor children the plaintiffs aforesaid. Deeds 684, P 11, and 686, P 12, were both duly registered. The five minor children therefore by this deed of gift, No. 686, P 12, if a valid one, became owners of the share which had previously belonged to their mother Fatheela and their grandmother Saffra Umma. For the appellant attention was drawn to the fact that after the death of the son Mohamed Zain, the mother Saffra Umma became owner of a fraction, probably 28/336, of his half share of the premises in dispute and that as admittedly she lived in those premises from long before his death continuously up to her own death in 1929, she was, probably from his death in 1925, certainly from the conveyance No. 684 by the administratrix Fatheela, in possession

[1] *33 N. L. R. 176.*

of this fractional share. But with this fact must be taken another one, namely, that according to the evidence she continued to pay the Rs. 25 per mensem from the death of Mohamed Zain in 1925 continuously up to her own death in 1929, which payment the learned District Judge infers to have been rent for her occupation of her son Mohamed Zain's half. If she had wanted at any time to mark the change in her rights as to the premises in question, she could have done so by reducing the amount paid by her each month or by other sufficient indication. The only other material fact in the case is that Saffra Umma by notarial deed No. 1,486, D 22, of February 4, 1928, purported to revoke her deed of gift No. 686 of October 21, 1927, P 12, to her five minor grandchildren and by the same deed No. 1,486 to give to her son Mohamed, defendant in this case, her own undivided share in the premises. The five minor children by their next friend brought this action for partition and sale of the premises and the learned District Judge gave judgment in their favour, holding that Saffra Umma had no power to revoke the gift by her under deed No. 686 of her share of the premises and that consequently deed No. 1,486 was of no force. It is from this decision that the present appeal is brought. The parties to these deeds are Muslims and the validity or otherwise of these deeds must be tested by Mohammedan law.

Having so recently considered the law with reference to Mohammedan deeds of gift in the case *Rafeeka et al. v. Mohamed Sathuck* cited above, it hardly seems necessary to set out at length what was said in the judgment in that case. Fatheela, the mother of the plaintiffs, is in the position of their guardian, so her possession is that of the minors and no acceptance on their part is necessary. Now Saffra Umma, the grandmother, by paying rent for the share of the premises vested in the children by the deed No. 686 to which she was a party, seems to have recognized their possession of the premises in question. No doubt the rent Rs. 25 per mensem was actually received by their mother Fatheela, but as her possession is the possession of her minor children the plaintiffs, this fact makes no difference. See *1 Ameer Ali, 4th Ed. p. 119*, quoting with approval *Shaikh Ibrahim v. Shaikh Suleman*,[1] " As to the law of the case the Courts below are to bear in mind that when land is occupied by tenants a request to them to attorn to the donee is the only possession that the donor can give of the land in order to complete a proposed gift. Such a possession would . . . . be sufficient ". Now here the donor has done something more than requesting tenants to attorn to the donee; she being herself the tenant has attorned and paid rent to a person, Fatheela, whose possession is that of the donees. It is a " giving of possession " as complete as the subject-matter of the gift allows, and a kind of delivery appropriate to the subject-matter of the gift made to a person whose possession in law is that of the donees. Then I think that the gift made by Saffra Umma in deed No. 686, P 12, has been completed by delivery of possession and is one therefore that cannot be revoked.

Perhaps the acts of Saffra Umma as tending to give or not to give possession under this deed No. 686, P 12, can be analyzed thus. During

[1] *9 Bom. 146.*

the lifetime of her son Mohamed Zain she was paying rent Rs. 25 per mensem for the right to occupy his property. At his death in January, 1925, she became entitled to a small fraction—28/336 of one-half—of this property, but she continued to pay the same rent as before. Had this payment been continued by her for ten years she might, I apprehend, have been held to have lost her fractional share by prescription; at least it could have been argued that by paying rent for those ten years she had continued to do and to repeat doing an act inconsistent with her co-ownership. On October 21, 1927, she executes the deed of gift No. 687, P 12. Let us assume that the words in it " a gift absolute and irrevocable " are of no force or at least of insufficient force to complete the gift, and that something further is needed, viz., delivery of possession to someone whose possession will be that of the donees. As a Muslim she must be presumed to know Mohammedan law, and she deliberately continues to pay Rs. 25 per mensem rent to Fatheela thereby attorning to her and recognizing her right to possession which right is by implication of law the right of the donees. If this act of the donor Saffra Umma was not intended to have that meaning it was for her to say so, and if a Court interprets it as a deliberate attornment to one who represents the minor children and whose possession is theirs, the donor has no right to complain. There is no necessity to take it as high as an estoppel. It is sufficient to call it an admission on the part of the donor which can reasonably be interpreted as an attornment to the donees through their mother Fatheela.

In conclusion I would respectfully concur in and would desire to repeat the words of Garvin J. in his judgment in *Rafeeka et al. v. Mohamed Sathuck* (*supra*), " Under the Kandyan law gifts are ordinarily revocable but this Court has held and it is now settled law that when such a gift is expressed to be irrevocable the donor may not revoke it. I can see no reason why the principle of these decisions should not be applied to the case of gifts between Muslims. This view of the law is affirmed in section 3 of Ordinance No. 10 of 1931 which while defining and declaring the law as to donations by Muslims domiciled in Ceylon provided ' that no deed of donation shall be deemed to be irrevocable unless it is also stated in the deed . . . . ' "

I conclude that this proviso to section 3 of Ordinance No. 10 of 1931 means that when a Mohammedan deed of donation is stated to be irrevocable, this shall be conclusive of its irrevocable character. There can be no hardship in this, whatever the system of law under which the deed is made. " That men do perform their covenants made without which covenants are in vain and but empty words " was laid down by Hobbes as one of the laws of nature. It is, and a necessary law.

For the foregoing reasons, I am of opinion that this appeal must be dismissed with costs.

LYALL GRANT J.—I agree.

Appeal dismissed.