1933 *Present :* **Dalton S.P.J. and Poyser J.**

ISMAIL *v.* MOHAMED.

196—D. C. Matara, 6,885.

Donation—Gift by Muslim—Reservation of life-interest and right of revocation —Possession by donee—Renunciation of life-interest—Intention of donor—Roman-Dutch law.

A Muslim donated certain premises to his brother-in-law reserving to himself the right of revocation and a life-interest. The donation was accepted by the donee, who lived on the premises. Later the donor executed a deed renouncing in the donee's favour his life-interest and right of revocation.

Held, that donor intended to create and did in fact create a donation such as is recognized under the Roman-Dutch law.

Held, further, that the combined effect of the two deeds was to constitute a valid gift under the Muslim law.

APPEAL from a judgment of the District Judge of Matara.

N. E. Weerasooria (with him *Haniffa*), for first defendant, appellant in No. 196.

H. V. Perera, for the appellant in No. 197, and for the respondent in No. 196.

Hayley, K.C. (with him *Rajapakse*), for the second defendant, respondent in both appeals.

Garvin (with him *Alles*), for third defendant, respondent, in both appeals.

November 29, 1933. DALTON S.P.J.—

Two appeals, taken together, arise in this action. The plaintiff (appellant in No. 197) brought this action to partition a lot of land, depicted as lot B on the plan No. 316 produced in the case. He claimed that he was entitled to an undivided one half, allotting the remaining undivided half to the defendant (appellant in No. 196). The added defendant (respondent in both appeals) intervened, claiming the whole of the lot.

The trial Judge dismissed the action on the ground " that plaintiff has brought a partition action in 'order improperly to take advantage of the Partition Ordinance' ", and directed that he do pay double stamp duty. The plaintiff and defendant both appeal from that conclusion, and Mr. Hayley for the respondent concedes that he cannot support the judgment on the ground upon which the trial Judge has decided the case. He nevertheless argues, and of course is entitled to argue, that the judgment is correct for other reasons.

The parties are all Muslims, the intervenient being the brother-in-law of the defendant. The latter lived with his brother-in-law, by whom he was brought up since his mother's death in 1905 when he was one year old, and sister, and was maintained and educated by the former, although his father lived with them in the same house.

In 1918, by the deed P 1, intervenient donated the lot in question to the defendant, reserving, however, the power to revoke the deed, and also a life-interest in the premises for himself, and after his death for his wife, defendant's sister. Defendant accepted the gift, signing the deed together with intervenient, and the deed was handed to him by the notary. Thereafter the evidence shows that defendant continued living on the premises, which was his home during his holidays. He says he attended the Royal College, Colombo, from 1919 to 1924.

In 1922 intervenient executed a further deed in favour of the defendant (exhibit P 2), renouncing the power of revocation and the life-interest he had retained for himself, and granting " the rights thereof to the credit and interest of the said donee ", the defendant. Nothing was said about the life-interest in favour of the intervenient's wife, which however in any

case was not to take effect until the intervenient's death. The deed P 2 goes on to state that " the donee, his heirs, executors, and administrators can do anything they like with the said property from date hereof without contravening the other covenants of the deed, as if I the said Omardeen Hadjiar reserved no life-interest and no right of revocation at pleasure in the said deed of gift. And I also declare that I or my heirs have no claim whatever from henceforth and that if any further documents become necessary to be executed to confirm this deed in favour of the donee Abdulla Saibu Mohammadu, I the said Omardeen Hadjiar hereby agree to execute the same ".

The evidence shows that, as stated above, defendant who came of age in 1925 continued thereafter to live on the premises during his holidays. The notary, to whom the parties were known, states that he was living there with intervenient as his adopted son, and the evidence shows that he always regarded it as his home. It is impossible therefore to agree with the trial Judge's finding that defendant was never in possession of the premises.

The effect of the two deeds P 1 and P 2 is that the intervenient gave over to the defendant, by way of gift, all his rights in the lot, reserving nothing for himself. There was the contingency that, on his death, a life-interest in favour of his wife might come into existence, but in fact she died in February, 1931. On the execution of P 2, however, there was nothing to prevent full and effective possession being given to defendant, and the evidence in my opinion is only consistent with that possession having been given. It is true intervenient still continued to live on the premises with his wife, her father and the defendant, but there is evidence to show that he regarded the latter as the owner. In 1926 there had been an action by a neighbouring owner against defendant and intervenient, in which the latter took up the position that the premises now in dispute belonged to the defendant. No evidence was led by the intervenient to controvert the evidence of defendant and his witnesses on this point.

In February, 1931, intervenient's wife died, and he married again two months later, bringing his new wife to the premises. That was the origin of the dispute between defendant and intervenient, and there was a disagreement between them over the late wife's property. Defendant wanted to raise money and so looked round for a purchaser of what he considered his property under the deeds of gift. The plaintiff was found but only had sufficient money to buy half the lot, an undivided half being thereupon conveyed to him by defendant by deed P 3 of June, 1931. The intervenient, however, refused to let plaintiff have possession of his purchased interest in the premises, although defendant was living there, whereupon he instituted this action against the defendant for a partition.

His right to institute this action, under the provisions of section 2 of the Partition Ordinance, if he was entitled under P 3 to an undivided half of the lot, it is now conceded cannot be questioned, and the trial Judge was wrong in his conclusion on this point. The fact that he was also

never in possession of the interest claimed is no bar to his maintaining the action. These points were decided by the Full Bench in *Sinchi Appu v. Wijegunasekera*[1] many years ago.

Mr. Hayley, however, contends on behalf of the intervenient (respondent) that according to Muslim law, which he argues is applicable here, there was no valid donation of the lot to the defendant. He argues that the deed P 1 conveyed no title to defendant, and the deed P 2 in no way bettered his position in that respect.

According to Muslim law, according to the authorities, three things are necessary to constitute a valid gift, a declaration by the donor of his intention to give, acceptance by the donee, and the delivery of possession. Had deed P 1 stood alone, it is clear that, since the donor retained for himself a life-interest, possession was not then given to the donee. The second deed P 2, however recites the deed P 1 and from its terms is clearly intended to be complementary of the earlier deed, granting to the donee all the rights the donor had reserved for himself in the earlier deed. The two deeds must be read together, and on the execution of the second deed, the donor had parted with each and every right and interest he had in the property. The donee was living on the premises, and the only conclusion, to which in my opinion one can reasonably come upon the documents and verbal evidence, is that effective possession was thereupon given to the donee.

Under Muslim law therefore, if it is applicable, on the execution of the second deed P 2, that deed, coupled with the earlier deed which it was to supplement, was in my opinion operative to convey title to the defendant.

On the deeds and evidence here, however, I have very great difficulty in accepting Mr. Hayley's contention that Muslim law is applicable at all in this case. In my view of the authorities and the decision of the Privy Council in *Weerasekere v. Peiris*[2], in my opinion Roman-Dutch law applies. The deed of gift, the subject of that case, was executed by a Muslim resident in Ceylon in favour of his son. The Supreme Court had held that the deed, which it was urged involved a *fidei commissum* according to Roman-Dutch law, was void under Muslim law in the absence of delivery. It was pointed out, however, by their Lordships of the Privy Council that the conditions and reservations mentioned in the deed were quite inconsistent with a valid gift *inter vivos* according to Muslim law. In their Lordships' opinion all the terms of the deed must be taken into consideration when construing a deed, and it seemed clear to them that it was never intended that there should be a valid gift as understood in Muslim law. They pointed out that Roman-Dutch law is the common law of Ceylon, and on a true construction of the deed and having regard to all its terms, they held the father, the donor, intended to create and did create a valid *fidei commissum* such as is recognized by Roman-Dutch law.

The defendant in this case before us led no evidence at all, but seems to have preferred to rest his case, so far as this aspect of it is concerned,

[1] *6 N. L. R. 1.* [2] *(1933) A. C. 190; 34 N. L. R. 281.*

upon the terms of the deed. The deed P 1 itself clearly expresses his intention to give, and the fact that he by the deed is giving subject to certain conditions and reservations, and it sets out the acceptance of the gift by the donee. The retention of the power of revocation and a life-interest for himself is, it is conceded, quite inconsistent with a valid gift under Muslim law, whereas it is entirely consistent with a gift under Roman-Dutch law. The Muslim law on the question of revoking a deed of gift to one's children is referred to in *Cader v. Pitcha*[1]. The validity under Roman-Dutch law of the express reservation of the power of revocation in a deed of gift is supported by the decision in *Government Agent, Western Province v. Palaniappa Chetty,*[2] followed in *Ponnamperuma v. Goonesekera*[3]. Mr. Hayley for the respondent, however, carried his argument so far as to say that a Muslim in Ceylon is debarred by law from making a donation reserving a life-interest in himself, but that seems to me to be quite inconsistent with the principles laid down by the Privy Council in *Weerasekere v. Peiris (supra)*. He cited also the decision in *Peiris v. Sultan*[4] argued before a Bench of four Judges, and urged that the case for the application of Muslim law and not Roman-Dutch law is the same in the circumstances here as it was in the circumstances of that case. As pointed out, however, by Mr. Perera in his argument before us, Macdonell C.J. in his decision (at p. 229) expresses the opinion that having regard to the terms of the deed both donor and conveyancer in the deed intended to emphasize the Muslim character of the deed of gift, in other words, intended to make a gift according to Muslim law, although the donor in fact failed to do so. He concludes his judgment by pointing out that, since the decision of the Privy Council in *Weerasekere v. Peiris (supra)*, in examining a deed of gift from one Muslim to another one must examine the deed as a whole and ascertain if it shows an intention to make such a gift *inter vivos* as is recognized by Muslim law. If it shows such an intention, the validity of the gift will be determined by Muslim law; it if does not show such an intention, but nevertheless an intention to make a deed of gift, the validity of the gift will be determined by Roman-Dutch law. Applying that construction of the decision of the Privy Council in *Weerasekere v. Peiris (supra)*, with which construction I would say I respectfully agree, to the deed P 1 in the case before us, I would hold that the donor intended to create and did create a deed of gift such as is recognized by Roman-Dutch law.

In the result the appellants are entitled to succeed on either of the grounds dealt with.

The order and decree of the trial Judge must therefore be set aside and the case sent back for the partition action to continue, the intervention being dismissed. The appellants are entitled to their costs of the proceedings already had between them and the intervenient in the lower

[1] *19 N. L. R. 246.*
[2] *11 N. L. R. 151.*
[3] *23 N. L. R. 235.*
[4] *2 Ceylon Law Weekly 211.*

Court and also to their costs of this appeal. The respondent named in the caption as the third defendant is, however, entitled to his costs (one set of costs only) in the appeals from the appellants, to be divided between them equally. He does not appear to have been a necessary party to the appeals.

POYSER J.—I agree.

Appeal allowed.