1941 *Present :* **Moseley S.P.J. and de Kretser J.**

JAMEEL *v.* HANIFFA *et al.*

209—D. C. Colombo, 858.

Fidei commissum—*Devise to sons and their heirs—Rule of intestate succession —Muslim law.*

Where a Muslim testatrix devised property to her two sons subject to the condition that the property should not be alienated but should be enjoyed "by their heirs from generation to generation in perpetuity under the bond of *fidei commissum*".—

Held, that on the death of a devisee. his heirs would take according to the rule of intestate succession applicable under the Muslim law.

APPEAL from a judgment of the District Judge of Colombo.

N. Nadarajah (with him *H. W. Thambiah*), for plaintiffs, appellants.

C. Thiagalingam (with him *A. H. M. Ismail*), for first to fifteenth defendants, respondents.

Cur. adv. vult.

March 28, 1941. DE KRETSER J.—

Pathumma Natchia by her last will dated July 2, 1859, devised certain lands to her two sons, Casi Lebbe Marikar and Sego Lebbe Marikar, subject to the condition that the lands should not be alienated but should be enjoyed by the devisees "and by their heirs from generation to generation in perpetuity under the bond of *fidei commissum*".

The two sons effected a partition of the lands devised to them and the land which is the subject-matter of this action was allotted to Sego Lebbe Marikar, who died leaving eight children, two sons and six daughters. Plaintiffs contend that the sons became entitled to two-tenths each and the daughters to one-tenth each, in accordance with the rule of Muslim law. Defendants contend that the children took equally.

The learned trial Judge upheld the defendants' contention, being guided by what he considered to be the intention of the testatrix. After making several devises the testatrix left the residue to all her children to be taken "share and share alike". From this the trial Judge inferred that she intended that whenever a division came to be made whether among her children or her grandchildren or remoter descendants, they should always take share and share alike.

This argument was repeated before us but not with any confidence. Suffice it to say that each devise is complete in itself and can be interpreted by itself; that different considerations might apply to each devise; and that the fact that the testatrix took care to specify in one case that the heirs should share equally shows that she was alive to the consequences of not making such special provision. If at all, the argument might be the other way.

It is not questioned that a *fidei commissum* was created. This will came before this Court on a previous occasion when a widow of a devisee claimed to come within the class of the beneficiaries. This Court held that the testatrix could not have intended a person like her since the

beneficiaries were described as the "heirs from generation to generation". It was held that the expression meant the *descendants* of the devisees. Counsel argues that the meaning of the decision was that the descendants took in equal shares. As I understood him, he argued that as this Court held that the descendants were the beneficiaries and made no qualification, therefore the decision meant that the decendants took equally. It is clear that no such meaning was intended.

He also argued that because, according to Muslim law, the widow would be an heir and the widow was excluded, therefore the decision of this Court proceeded on the footing that the heirs referred to in the will were not heirs under Muslim law. This contention too must be rejected, for all that this Court held was that the widow did not come within the terms used in the will.

Counsel's next argument was that since *fidei commissa* were unknown to the Muslim law and were only recognized by the Roman-Dutch law, therefore every matter involved in the *fidei commissum* must be interpreted with reference to the Roman-Dutch law. He referred us to the passage quoted with approval by Drieberg J. in *Balkis v. Perera* [1], which says:—"But in the construction of deeds, wills, *fidei commissa,* and in ordinary matters of contract the principles of the ordinary general law and not of the Muhammadan law are always applied." He also urged that the Privy Council had decided in *Weerasekera v. Peiris* [2], that two systems of law should not be applied to one disposition of property.

How do these decisions affect the question now under consideration? What has now to be decided is not whether the Roman-Dutch law applies regarding a form of contract or the sufficiency of the language used to create a *fidei commissum* nor the principles governing *fidei commissa* but what the words "heirs from generation to generation" mean and in what proportion those heirs take. To my mind there is no difference between the terms "lawful heirs" and "heirs" and in both cases the words would mean those whom the law recognizes as heirs. The Roman-Dutch law would say the term means the heirs according to intestate succession. In *Samaradiwakara v. de Saram* [3], the Privy Council interpreted the expression "lawful heirs" to include those who according to the law applicable to the devisee would be his intestate heirs. The argument was urged that the Roman-Dutch law applying, and a widow not being an heir under that system, she would not be included in the term "lawful heirs", but this contention was repelled and the widow being an heir under the existing law she was declared entitled, not to an equal share with the other heirs but to the half share of a surviving spouse. It is quite sound therefore to say that the Roman-Dutch law would interpret the term "heirs" to mean the heirs according to the law applicable to the case. The simple question is who were Sego Lebbe's intestate heirs? That question must be answered according to the law applicable to him, i.e., the Muslim law, and the heirs would take their shares according to that law. This would also accord with the intention of the testatrix for it is inconceivable that she thought that her son's heirs would be ascertained by any but the Muslim law merely because she used a notarial

[1] *29 N. L. R. 254.* [2] *34 N. L. R. 281.*

[3] *14 N. L. R. 321.*

instrument unknown to Muslim law but known to our law and adopted a disposition of property unknown to Muslim law. Assuming that the widow and the parents of the devisee might be included in the term "heirs", she excluded them when she restricted the term to those falling within the definition of "heirs from generation to generation". There was nothing to prevent her from doing this and the restriction did not make the class of beneficiaries doubtful. The intestate heirs would necessarily take according to the rule of intestate succession applicable to descendants, *i.e.*, the males would have a double portion.

It was agreed that mesne profits would be raised to Rs. 840 and that damages should remain at the rate of Rs. 225 per annum. The decree will be set aside and plaintiffs declared entitled to two-tenths (2/10) and to be placed in possession thereof, to Rs. 840 as mesne profits, Rs. 225 as continuing damages, and costs both in this Court and in the Court below.

MOSELEY S.P.J.— I agree.

Appeal allowed.