1933 *Present :* **Macdonell C.J., Garvin S.P.J., Drieberg and Akbar JJ.**

SULTAN *v.* PEIRIS.

337—D. C. Colombo, 38,728.

Muslim law—Deed of gift—Gift inter vivos *intended to take effect immediately —Reservation of life-interest—Validity under Muslim law—Applicability of Roman-Dutch law.*

Where a Muslim, by a deed of gift *inter vivos* intended to take effect immediately, reserved to himself during his life-time " the full and unfettered right of residing in any of the premises hereby gifted and of taking and enjoying the rents, profits, produce and income of all the said allotments of land and premises hereby gifted, without the interference of the said donees or either of them ",—

Held, that the gift was not a valid one under the Muslim law, as it did not comply with the requirement of that law that delivery of possession of the subject-matter of the gift must be made to the donee in order to make the gift complete.

THIS was an appeal from a judgment of the District Judge of Colombo dismissing two actions in which the relief claimed was for a declaration that the assignee of an insolvent estate was entitled to certain property. The defendant denied the title of the insolvent and claimed to be the lawful owner of the premises. M. B. Oduman (the insolvent) and M. B. A. Cader are nephews of the defendant. On August 15, 1913, the defendant executed deed No. 4,277 which was a transfer by way of gift of the property in question to his two nephews, containing certain reservations, conditions, agreements, and restrictions, which are fully set out in the judgment of the Supreme Court. The learned District Judge held that the deed of gift was subject to the reservation of the life-interest of the donor and was therefore obnoxious to the Muslim law. He therefore dismissed the actions.

H. V. Perera (with him *Canakeratne, Nadarajah* and *E. B. Wikramanayake*), for plaintiff, appellant.—The effect of the Privy Council ruling in *Weerasekera v. Pieris*[1] is that a Muslim can waive his right to be governed by his own law and submit to the common law. The Roman-Dutch law is generally applicable, and the special laws are in the nature of privileges afforded to particular classes. A document must be construed in a manner which will give effect to the intention of the parties rather than in a manner which will defeat that intention. A distinction must be drawn between what the document says and what the parties do afterwards.

[GARVIN J.—When will the Muslim law apply, and when the Roman-Dutch law ?]

Muslim law requires actual giving. If possession is not actually given the deed would be bad according to Muslim law. If the rules to be applied are so strict that the intention of the parties is to be defeated there is no escape from that position. But if it is possible that another

[1] *(1932) 34 N. L. R. 281.*

set of rules can be applied which will give effect to that intention you must apply those rules. The rules of Muslim law do not bind a Muslim in all his transactions.

[DRIEBERG J.—Cannot you have under the Muslim law a gift with a condition ? If so, one need not apply the Roman-Dutch law.]

All such conditions are void under Muslim law. A forfeiture of rights in favour of another person is bad. A condition should not be imposed on the donee except a condition that he should make a return to the donor. The test to be applied is not what system of law the parties had in mind but the construction of the deed and the sort of gift it did create. (*Weerasekera v. Pieris (supra)*.) Where the donor does not give possession the gift would be bad under Muslim law. But such a gift may be good under the Roman-Dutch law. The document must first be examined in the light of Muslim law because the parties are Muslims and have the privilege of donating under that law. If the terms of the gift are repugnant to that law then the Roman-Dutch law applies. The effect of the Privy Council decision is that you exclude the Muslim law whenever a donation includes a subsequent condition.

[MACDONELL C.J.—Suppose there is no *fidei commissum* but the gift reserves a usufruct during the life-time of the donor and the gift is not to take effect till after death?]

The Privy Council ruling would still apply, that is the Roman-Dutch law would govern such a case. In the deed under consideration there is a condition that if one donee changes his faith the property is to go to the other. Under Muslim law that condition fails. There are several other conditions in the gift which become inoperative, if the gift fails under the Muslim law. There is also an express delivery of title deeds to vest title. There is clearly an intention to contract under the Roman-Dutch law. In previous cases where there has been a reservation of a life-interest the Roman-Dutch law has been applied without question. (*Ahamadu Lebbe v. Sulaiyama*[1].) Even under the Muslim law this gift is good. What is reserved is not a real right but a right to take the produce (*Sahul Hamid v. Mohideen Nachiya*[2]—*Vide* judgment of Dalton J.; *Abdul Gani v. Jahan Begam*[3]).

Hayley, K.C. (with him *Garvin* and *Rajapakse*), for defendant, respondent—The systems of law prevailing at the time were not interfered with by the Portuguese, Dutch, and English invaders. (*Ribeiro 91 and 92 ; Cleghorns Minutes in Dickman's Civil Service Manual 280 ; Proclamation of September 23, 1799 ; 1 Browne, Appendix A, at p. 9.*) The Roman-Dutch law is not the common law of the land in the strict sense. Donations according to Muslim law were always recognized. (*Vand. Appendix B, 21.*) This law is a personal and not merely local law and goes with the person. (*Maine's Hindu Law and Usage 55.*) If the Muslims borrowed a custom from a parallel system of law that custom would become an extension of the Muslim law. Kandyan law has adopted the *fidei commissum*. (*A. G. A. Kandy v. Kalubanda*[4]; *Menika v. Banda*[5]. It does not follow that

[1] *2 C. W. R. 208.*
[2] *34 N. L. R. 57.*
[3] *44 Allahabad 301 at 314.*
[4] *23 N. L. R. 26.*
[5] *25 N. L. R. 207.*

the Kandyan subjects himself to the Roman-Dutch law. An Afghan in Ceylon is governed by the Muslim law (*Kahn v. Maricar*[1]).

Limited gifts are not contrary to Muslim law. The Sunni law does not recognize them but the Shiah law does. (*Tyabji, 1913 ed., p. 349, ss. 446, sqq.*) Where a Muslim deed creates a *fidei commissum* it would be more reasonable to say that the Shiah law was followed rather than the Roman-Dutch law. Even in such a case there must be delivery of possession. (*Tyabji, s. 448.*) The judgment of the Privy Council in *Weerasekera v. Pieris* (*supra*) is confined to that particular case. The basis of that judgment is this. Apart from the idea of a gift which must be construed according to Muslim law is the idea of a settlement which is usual in Roman-Dutch law. Being a settlement there is no intention of gifting. A valid *fidei commissum* is not a gift at all. The Privy Council are careful to avoid all mention of a gift. They do not look at it in this light, is it a gift with a condition or a gift without a condition? But rather, is it a gift or a settlement? The whole judgment is founded on intention. The fact that it was called a gift was immaterial. In the deed under consideration the whole intention is to create a gift at once. The donor wrongly thought that he could keep a right to the profits. The donees get an immediate right, for example, the right to alienate. There are no restrictions of any kind as to sale, mortgage, &c. It cannot be said of this deed that the donor did not intend to make a Muslim deed of gift.

A condition such as the one attached to this gift does not create a *fidei commissum.* (*2 Burge 159.*) The idea of a *fidei commissum* is to confer a benefit on a party. A suspensive condition such as this is intended to impose a penalty and the intention of the donor in such a case is not the creation of a *fidei commissum.* The gift is a conditional gift and not a *fidei commissum.* (*Voet 39, s. 3.*) In any case the *fidei commissum* is bad for want of designation of the ultimate donee. It is clear that the primary intention of the donor in this case was to make a gift and the Privy Council decision therefore does not apply.

H. V. Perera, in reply.—The intention was to give immediate title. That is clear from the terms of the deed. The statement in the deed is binding on the parties. The deeds were handed over. The instrument must be construed to give effect to the intention of the parties. Any condition must be construed rather as supporting that intention than defeating it. The document must be construed so as to ensure to the donor the rights he reserves to himself if that is possible. The right reserved here is not a usufruct, only a right to reside in the property without interference. The question is, can the right to possession be given to the donees consistently with the terms of the grant. This is a contract, a bilateral act. There is a contractual liability in the donee to give the rents and profits. (*Sahul Hamid v. Mohideen Natchiya*[2].) The whole possession is not kept back by the donor. There is symbolical delivery of the title deeds. A gift which creates a *fidei commissum* or usufruct must be governed by the Roman-Dutch law.

[GARVIN J.—But if it is not allowed by the Muslim law ?]

[1] *16 N. L. R. 425.* [2] *34 N. L. R. at 62.*

Muslim law does not prohibit it. It will merely not give effect to it. If the Roman-Dutch law which is the common law allows it, a Muslim can make a gift under the Roman-Dutch law which is not allowed by the Muslim law. A deed with a reservation of a usufruct is good in Ceylon. The decision of the Privy Council can be carried as far as that. Ordinance No. 10 of 1931 says so. That is not a radical change in the law but a recognition of what was the law. A Muslim gift is a giving of all one's rights in a thing. Not the giving of the dominium reserving the usufruct (*Tyabji 256.*) A Muslim who makes such a gift brings himself under the Roman-Dutch law.

[GARVIN J.—Is there any authority that a man can contract himself out of his system of law ?]

Not by a mere declaration to that effect, for example, if a Muslim makes a simple hiba. Muslim law does not recognize the bundle of rights which we call the dominium. It only recognizes the thing itself.

[GARVIN J. referred to *3 Moore's Indian Appeals 345.* The Privy Council considered the case of a gift to take effect after death and held that it was bad not because it was unknown to the Muslim law but because seisin could not be given.]

That was in India. An Indian Muslim cannot fall back on any other system of law. In Ceylon the common law which is the Roman-Dutch law recognizes this kind of gift. Here there is a failure of the most essential element of a Muslim gift. Where a donor reserves the usufruct one cannot say that he intended the donee to take such possession as is required by the Muslim law. The principle of the Privy Council decision cannot be narrowed down to the case of a *fidei commissum* merely. The Roman-Dutch law recognizes donations which do not involve the giving of the property. The Muslim law recognizes gifts which involve the immediate giving of the property. Donations involving the reservation of a usufruct are known to the Roman-Dutch law but not to the Muslim law. Therefore clearly the intention of the donor was not to make a valid gift under the Muslim law. One must look at the intention of the donor, not the object he intended to secure. If there was an intention to retain the usufruct clearly there was an intention to keep the property and to deliver after death. In this case there is also a *fidei commissum.* It is a gift with a limitation. There is also an intention to create a trust, *e.g.*, to give a benefit to a servant. No prohibition against alienation is necessary to create a *fidei commissum.* (*Pereira v. Perera*[1]; *Lee, 2nd ed. 244*; *2 Burge 150.*)

March 27, 1933. MACDONELL C.J.—

These were two actions, instituted on June 17, 1930, and March 31, 1931, respectively, each praying the same relief, namely, a declaration that the assignee of the insolvent be declared entitled as such assignee to certain lands. In action S. C. 337 the plaintiff is the assignee himself and the defendant is the uncle of the insolvent. In action S. C. 339 the plaintiff is a certain Chetty creditor of the insolvent and the defendants

[1] *20 N. L. R. 463 at 469.*

are the same, uncle of the insolvent, the insolvent himself, and the assignee, joined we are told, *ex abundanti cautela.* The evidence is to be found almost wholly in action S. C. 337.

A single judgment was given in the Court below and, being against the plaintiff in each action, each of them appealed, their petitions of appeal being identical in terms, and the two appeals were heard together by my brother Dalton and myself, but after argument they were referred to a Full Bench of four Judges before whom they were, as before, argued as one appeal. The facts were these.

One Saibo Sultan, being childless and possessed of considerable house property in Colombo, made on August 15, 1913, a deed of gift No. 4.277, P 1, of that property to his nephews Abdul Cader and Uduman for a half share each. Uduman is the insolvent mentioned above for whose assignee a declaration is sought in these two actions. The donor is a Moslem, and so are his nephews the donees, and each of them was of full age in 1913 when deed 4,277 was executed.

The deed recites the properties owned by the donor and his intention to transfer and convey them to his nephews, " as and by way of gift *inter vivos* subject to the reservations, conditions, agreements, and restrictions hereinafter mentioned " and the donor then states " I do hereby grant, convey, transfer, assign, set over and assure as and by way of gift *inter vivos* absolute and irrevocable upon and subject to the reservations, conditions, agreements, restrictions, hereinafter mentioned, unto the said Abdul Cader and Uduman and their respective heirs, &c., the aforesaid several allotments of land and premises . . . . " and there follows a full description of the parcels so granted. The *habendum* is as follows : " to have and to hold the said several allotments of land and premises hereby conveyed as and by way of gift *inter vivos* absolute and irrevocable unto the said donees and their respective heirs, &c., in the proportion of an undivided one-half part or share . . . . upon and subject to the following reservations, conditions, agreements, and restrictions, to wit :— (1) That notwithstanding the gift hereby made, I the said donor reserve to myself during my life time the full and unfettered right of residing in any of the said premises hereby gifted and of taking and enjoying the rents, profits, produce and income of all the said several allotments of land and premises hereby gifted without the interference of the said donees or either of them. (2) That the said donees and each of them shall always profess the Islamic faith as they have hitherto done and shall marry only a virgin or spinster and not a widow or a divorced woman. (3) That if either of the said donees shall at any time hereafter abandon the Islamic faith or shall marry a widow or divorced woman then the title to the share of the delinquent donee of the several allotments of land and premises which I have hereby gifted to him shall at once devolve on the other donee who shall thereafter be entitled to the whole of the said several allotments of land and premises herein described as if the entirety of them had been gifted to him alone by me ". It will be seen that restriction (3) does not provide for the case of a donee who has thus become entitled to the whole, himself thereafter abandoning the Islamic faith or marrying a widow or divorced woman. There was evidence that the elder of the two donees—who is no party to either of these two actions—

had married a widow prior, according to the uncle donor, to the execution of this deed of gift. But the uncle donor was an unsatisfactory witness in several respects, he denied some things which were certainly true, and although the birth certificate of 1907 was filed of a child alleged to be that of a married woman whom the elder donee is said subsequently to have married, still no evidence was given as to the year when he did marry her, and the learned trial Judge does not pronounce on the statement that the marriage was before the execution of deed 4,277. It must therefore remain uncertain whether the elder donee married before the execution of deed 4,277 or after. There are the usual covenants for title at the end of which come the following words: "by way of vesting the legal title to the premises donated from the date thereof in the donees, I hereby hand them this deed and the connected deeds thereof" and the deed concludes with the usual clause in deeds of gift, by which the donees thankfully accept the gift so made to them. The deed is signed by the donor and the two donees. The Notary's attestation clause to the deed states that the words (quoted just above) as to handing over the deed of gift and the connected deeds so as to vest the legal title were "interpolated before the foregoing instrument was read over and explained to the said . . . . Saibo Sultan" the donor, and goes on as follows:—"And the donor has requested me (*sc.* the Notary) to hand to the said donees the original of this instrument and the connected title deeds of the premises devised thereby". It was argued that the deed itself and the attestation clause were not in harmony. The donor says he hands over the deed of gift and the connected deeds to the donees but the attestation clause makes it clear that at the time of attestation the deed of gift and the other deeds were in the hands of the Notary. After attestation the Notary would have duties to perform with regard to the deed attested and for the next few days after attestation he would have to have custody of the deed of gift; consequently it would be difficult if not impossible for the deed to be at once given into the custody of the donees so as to remain continuously in the same. The Notary is stated to be dead and there is no evidence forthcoming as to what was done with the deeds at that time. None the less on the principle *omnia praesumuntur rite acta* and taking notice, as one surely may, of notarial practice, one may conclude that the donor did manually hand, as he says he did, the deed of gift and connected deeds to the donees, and that a few minutes afterwards the Notary took those deeds into his own custody, as he would have to do to complete his duties as Notary with regard to them. As this was a taking away from the custody of the donees of the deeds just given them, the Notary was made to add in writing the request to him of the donor to "hand to the said donees the original of this instrument and the connected deeds", *semble* when he had completed his notarial duties with regard to them. One may conclude then that the donor did at the execution of the deed of gift hand it to the donees; he says he does so, and the attestation clause can be interpreted as not being a contradiction of that statement.

It seems to be common cause that the properties donated by deed 4,277 represented all the immovable property then owned by the donor, and there is no evidence that he acquired any other immovable property thereafter.

The further facts are these. The elder nephew donee who is said to have married the widow does not come into the story at all. The uncle donor and the younger nephew donee, the now insolvent, continued to live together in the uncle's house at 5, Jefferson street, after the deed as before, apparently until the nephew's insolvency in May, 1930. The other properties given by it consisted of residential buildings—houses and tenements—in Rifle street, Church street, New Station Passage, Malay street, and Glennie street, all in Slave Island and all closely contiguous to each other and to 5, Jefferson street, also donated, where the uncle and nephew continued to reside. Those properties were let to tenants who paid rent for same. The uncle donor is said in the evidence in action No. 337 of the plaintiff in action No. 339—the Chettiar creditor—to have been bed-ridden for 4 or 5 years prior to July, 1931, but he himself says that he has been "ill for two or three years" and later that he has been bed-ridden for 15 years, the two statements do not agree. The learned District Judge who took his evidence at his residence in Jefferson street described him as "a very old man now largely crippled" but adds that "he still has a vigorous memory and in his day must have been quite a capable man". One may perhaps take it as proved that for some years prior to the date of the trial of this action, July, 1931, he left the management of his affairs to others. In 1898 he had granted a power of attorney D 2 in action 339, in wide terms, and he says in his evidence that this power remained uncancelled after the execution in 1913 of deed 4,277; this instrument gives authority to the attorney named in it to purchase lands on behalf of the maker but not apparently to execute the transfer deeds that would be necessary on such purchases and "to call for and give consent to or oppose the partition or sale of any houses, lands, messuages or tenements belonging to us solely or jointly or in common with any other person or persons and to join in or oppose any action, suit or other judicial proceeding for effecting any other partition or sale". In 1917 he granted a power of attorney, D 3 in action 339, to his nephew, the insolvent in much less ample terms; it included however a power "to superintend, manage and control the houses, lands or other property which I now am or hereafter may be possessed of or entitled to". The plaintiff in action 339 says (the evidence is in action 337) that he has seen the nephew, the insolvent, collecting rents for the properties donated in deed 4,277, and the uncle in his evidence states that the nephew did so after the date of the power of attorney, D 3, to him of 1917. No receipts for these rents were produced or (apparently) called for. As the onus is on the plaintiffs in these two actions to establish the validity of the deed of gift 4,277, it would be for them to show that receipts were taken in the name of the donee insolvent. There is no evidence that the tenants or any of them at any time attorned to the donees or to either of them. It is proved that the donee insolvent used himself to pay the municipal taxes on these properties from 1928 onwards (it is the practice of the Colombo Municipality to destroy receipts three or more years old, so no evidence as to these payments is available earlier than 1928) and these receipts are made out in the name of the donee insolvent, but the properties remained registered in the municipal books in the name of the uncle the donor, no change ever being made in that respect. The clerk

from the Municipal Treasurer's Department who gave evidence says: "A man's name once registered his name remains as such until somebody writes and gets it altered, and a Notary Public has to send an abstract of title deeds". The donee insolvent had property in this part of Colombo of his own, entirely distinct from that of the subject of deed 4,277, and this property was in his own name and the receipts for taxes on this property state that fact. On the other hand in certain applications to the Municipal Engineer and to the Waterworks Engineer for permission to make alterations or additions to 5, Jefferson street, where the uncle and nephew were residing, the nephew does describe himself as owner.

The nephew was extravagant and became heavily indebted. He granted mortgages for considerable sums on his own properties, those, that is, independent of the ones the subject of deed 4,277, and these properties have been sold under mortgage decrees by the mortgagees. He obtained an overdraft for Rs. 30,000 from a bank and deposited with it on September 12, 1929, the title deeds of the properties the subject of deed 4,277 and executed to the bank a letter on a printed form P 11, admitting the deposit of the deeds, specifying the properties to which they related, and undertaking to execute a mortgage bond over them if and when the bank should call on him to do so. This letter P 11 does not name deed 4,277 as among those deposited with the bank, but it seems to have been so deposited. He at no time did mortgage any of the properties mentioned in it nor is there evidence, apart from this letter to the bank, that he ever proposed doing so. During the early part of 1930 the nephew seems to have been evading his creditors and the service of writs out against him. The bank was trying to serve him with a summons and on May 29, 1930, it seized a pharmacy business which he was carrying on. On May 30, 1930, he was declared insolvent on his own petition. Meanwhile on April 14, 1930, the uncle donor had executed deed 2,380, P 4, by which he purported to revoke deed 4,277 of August, 1913, and the nephew insolvent signs a statement at the end of P 4 that he consents to the revocation and cancellation of deed 4,277. The same day the uncle executed a will, hitherto there had not been any will made by him, bequeathing the property mentioned in deed 4,277 to the nephew insolvent's wife and children. The insolvent's own property, independent of that the subject of deed 4,277, has been sold by the secured creditors as has been said, and if this purported revocation of deed 4,277 is held to be a good revocation or if the deed 4,277 is held not to have been a valid deed of gift, then and in either case there will be, we are told, no assets of the insolvent wherewith to satisfy the claims of the unsecured creditors.

In action S. C. 337 (D. C. 37,280) the assignee by leave of the Court sues the uncle, the donor. After reciting the execution of deed 4,277 and averring that the other nephew donee had forfeited his half share, and that the insolvent is owner of the entirety of the properties the subject of it, he states "on or about the 14th day of April, 1930, the defendant acting in concert and collusion with the said Mohamed Batcha Uduman and or with intent to defraud the creditors of the said Mohamed Batcha Uduman purported to revoke the said deed of donation by deed No. 2,380, dated 14th day of April, 1930, attested by M. S. Akbar of Colombo, Notary Public, and now claims to be the owner thereof and the said deed

is void in law". Alternatively he states "that the said Mohamed Batcha Uduman was the owner of the said lands and premises described in the schedule hereto and the deed of donation was irrevocable by any act *inter partes* and that the deed of donation No. 4,277 is still in force and that he is entitled to a declaration that he as provisional assignee of the insolvent estate of Mohamed Batcha Uduman is the owner of the said lands and premises described in the schedule hereto and that the said deed of revocation No. 2,380 is null and void". Wherefore he prays: " (*a*) for judgment declaring him as assignee the owner of and entitled to the lands and premises described in the schedule hereto, (*b*) that the deed of revocation No. 2,380 be declared null and void, (*c*) for costs of suit, and (*d*) for such further and other relief in the premises as to this Court shall seem meet". In action S. C. 339 (D. C. 43,620) a Chettiar creditor who had proved in the insolvency sues, as has been said, the uncle the donor, the insolvent donee, and adds the assignee as defendant also. The allegations in his plaint are to the same effect as those in action 337, and he prays " (*a*) for a declaration that the third defendant as assignee of the insolvent estate of Mohamed Batcha Uduman is the owner of or is entitled to the said lands and premises described in the schedule of this plaint, (*b*) and order declaring that the deed of revocation No. 2,389 mentioned in the plaint is null and void, (c) for the costs of this action, and (*d*) for such further and other relief in the premises as to this Court shall seem meet". The learned trial Judge gave one judgment in the two actions. The important parts of that judgment are these.

He considered that the law governing the case was the law as it stood when these actions were brought, viz., June 17, 1930, and March 31, 1931, and not the law as declared in Ordinance No. 10 of 1931, which came into operation on June 17, 1931. The judgment of the Privy Council in *Weerasekera v. Pieris*[1] holds that Ordinance No. 10 of 1931 is not retrospective in effect, consequently it will be unneccessary to consider that Ordinance.

As to the purported revocation of April 14, 1930, by deed 2,380, P 4, he said: "There can be no question I think in this case that the revocation is bad". On this point then he finds in favour of the plaintiffs, and the defendants (respondents on this appeal) did not, either when these appeals were argued before my brother Dalton and myself or when they were re-argued before the Full Bench, contest the correctness of his conclusion that the revocation was bad. He held that the Chettiar creditor's action No. 339 would not lie, but at the earlier two Judge hearing of these appeals it was conceded for the respondents that that action, No. 339, would lie, and *Poulier v. Alles*[2] and *Doresamy v. Fernando*[3] seem to be authority that it would, at least in so far as the plaintiff therein sought to set aside the purported deed of revocation 2,380, P 4, the ineffectiveness of which was only conceded after the two Judge hearing of the appeals had commenced. During that hearing it was conceded then that action No. 339 would lie, and at the Full Bench hearing the point was never mentioned at all. On this point then it is agreed that the ruling below that the action No. 339 would not lie, was incorrect.

[1] *(1932) 34 N. L. R. 281.* [2] *27 N. L. R. 219.* [3] *31 N. L. R. 413.*

On the issue 5 (c), was the deed 238 executed with intent to defraud the creditors of the donee insolvent, the learned trial Judge says as follows:—"I should say that the parties did contemplate depriving the creditors of Oduman of the property which he owned but that the question of intention does not affect the revocation, if the revocation is otherwise valid. If the revocation was in order, there is no question of defrauding creditors".

The main issue was No. 1 which was as follows:—"Was the deed 4,277 of August 15, 1913, operative to convey title in respect of property mentioned in the deed to the donees"? And this was the sole issue argued to us at the Full Bench hearing of the appeals. The learned trial Judge answered the issue thus. After mentioning that the parties, Muslims, will be governed by Shafei law, he says: "One of the chief essentials of a donation according to Muslim law was the transfer of possession from the donor to the donee. Until that was done title did not pass. Where the donation was unfettered by any reservations, constructive possession might well be given in one of the ways mentioned in the text books, or by delivery of the deed of gift where that was intended to be a sign of the delivery of possession. But where the deed itself expressly reserves the possession to the donor there is no room for arguing that constructive possession must be held to have been given because the deed of gift was handed to the donees. It has been argued that Oduman made repairs, collected the rents and paid taxes. All these were quite consistent with the relationship in which he stood to the donor, but the matter is put beyond doubt by the fact that he held a power of attorney from the donor authorizing him to do these acts. The donor had no other property and if the possession had been handed to Oduman there was absolutely no need for a power of attorney. The donor could not have emphasized more than he has done in this case the fact that he retained and exercised control over the properties gifted".

This issue then was the crux of the whole case. If the deed 4,277 was a valid deed of gift, then admittedly it could not be revoked; both sides conceded that. If it was not a valid deed of gift, then there was nothing to revoke, and nothing for the assignee or the creditors to claim.

The parties here, donor and donee, were Muslims and gifts between such must presumably be governed by Muhammadan law. It is well settled that to constitute a valid gift by Muhammadan law three things are necessary: a declaration by the donor of his intention to give, expression of acceptance by the donee, and delivery of possession or seisin (actual or constructive) to the donee. The first two requirements are admittedly satisfied here and the only question is, has the third requirement been satisfied also. The plaintiff-appellants, in arguing that it has been, rely on the words of the donor in the deed 4,277 "by way of vesting the legal title . . . . in the donees I hereby hand them this title deed and the connected deeds", and they argue that the donor, being a Muslim, must be taken to have known that under this law delivery of possession is an essential to the validity of a gift and to have intended by handing over the deed to give possession. In *Sayambo Natchia v. Osman* [1], it is said that delivery of the deed of gifts is a constructive delivery

[1] *26 N. L. R. 446.*

of possession but since in that case a father seems to have taken possession on behalf of a minor child (the word "minor" occurs only in the head-note and not in the report but the fact of minority seems to be assumed all through), and since there was evidence that the donee actually took the rents of the land given, perhaps this dictum as to delivery of the deed of gift being constructive delivery of possession was unneccessary for the decision of that case. Let it however be assumed that delivery of a deed of gift can under certain circumstances be delivery of constructive possession: does the deed as a whole show that possession, actual or constructive, was given? This will neccessitate an examination of the whole deed, particularly of the earlier clause reserving certain rights to the donor.

But before doing so it is necessary to state the law of Ceylon as affecting Muhammadans. The proclamation of September 23, 1799, declared that "the administration of justice in . . . . Ceylon . . . . shall be . . . . according to the laws and institutions that subsisted under the ancient Government of the United Provinces", and this provision was repeated and re-enacted in Ordinance No. 5 of 1835, and it has always been held that it secured to the Muhammadan inhabitants of the Island the right to live under their own laws and institutions in so far as recognized by the Government of the United Provinces. Meanwhile the Charter of 1801, section 32, had declared that "in the cases of Cingalese or Mussulman natives, their inheritance and succession to lands and all matters of contract and dealing between party and party, shall be determined in the case of Cingalese by the Laws and Usages of the Cingalese, or in the case of Mussulmans by the Laws and Usages of Mussulmans, and where one of the parties is a Cingalese or Mussulman, by the Laws and Usages of the defendant". This Charter was repealed by the Charter of 1833, but this repeal did not affect the proclamation of 1799, which together with its re-enactment by Ordinance No. 5 of 1835 has always been held to establish the right of Muhammadans to use their own law, within the limits to be mentioned below. In 1806 a 'code' of "Special laws, concerning the Maurs or Muhammadans" ('Moorman' is a usual local name for a Muhammadan) was promulgated for the Province of Colombo dealing however only with Succession, Inheritance and Matrimonial matters, and its provisions were extended by section 10 of Ordinance No. 5 of 1852, to Muhammadans residing in the other parts of the Colony. The judgment of Schneider J. in *Rahiman Lebbe v. Hassan Ussan Umma*[1] may be quoted from to show the extent of the reception of Muhammadan law in Ceylon. Reported cases show that since A.D. 1862 our Courts have consistently followed the principle that it is so much and no more of the Muhammadan Law as has received the sanction of custom in Ceylon that prevails in Ceylon. (1862) Anonymous case D. C. Colombo No. 29,129 in Vanderstraaten's Reports, Appendix B. xxxi.; (1873) D. C. Colombo 59,578 in Grenier's Reports, Part iii., p. 28; (1914) *Rama Umma v. Saibu* (17 N. L. R. 338), being but a few among a number of others. It is true that the treatises on the Muhammadan Law generally are frequently referred to in our Courts. But this is done only to elucidate some obscure text in our written Muhammadan Law or in corroboration

[1] *3 C. W. R. 88.*

of evidence of local custom. I cannot find a single decision that has gone to the length of holding that apart from the prevalence of a local custom Muhammadan Law has any application in Ceylon. On the contrary there is authority to the effect that where there is a conflict between the Muhammadan Law as found in the treatises and local custom that the latter should be followed. (*Sale Umma v. Padily*, 10 N. L. R. 109; *Bandirale v. Mariamma Natchia*, 10 N. L. R. 235.) The principles of the Muhammadan Law as found in treatises have been adopted as governing Muhammadans here in the matter of pure donations, because since 1862 there has been evidence that the custom of the Ceylon Muhammadans recognized those general principles. (D. C. Colombo No. 29,129 *ubi supra*). But in the construction of wills, deeds, *fidei commissa*, and in ordinary matters of contract the principles of the ordinary general law and not of the Muhammadan Law are always applied. (D. C. Colombo No. 59,578, Grenier's Report, 1873, Part iii., p. 28; and *Kadija Umma v. Meera Lebbe*, 7 N. L. R. 23.)" There are also decisions, (*Affudeen v. Periatamby*[1] and *Cader v. Pitcha*[2]) which hold that it is the law of the Shafei sect which should be resorted to in cases where Muhammadan law is to be applied.

It must be observed that there is no discoverable legislative enactment declaring the Roman-Dutch law to be the general law or the 'common law' of the Island. If one went solely by statutes, one would have to conclude that it was but one among a number of laws in force in Ceylon. Kandyans, Tamils and Muhammadans are declared each to have their own law, and if Roman-Dutch law has become the general or (if one may use the term) residuary law of the Island—a law, that is, which provides (1) for Kandyans, Tamils and Muhammadans in matters where their own personal law, as received, is silent and (2) for the other portions of the community generally—this has been effected by judicial decision, supporting itself on such statute law as refers to legal terms familiar to Roman-Dutch law. If the Roman-Dutch law is the residuary law of the Island, as it unquestionably is, it has not been by reason of positive enactment that this has been effected.

To return. There is a uniform succession of decisions that in Ceylon gifts by one Muhammadan to another must be governed by Muhammadan law and that by that law a gift to be valid must, as said above, satisfy three conditions: expression of intention to give, expression of intention to accept, and delivery of possession or seisin actual or constructive. To ascertain what is a sufficient delivery or transfer, recourse has been had, in default of any rule established by local Ceylon custom among Muhammadans or by a case decided here, to the recognized treatises on Muhammadan law, such as those of Ameer Ali and Tyabji, and to the Indian cases cited therein. These last have, however, been but sparingly used, since we have not here adopted the developments by the Indian Courts of Muhammadan law, nor is it necessary to do so, since Muhammadan law in Ceylon covers a much smaller portion of the general field of law than it does in India. But it is certainly part of the local Muhammadan law as to gifts that there must be delivery or transfer of possession, and the

[1] *14 N. L. R. 295 at 300.* [2] *19 N. L. R. 246 at 248.*

onus is on the donee to show that such has taken place. This brings us to the words in the present gift importing a restriction.

The words to be interpreted are expressed as imposing a "reservation condition agreement or restriction" subject to which the gift is made, and are as follows:—"That notwithstanding the gift hereby made, I the said donor reserve to myself during my life time the full and unfettered right of residing in any of the said premises hereby gifted and of taking and enjoying the rents, profits, produce and income of all the said several allotments of land and premises hereby gifted without the interference of the said donees or either of them". The donor reserves to himself the unfettered right to live in any of the premises given without interference from the donee. Then it is difficult to see how the donee could grant a lease of any of these premises, or a lessee be safe in taking a lease from the donee for any term however short, since the donor has reserved to himself the right at any time to move into and reside in the premises so leased. I find it difficult to give to these words any other meaning than that the donor after the gift as before retains the right to say who shall live in each and every of the premises he purports to give. Prior to the gift he was in possession of the properties gifted and had the right, subject of course to any subsisting contract with a tenant, to live in any building he chose on his different properties and after the gift he has the same right with regard to them that he had before, and that right is to remain to him "full and unfettered" by "interference" from the donee. With all deference to the forcible argument put to us for the appellants, I cannot see in these words anything else than an expressed intention to retain after the gift what confessedly the donor had before it, the possession of these properties. The words that follow are to a like effect. The donor is to have the "full and unfettered right . . . . of taking and enjoying the rents, profits, produce and income of all" the properties given "without interference" by the donee. He can "take" those rents, and a man takes rents, I apprehend, by demanding them, and, if the demand is not complied with, by instituting such legal proceedings as may be necessary. In the face of these words could the donee bring action against a lessee requiring him to pay his rent? If the lessee called for and obtained inspection of the deed of gift under which the donee claimed the right to sue—and he could not claim such a right under anything else—an exception by the lessee that the donee was not the person entitled to sue, that he had no *locus standi in judicio* would have, I apprehend, to be upheld and the donee's plaint dismissed. *Per* Sir Edward Vaughan Williams in *Nawab Umjad Ally Khan v. Mussumat Mohundee Begum*[1],—"It remains to be considered whether a real transfer of property by a donor in his life time under the Muhammadan Law, reserving not the dominion over the *corpus* of the property nor any share of dominion over the *corpus*, but simply stipulating for and obtaining a right to the recurring produce during his life time is an incomplete gift", and he goes on to quote a passage from the *Hedaya* which shows that it is not an incomplete gift. That was a case of a gift of *mobilia*, Government promissory notes, possession of which had been handed over to the donee, with a promise from him to pay to the donor for his life time

[1] *11 Moore's I. A. 517 at 548.*

the interest accruing on those notes. There the *corpus* had been transferred, here, as I understand the words used in the deed of gift, the title to the *corpus* has been transferred but a considerable "share of dominion over the corpus" has not been transferred, the donor seems to retain over that *corpus,* not the *dominium* or ownership, but at least the enjoyment and the possessory rights, after the gift as before.

Some idea of what is meant by giving possession is obtained from *Tyabji, 2nd edition, p. 441,* where he quotes from a work on Shiah law which however lays down, he says, rules of general applicability:— "Delivery of possession is the transfer of the customary control over the thing from the transferor to the transferee . . . . There is no doubt as to possession being transferred by vacating with reference to immovables, in the sense of the removing of obstacles in the way of the transferee and by the transferor raising his hand and giving him permission; this is necessary in order to place the transferee in the same position as the transferor . . . . Takhliat, or vacating a property, means giving up all dealings with it and leaving it entirely at the disposal of the purchaser or the donee without leaving any obstacle in the way of his using it". This metaphor, "raising the hand" or "taking off the hand", is several times used by Tyabji as expressing what the donor must do before it can be said that he has given possession to the donee. Now in this case it is exactly the "taking off the hand" or "raising the hand" which seems to be absent. The donor is to have certain full and unfettered rights without the interference of the donee. The use of such phrases do not suggest that the donor has "raised" or "taken away his hand".

Tyabji says further—*2nd ed., p. 427*—that the donor "must do everything which according to the nature of the property the subject of the gift is necessary to be done in order to transfer the ownership of the property and to render the gift complete and binding on himself" and that he "will be held to have done everything that is necessary to be done to transfer possession, when he has put it in the power of the donee to take possession of the subject of the gift, if he so chooses". Where the subject of the gift is immovable property let to tenants, their attorning to the donee will be proof that possession has passed to him. There is no suggestion that that was done here, or (one may mention) that any change of the name of owner was made in the municipal records of Colombo, or that there was even any handing over, symbolical or actual, of the premises 5, Jefferson street, where the donor and donee continued to reside after the gift as before—indeed this last could not be done consistently with the reservation to the donor of the "full and unfettered right of residing in any of the premises hereby granted".

One may perhaps note that had the 'reservations and restrictions' been worded as requiring the donee to 'permit' the donor to reside in any of the premises named in the deed and as requiring him to 'hand over' the rents and profits to the donor, or to 'permit' the donor to receive them, then it might have been possible to hold that the donor had 'raised' or 'taken off the hand' and that there was evidence from which it could be inferred that he had 'put it in the power of the donee

to take possession of the subject of the gift', but these things are just what the wording of the deed seems to preclude; the donor is to do everything himself, unfettered and unrestricted.

If we examine the subsequent doings of the parties, we do not, I think find any evidence that clearly points to an intention to transfer. The donee seems sometimes to have collected rents but it is left uncertain whether he collected those rents in his own name or in that of the uncle donor, and until some evidence is produced to show that he did collect those rents in his own name, it must be assumed that he collected them in the name of his uncle the donor since the onus is upon those seeking to establish transfer of possession, and this is a piece of evidence from which transfer of possession might be inferred. He paid municipal taxes and took receipts in his own name but this again is equivocal without the production of other evidence to show that the properties he was paying taxes for were in his possession. He ordered repairs and negotiated with the Municipality for structural alterations to premises forming part of the property mentioned in deed No. 4,277 but these acts again were equivocal. He may have done them as agent for his uncle, he may have done them for himself as owner. The possibility that he did these things as agent is strengthened by the power of attorney given him by the uncle donor in 1917. The fact that the title deeds and deed No. 4,277 were in his possession so that he could and did deposit them at the bank on a species of equitable mortgage can be attributed, no doubt, to the declaration at the end of the deed by the donor that he hands over the title deeds to the donee, but if what has been said above is correct, this handing over of the title deeds and the fact that they remained in the donee's possession are insufficient to establish transfer of possession of the properties in the face of the declaration earlier in the deed which has, I am driven to conclude, the effect of retaining possession of them in the donor.

The position is then that we have in this deed a definite statement that the legal title is transferred and what seems to be an equally clear statement, and not less clear because it is not worded in artificial terms, that possession is to be retained by the donee. The two provisions have to be read together, being each a part of the same deed, and we have to judge from what the donor has said what it was that he intended by these two provisions in the deed, and he seems to have said, and therefore to have intended, that he has given the legal title but not so as to give possession, but under Muhammadan law which one assumes is the law applicable to this deed, if he did not give possession, he did not make a valid deed of gift.

The matter cannot however be decided simply on the foregoing considerations since while these appeals were pending the Privy Council gave judgment in *Weerasekera v. Pieris* (*supra*) and it is necessary to examine them in the light of that judgment.

The deed to be interpreted in that case was one made by a Muhammadan donor in favour of his son the donee, also, a Muhammadan, and in it he declared that in consideration of natural love and affection he gave, granted, assigned, transferred, set over and assured unto the donee, his heirs, executors, administrators and assigns as a gift *inter vivos* absolute and irrevocable the property specified, to have and to hold unto

the donee, his heirs, &c., subject to the conditions and restrictions to follow, namely, that the donor had reserved to himself the right and power to cancel and revoke the deed and make any other deed (with regard to the property specified) as he should think fit and proper during his life as if the deed had not been executed, and had also reserved to himself the right of taking, receiving and enjoying the rents, profits, &c., of the property during his lifetime, and further that after his death the property should go to and be possessed by the donee as his property but so that he should not have power to sell, mortgage, give, exchange or otherwise . . . . alienate it or encumber the rents, profits, &c., or allow the property or its rents, profits, &c., to be seized, attached or sold under writ of execution for any debt, default, &c., of the donee and that he should not lease the property for more than three years, with power to the donee however to make gifts to his daughters, and that after the death of the donee the property should devolve on his children as their absolute property. The donee accepted the gift subject to the above conditions.

If this deed had been one between a donor and a donee who were not Muhammadans, then one would be correct in describing it as a gift *inter vivos* which was to take effect if at all (since it was revocable), only on the death of the donor, and then under the bond of a *fidei commissum* for the life time of the donee, the whole being a transaction conforming to the provisions of Roman-Dutch law.

The Privy Council judgment mentions the three conditions required for the validity of a Muhammadan deed of gift and agrees that 'the last mentioned provisions' in the deed then under consideration 'constitute a *fidei commissum*'. It then goes on to say that the common law of Ceylon is the Roman-Dutch law as it obtained in the Netherlands about the commencement of the 19th century—with all respect, one prefers to call it the residuary law of Ceylon rather than its common law—and it notes that under that law donations involving *fidei commissum* were well known and recognized. It then proceeds to say that the question before the Board depends on the construction of the deed which it summarises as follows:—"The conditions and restrictions mentioned in the deed are quite inconsistent with a valid gift *inter vivos* according to the Muhammadan law. For, by the deed, the father reserved to himself the right to cancel and revoke the so called gift, as if the deed had not been executed, and to deal with the premises as he thought fit; he reserved to himself the rents and profits of the premises during his life time, and it was only after his death that the premises were to go to, and be possessed by, his son. In their Lordships' opinion, all the terms of the deed must be taken into consideration when construing the deed, and it seems clear to their Lordships that it was never intended that the father should part with the property in, or the possession of, the premises, during his life time, or that the son should have any control over or possession of the premises during his father's life time. In other words, it was not intended that there should be a valid gift as understood in the Muhammadan law. The deed further provided (among other things) that after the father's death, the son should not sell, mortgage or alienate the premises or any part thereof, that his powers of leasing the premises should be limited to granting leases for three years and that apart from gifts which the son

might make to his daughters on their marriage, the premises upon the death of the son should devolve upon the children of the son as their absolute property. It was not disputed that the last mentioned provision constituted a *fidei commissum* according to Roman-Dutch law, but, as already stated, it was contended on behalf of the respondent that inasmuch as the terms of the first part of the deed purported to constitute a gift *inter vivos* between Muslims, the Muhammadan law must be applied thereto, and as possession of the premises was not taken by the son during the father's life, the gift was invalid and the *fidei commissum,* which was based on it, also failed. Their Lordships are not able to adopt this contention of the respondent, and upon the true construction of the deed, having regard to all its terms, they are of opinion that the father did not intend to make to the son such a gift *inter vivos* as is recognized in Muhammadan law necessitating the donee taking possession of the subject-matter during the life time of the donor, but that the father intended to create and that he did create a valid *fidei commissum* such as is recognized by the Roman-Dutch law".

Conformably to the principles of the judgment, it will be necessary then to ascertain the true construction of the present deed having regard to all its terms, and if so, the present deed seems to be clearly distinguishable from that under consideration in the Privy Council judgment. The present deed purports to make a gift *inter vivos* absolute and irrevocable, these words being repeated in the *habendum* clause, and purports to vest in the donees the legal title by handing to them the deed itself and the connected deeds. It purports to make an immediate and irrevocable gift of the legal title, that is of the *dominium.* In the deed in *Weerasekera v. Pieris* (*supra*) on the other hand, there was a "so called gift" which transferred nothing at all unless and until the donor died without having revoked the deed; until that event happened nothing could vest in the donee. Further: the donor in the present deed imposes a penalty or forfeiture clause on either of the two donees who at any time thereafter abandons the Islamic faith or marries a widow or divorced woman; one would say a tolerably clear indication that he was purporting to make a gift under the Muhammadan law as he understood it. Regard must be had to all the terms in the deed, and I find it difficult to give due significance to this penalty or forfeiture clause unless the donor considered himself to be acting under and within the ambit of his own Muhammadan law. Yet again, the clause stating that he handed over the deed and connected deeds "by way of vesting legal title", and the reinforcement of this in the attestation clause by his request to the Notary to hand over the deed and connected deeds to the donee, certainly suggest, at the very least are consistent with, knowledge by him that a gift under Muhammadan law to be valid must be a gift *in praesenti,* and even with a belief that this handing over of the deeds was sufficient to ensure possession passing. Handing over the title deed is a thing from which constructive delivery of possession, unless negatived by other provisions, can be inferred. One concludes then that the donor did intend to make such a gift *inter vivos* as is recognized in Muhammadan law, with possession passing to the donee.

It is true that the deed fails as a Muhammadan deed of gift since the restrictions imposed are so worded as to prevent possession passing but this is no more than saying that the deed failed of its intention, a common enough event, as reported cases on conveyances of immovable property show; the conveyancer failed to effect the donor's purpose. But the purpose itself seems clear from the foregoing considerations.

One would also repeat what has been said earlier. Had the restrictions been expressed as requiring the donee to permit the donor to reside in any of the premises named in the deed, and requiring him to hand over the rents and profits to the donor or to permit the donor to receive them, it might well have been held that there had been a transfer of possession.

If it be argued that the donor here could not have intended to make such a gift *inter vivos* as is recognized in Muhammadan law, since on the restrictions and reservations as expressed in the deed, no possession could pass to the donee, this would firstly be very like arguing that no Muhammadan can intend to make a gift *inter vivos* under Muhammadan law unless that deed turn out to be valid under Muhammadan law in every respect—his intention must effect its purpose to be an intention at all—and secondly it would, in determining what the intention of the donor was, be laying stress solely on one clause in the deed and disregarding others, equally important, the clause declaring the deed to be irrevocable, the statement of intention to vest the legal title in the donees, that is to transfer the *dominium in praesenti,* the handing over of the title deeds, and not least the forfeiture clause if either donee abandons the Muhammadan faith. When the various provisions in the deed are all examined to ascertain intention, the balance certainly seems to incline in favour of the donor having intended to make a gift *inter vivos* as recognized by Muhammadan law.

But the deed must be examined further. Restriction (3) says that "if either of the said donees shall at any time hereafter abandon the Islamic faith or shall marry a widow or divorced woman then the title to the share of the delinquent donee of the several allotments of land and premises which I have hereby gifted to him shall at once devolve on the other donee who shall thereafter be entitled to the whole of the said several allotments of land and premises herein described as if the entirety of them had been gifted to him alone by me". This restriction, though a penalty or forfeiture clause, is none the less a *fidei commissum,* for it provides that if one of the donees does either of two named things, his moiety shall go over to the other, who would to that extent be a *fidei commissarius. Lee, 3rd ed., 277* "Very often *fidei commissum* depends upon a condition as where a wife is appointed heir with a gift over in the event of re-marriage", and he cites *Huber 2.19.44.* But though this is technically the effect of this restriction, I think that both the donor and his conveyancer would have been surprised had they been told that the donor "intended to create or did create a valid *fidei commissum* such as is recognized by the Roman-Dutch law". What they intended was to emphasize the Muhammadan character of the deed of gift, and to ensure the donees remaining in that faith—the intention is imperfectly expressed since they did not look beyond the possibility of one donee apostatizing, but the intention is unmistakable. Here then

we have a clause which is, beyond question, "a valid *fidei commissum* such as is recognized by Roman-Dutch law". But it is also a penalty or forfeiture clause inserted to prevent the donees abandoning the Islamic faith, and, to give due effect to what the donor has said and to what therefore he must be presumed to have intended, one would say that he has thereby stated that this is a Muhammadan deed of gift between Muhammadans, and so presumably to be governed by Muhammadan law, but that, perhaps unwittingly, he has so expressed himself as to create a *fidei commissum* valid under the residuary law of the Island. There is then no contradiction between the two aspects of this clause, a forfeiture if the Islamic faith is abandoned but in the form of a *fidei commissum*.

But perhaps the matter must be probed further. Suppose it be argued that the donor, having created by this clause a valid *fidei commissum*, has thereby excluded the possibility of his having intended when making this clause to act under Muhammadan law—the two things mutually exclusive, the creation of the Roman-Dutch law *fidei commissum*, the intention to act under Muhammadan law, an opposition between them so strong that the making of a valid *fidei commissum* of any kind *ipso facto* rules out the possibility of any intention in so making it and in so far as it is a valid *fidei commissum* thereby and in the clause where it occurs, of acting under Muhammadan law—then two observations would have to be made. First, one would say that this would be an insistence on names to the forgetting of the realities behind those names, the reality of the clause being the intention that a donee shall forfeit if he abandon the Islamic faith, the phraseology in which that intention is clothed being a *fidei commissum* under Roman-Dutch law. Secondly, one would say that granting to the full that this clause creates *modo et forma* a valid *fidei commissum* under Roman-Dutch law, yet the effect of it is to penalize by forfeiture a donee abandoning the Islamic faith,—this surely must be conceded on any interpretation of the clause—and that consequently to use this *fidei commissum* to prove that the maker cannot have had the intention when making it and in so far as he made it, of acting under and within the ambit of Muhammadan law, would be to use the same piece of evidence to prove two contrary positions.

This question, the intention of this forfeiture clause, has been discussed at length to satisfy oneself that one has fully considered, from several aspects, what the intention can have been, and one is brought back continually to the original conclusion, that the right way to apprehend it is to hold that it is an attempt to ensure the donee or donees remaining in the Islamic faith and if so that the intention of its maker was thereby to act under Muhammadan law.

Returning now to the main question. One concludes from an examination of all the provisions in the deed 4,277 that the donor intended to make a valid gift *inter vivos* as recognized by Muhammadan law but that the deed failed to be a vaild one since under it possession did not pass.

But the Privy Council judgment in *Weerasekera v. Pieris* (*supra*) which one has been endeavouring to follow and apply, as clearly one must from the similarity of the matter there in dispute to that in the present appeal, states a question—it was one raised in that appeal—to which no categorical answer seems discoverable in that judgment; the answer may be

implied but it is not explicit. The question raised is best set out in the words of the judgment itself—" It was contended on behalf of the respondent that inasmuch as the terms of the first part of the deed purported to constitute a gift *inter vivos* between Muslims, the Muhammadan law must be applied thereto, and as possession of the premises was not taken by the son during the father's life, the gift was invalid and the *fidei commissum* which was based on it also failed ". The answer that the judgment gives is that the deed, on an interpretation of all its terms, showed an intention to create, and the creation of, a valid *fidei commissum* such as is recognized by Roman-Dutch law but that it did not show an intention to make such a gift *inter vivos* as is recognized in Muhammadan law. I have purposely transposed the terms of the answer so as to deal first with the *fidei commissum.* A valid *fidei commissum* was created by the deed in *Weerasekera v. Pieris (supra)* and to grasp the effect of this conclusion one reminds oneself that while a trust can be created merely by a declaration of A that he holds in trust for B, a *fidei commissum* needs for its creation something, here a gift (since there was no question of a will), which is valid to effect a transfer of *dominium ;* gift of *dominium* to the *fiduciarius* with a conditional limitation over—if so one may phrase it—in favour of another or others, *fideicommissarii.* If then a valid *fidei commissum* was created by that deed, there must have been a gift in itself valid to pass the *dominium* to the son the *fiduciarius.* There was no intention " to make to the son such a gift *inter vivos* as is recognized in Muhammadan law ", but there must have been an intention to make a gift, and a gift must have been made, for without it no *fidei commissum* could come into existence, and that gift must have been such as is recognized in some system of law, presumably the Roman-Dutch law, the residuary law, as one has called it, of the Island. With all submission, and endeavouring to understand and apply the principles which seem implicit in this judgment, one finds it difficult to escape from this conclusion. In *Weerasekera v. Pieris (supra)* there was a valid *fidei commissum,* but to create this at all, a valid gift was necessary. The deed then was a valid gift, but under Roman-Dutch law, since its terms negatived any intention to make such a gift as is recognized by Muhammadan law. Then the judgment seems to imply this proposition, that a Muhammadan in a deed of gift can manifest an intention to make that gift outside Muhammadan law altogether and therefore to make it—the only alternative—under Roman-Dutch law, and that one of the ways of doing so is to create by his deed a valid *fidei commissum* in an instrument which if made not by a Muhammadan would be valid as a deed of gift under Roman-Dutch law. In other words, if he manifest a sufficiently clear intention, he can contract himself out of the Muhammadan law as to gifts altogether. Henceforward then in examining a deed of gift from one Muhammadan to another one must examine the deed as a whole and with regard to all its terms, to see if it shows an intention to make such a gift *inter vivos* as is recognized by Muhammadan law. If it does show such an intention, the validity of that gift will be determined by the rules applicable to a Muhammadan deed of gift, namely, the three mentioned earlier in this judgment. If it does not show such an intention yet does show an intention to make a deed of gift, the validity of that gift will

be determined by the rules applicable to a deed of gift made under the residuary law, the Roman-Dutch.

One puts forward these propositions with all submission since it may be that one has failed to grasp the principles on which this judgment of the Privy Council is based, yet they certainly seem implicit in it, and if that is so, then an explicit statement of them would have been of great assistance to this Court in determining such cases of gift from one Muhammadan to another as may arise hereafter.

For the reasons given above I am of opinion that these appeals should be dismissed with costs.

GARVIN S.P.J.—

This is an appeal from a judgment of the District Court whereby the plaintiff's action was dismissed with costs. The plaintiff is the assignee of the insolvent estate of M. B. Oduman and the purpose of his action is to obtain for the benefit of the creditors the lands and premises described in his plaint which he claims as the property of the insolvent. The defendant denies the title of the insolvent and claims to be the lawful owner of the premises.

M. B. Oduman, the insolvent, and M. B. Abdul Cader are nephews of the defendant. On August 15, 1913, the defendant executed the deed bearing No. 4,277 which is in form a transfer by way of gift of these lands and premises to his two nephews subject to the following reservations, conditions, agreements and restrictions, to wit:—

(1) That notwithstanding the gift hereby made I the said donor reserve to myself during my life-time the full and unfettered right of residing in any of the premises hereby gifted and of taking and enjoying the rents, profits, produce and income of all the said several allotments of land and premises hereby gifted without the interference of the said donees or either of them.

(2) That the said donees and each of them shall always profess the Islamic faith as they have hitherto done and shall marry only a virgin or spinster and not a widow or a divorced woman.

(3) That, if either of the said donees shall at any time hereafter abandon the Islamic faith or shall marry a widow or divorced woman then the title to the share of the delinquent donee of the several allotments of land and premises which I have already gifted to him shall at once devolve on the other donee who shall thereafter be entitled to the whol of the said several allotments of land and premises herein described as if the entirety of them had been gifted to him alone.

(4) That, after the death of me the said donor the donees shall pay to my old servant Abone Ismail during his life-time monthly pension or allowance of thirty rupees (Rs. 30) from the date of my death and shall allow him the free use of a tenement suited to his status the rent of which is not to exceed twelve rupees (Rs. 12) per mensem and in case he shall predecease his wife then this monthly payment of Rs. 30 shall be made to his widow and the free use of the tenement shall also be allowed to his widow till her death.

The learned District Judge has construed the deed as a whole as a gift which is subject to the reservation of a life-interest in the donor and

following the judgment of this Court in *Weerasekera v. Peiris*[1] held that it was obnoxious to the Muslim law which governed the case. The judgment of this Court in *Weerasekera v. Peiris* (*supra*) has since been reversed upon appeal to the Privy Council, and the argument addressed to us by Council for the appellant is based on the judgment of their Lordships of the Privy Council.

As a matter of construction it was submitted that the document is in form of a deed of gift with the reservation to the donor of a life-interest by which the donor has also impressed upon the subject of the gift a valid *fidei commissum.*

Counsel invited our attention to the case of *Sahul Hamid v. Mohideen Nachiya*[2] where Dalton J. held that a reservation in terms very similar to those in which the donor in this case has reserved to himself rights in the subject of the gift did not amount to the reservation of a " real right in the land ". My own view on the point is fully set out in *Weerasekere v. Peiris* (*supra*) at page 188 at the bottom of the second column as follows:—

> If then the reservation referred to in these judgments (the reference is to certain judgments in Indian cases under consideration) is in law merely a right to *receive from the donee* the produce or profits of the subject of the gift *based on agreement* and not a real right in the land, then, when such land is in the possession of the donee, it is susceptible of delivery of possession as fully as if there were no such reservation.

The difference between personal rights proceeding from and based on agreement are contrasted with real rights in the land. The reservation in this case to the donor during his life-time of " the full and unfettered right of residing in any of the premises hereby gifted and of taking and enjoying the rents, profits, produce and income of all the said several allotments of land and premises hereby gifted without the interference of *the said donees or either of them* " is the reservation of real rights in the land. They are in no sense rights proceeding from a mere agreement on the part of the donees to hand over to the donor the rents, profits and income of the premises.

But it is not necessary to pursue the matter further. Counsel preferred to take up the position, I think rightly, that the donor in the case before us did reserve to himself real rights in the subject of the gift but these he urged were not so extensive as to be inconsistent with an intention to deliver possession of the premises to the donees.

The reservation by the donor to himself of the right to live in any of the premises and to take all the rents, profits, produce and income of the lands and premises gifted appear to me to negative any intention on the part of the donor to surrender possession of the subject of the gift to the donees.

Indeed, the main contention addressed to us was that the judgment of the Privy Council in *Weerasekere v. Peiris* (*supra*) proceeded upon the principle that in a case of gifts between Muslims where by reservations, conditions and restrictions of the character referred to the donor indicates that he never intends to part with the possession of the premises during his life-time, it is manifest that he did not intend that there should be a valid gift

[1] (1931) *32 N. L. R. 176.* [2] (1932) *34 N. L. R. 57.*

as understood in the Muhammadan law and must therefore be taken to have intended to make such a gift as is known to the Roman-Dutch law. In short, that it is competent for a Ceylon Muslim to make a gift in accordance with the principles of the Muslim law to which he is subject or at his will to free himself from those laws and make a gift which must be governed by the principles of the Roman-Dutch law if his intention is that regard be sufficiently manifested by reservations, restrictions or conditions which run counter to the fundamental principles of the Muslim law of gift.

If this be the correct view of the principle underlying the judgment of the Privy Council then the effect upon titles to land and upon the law as hitherto understood is very far-reaching. I would instance the case of gifts subject to the reservation of a life-interest in the donor. It is well settled law that such gifts are governed by the Muslim law and being obnoxious to the fundamental requirement of delivery of possession are void and of no effect. In such cases, the donor in terms manifests his intention not to part with possession of the property gifted. That, it is urged, is a manifestation of an intention not to make " such a gift *inter vivos* as is recognized by the Muhammadan law as necessitating the donee taking possession of the subject-matter during the life-time of the donor ", but to make a gift which would be operative under the Roman-Dutch law.

The alternative view was suggested that the Privy Council judgment is authority only for the proposition that in the case of a gift between Muhammadans where the donor impresses the subject of the gift with what would be a valid *fidei commissum* if tested by the Roman-Dutch law, the Muhammadan law is excluded and the whole transaction is brought under the Roman-Dutch law. The position then would be that in every case in which a deed contains provisions which appear to be intended to impress the subject of the gift with a *fidei commissum* these provisions must first be examined in the light of the Roman-Dutch law and if they are found to be sufficient to create a *fidei commissum* the Muslim law is excluded. Presumably, if upon such an examination it is found that the language used does not create a valid *fidei commissum* the gift will only take effect if it is a valid gift under the Muslim law.

As I shall presently endeavour to show we are required to determine all matters relating to gifts between Muslims in accordance with their laws and usages so far as they obtain in Ceylon, but it is a long established and inveterate custom among us to determine the validity of restrictive clauses in Muhammadan deeds of gift in accordance with principles derived from the Roman-Dutch law.

In view of the importance of these questions not only to the Muslims but to members of other communities, whose title to property in numerous instances depends upon the validity of the acts of their Muslim predecessors in title, it is desirable in the first instance to examine more fully the position of the Muslim law in our legal system with special reference to the law in regard to gifts between Muslims.

In his treatise on the *Laws and Customs of the Singhalese* (*vide* Introduction, section 4) Mr. Hayley when dealing with the assumption made in modern times that the Dutch had imposed the Roman-Dutch law on all the native inhabitants of this Island traces the history of the laws of the Sinhalese back to the time of the Portuguese who were the first

invaders of Ceylon. He refers to an incident reported in *Ribeiro* (Dr. Pieris' translation, p. 92) where we find it recorded that at a meeting between the Portuguese and delegates, representative of the Singhalese, the Portuguese agreed to preserve to the Singhalese "all their laws, rights and customs without any change or diminution". That the Dutch pursued a similar policy is beyond question. It is to them we are indebted for he compilation and promulgation of a code of the laws and customs of the Tamils of Jaffnapatam known as the Tesavalamai. They appear to have displayed a similar anxiety to ascertain and codify the laws of the Kandyans (*vide Hayley, p. 23,* who cites *Bertolacci, Appendix A*). This is further confirmed by Lawson D.J. in D. C. Colombo 29,129, a case of the year 1865[1], who says: "It is indeed matter of history and of notoriety, that the Moors under the Dutch Government were allowed to be governed by their own laws and usages . . . . ". It is hardly necessary to make further citation.

Shortly after the capitulation by the Dutch, His Majesty's Government made a proclamation dated September 23, 1799, declaring that the administration of justice shall be exercised by all Courts of the Island . . . . "according to the laws and institutions that subsisted under the ancient Government of the United Provinces . . . .". These words thus gave Royal recognition and sanction not only to the Roman-Dutch law but to the Kandyan law, the Muslim law, the Thesavalamai but even the Mukkuwa law, which together formed part of the "Laws and Institutions that subsisted under the ancient Government of the United Provinces".

In a note on "the operation of the Roman-Dutch law when in conflict with native usages" by T. Berwick, District Judge of Colombo, an acknowledged authority on the subject, this writer refers to the following passage in the Royal instructions to the first Governor quoted in the Proclamation of 1798, by which the Governor is directed that the temporary administration of justice "in these settlements should, as nearly as circumstances would permit, be exercised in conformity to the laws and institutions that subsisted under the ancient Government of the United Provinces, subject to such deviations, &c.", as "words which do not recognize the European Dutch law, but simply desire that the law, whatever it may have been (whether Singhalese, Moorish or other) hitherto administered by the Dutch in these settlements, should continue till further arrangements"—*vide 1 Browne, App. A, p. 12.* If in a matter so clear any doubts be possible, they are removed by clause 32 of the Charter of 1801 which provided "that in the cases of Cingalese or Mussulman Natives, their inheritance and succession to lands, rents and goods, and all matters of contract and dealing between party and party, shall be determined in the case of Cingalese by the laws and usages of the Cingalese, or in the case of Mussulmans, by the laws and usages of Mussulmans, and where one of the parties is a Cingalese or Mussulman, by the laws and usages of the defendant".

The position then and now is that there was preserved to the Cingalese, Mussulman and other natives of the Island as also to the Dutch inhabitants, their respective laws and usages. Indeed as Mr. Berwick remarks

[1] (*1869-1871*) *Vanderstraaten's Reports, Appendix B, 31.*

in the note referred to "Never once (that I can remember) has the Legislature or the Supreme Authority recognized the existence of the Roman-Dutch law, while it has more than once expressly confirmed the native usages".

This brief historical examination of the subject under consideration leads to the conclusion that the Muslim law and the other indigenous systems of law are as much a part of the common law of this Island as the Roman-Dutch law and that there is no body of legal principles and usage common to all parts of the Island and all its inhabitants in the sense of the Common law of England.

In Ceylon, therefore, we have several different systems of law each with a claim to recognition to the extent to which it obtained in the Island which no Court may ignore. These different systems are not in the nature of personal privileges which the individuals to whom they are applicable may claim to surrender at their will. The preservation to the Muslims of their laws and usages is not a privilege in any different or other sense than the similar preservation in the case of the Dutch inhabitants of the Roman-Dutch law or in the case of the Kandyans of their laws and usages.

The Muslims are therefore subject to their own laws and usages to the extent to which they obtain in Ceylon and the Courts are required to administer and apply those laws and usages in determining all questions relating to "their inheritance and succession to lands, rents and goods, and all matters of contract and dealings . . . .". But it is doing no injustice in the light of our knowledge of the laws and usages of the Muslims, Kandyans, and "inhabitants of Jaffnapatam" to say of them that in no single instance is there anything approaching a complete system of law. They are very limited in their scope and from the earliest times it became necessary to supply their deficiencies by the application of the principles of the only complete system of jurisprudence then in force in the Island, viz., the Roman-Dutch law. It has thus become the inveterate practice in Ceylon to resort to the Roman-Dutch law in all matters outside the area covered by the other systems of law where it can be applied without conflict with any of its provisions, rules or principles. The Roman-Dutch law thus became the general law of the Island applicable to all its inhabitants in all matters upon which their personal laws are silent and in this sense the Common law of the land.

Among the laws and usages of the Muslims in force in Ceylon are those relating to gifts. It remains to inquire what those laws and usages were. It is well settled here that according to the laws and usages of the Muslims in Ceylon it is essential to the validity of a gift that there should be (1) a manifestation of the wish to give on the part of the donor, (2) the acceptance of the donee, express or implied, and (3) the taking possession of the subject-matter of the gift by the donee—*vide* (1865) D. C. Colombo 29,129 (*supra*) and *Affefudeen v. Periatamby*[1]. There is no evidence that so far as is relevant to the matter under discussion the Muslim laws and usages in force in Ceylon during its administration by the Dutch in regard to gift went any further. Indeed, it would seem that so long as these fundamental requirements were complied with a gift between Muslims

[1] *(1911) 14 N. L. R. 295.*

was valid and effective. The whole body of the Muslim law as it obtains on the neighbouring continent of India does not appear ever to have formed part of the laws and usages of the Ceylon Muslims. Indeed, in so far as it has developed at all that development has followed a somewhat different course.

There are indications that the Muslim inhabitants of this Island realized the advantage of being able to settle property by impressing their gifts with *fidei commissa,* an advanage which the majority of their countrymen subject to the Roman-Dutch law enjoyed. The earliest reported case of such a gift is D. C. Colombo 59,578[1], the deed under consideration bore the date November 12, 1853. The deed was in form a gift to one Aydroos but subject to conditions and restrictions which in the case of persons subject to the Roman-Dutch law would have clearly burdened the gift with a valid *fidei commissum.* The subject of the gift was seized in execution against Aydroos who seems to have died thereafter. The widow and children brought an action to have the seizure set aside claiming to be entitled to the premises under the *fidei commissum* impressed on the gift. The defendant contended that the land vested in Aydroos absolutely and that the conditions and restrictions in the deed of gift were void and inoperative. It is to be noted that it was not suggested that the gift offended against any of the three requirements of the Muslim law of gift referred to earlier. The defendant affirmed the transaction as a valid gift to Aydroos. His contention is set out in the judgment as follows:—"The defendant contends that the restrictions against alienation (wrongly styled condition) is illegal, void and inoperative and rests his proposition on the Muhammadan law". The judgment proceeds: "It is argued for the plaintiffs, that this question, being one affecting real property, must be governed not by Muhammadan law but by the Lex Loci; and for the defendants, that in this instance the Muhammadan law is the Lex Loci". The Judge then refers to the Charter and concludes that the Muhammadan law is part of the Common law of the country. He then considers to what extent the Muhammadan law obtains, he points out that "the whole immense body of Muhammadan law" is not law in Ceylon and that the branch of law known as Wukf was not introduced into Ceylon and did not become part of the customary law of the Ceylon Muslims, and concludes as follows:—"The clause in question would be valid by the ordinary law of Ceylon, and must therefore be held valid in this case, however the Muhammadan law may vary in this regard in distant parts of the world. He expresses the opinion that as the Muhammadan system of jurisprudence relating to the construction of wills, &c., and the effect of void conditions did not form part of the law of Ceylon the matter should be governed by what he refers to as the ordinary law of the land. He finally holds the clause to be good but notes with satisfaction that the Muhammadan law as it exists out of Ceylon is substantially similar. This presumably is a reference to the law of the Shiah sect which recognizes the gift of a limited estate, *e.g.,* a gift by A to B for life and after him to C.

The case with which Berwick D.J. was dealing was one of gift between Muslims which the contestants were agreed was a valid gift under the

[1] *Grenier's Reports, Vol. II, Part III., p. 28.*

Muslim law in force in Ceylon to the donee Aydroos. The sole contest related to the clause which restricted alienation by the donee in favour of "his heirs in perpetuity". The question which was proposed and decided was whether such a clause was void or valid and operative. The learned Judge held that as the rules by which such matters were determined under the Muslim law in other countries did not form part of the laws and usages of the Muslims of Ceylon which are silent on the point the validity of the clause should be determined in accordance with the rules of the Roman-Dutch law by which the validity, nature and scope of *fidei commissa* created by gift are ascertained. A *fidei commissum* may be imposed upon a legatee by the terms of the will or upon a donee by the terms of the gift. It is hardly necessary to say that there must be a valid transfer of property to the legatee or donee before a *fidei commissum* can operate. Under the Muslim law of Ceylon no transfer of property takes place without delivery of possession. Berwick D.J. did not hold that the validity of the transfer by way of gift was to be determined in accordance with the principles of the Roman-Dutch law of gift or that once it was ascertained that the restrictive clause would be effective to create a valid *fidei commissum,* supposing the gift to be valid, the whole transaction must be judged by the Roman-Dutch law. Nor was he called upon to decide anything more or other than whether in the case before him the clause was obnoxious to the laws and customs of the Muslim law in force in Ceylon.

Whether that learned Judge was right or wrong in resorting to the Roman-Dutch law and determining the question of the validity of such a clause in accordance with the principles of that law where the Muslim laws and customs in force in Ceylon were silent the Courts of Ceylon have thereafter invariably applied the rules of the Roman-Dutch law relating to *fidei commissa* created by gift whenever any question arose as to the sufficiency of such a clause to establish a *fidei commissum* or as to the nature or scope of the *fidei commissum* thereby created in connection with a gift between Muslims. And the Muslims, who in all probability had commenced to do so long before the case referred to was decided, continued to burden their gifts with *fidei commissa.* This is evidenced by a long chain of decisions of this Court in every one of which this Court was called upon to decide whether the language used by the donor or testator was sufficient to impress the gift with a *fidei commissum* or assuming that it was, to determine some question as to its nature or scope and in every case the matter was determined in accordance with the Roman-Dutch law of *fidei commissa.* In no single case was the Court invited to determine the validity of the gift to the donee by the Roman-Dutch law of gift; nor has this Court ever said that that question must be decided by the Roman-Dutch law and not by the Muslim law where the language used by the donor when imposing restrictions or restraints was in other respects sufficient to creat a *fidei commissum.* Counsel have failed to point to any one of the numerous cases of Muslim gifts involving *fidei commissa* decided by our courts in which it was held that a gift which was bad for want of seisin was a valid gift under the Roman-Dutch law because the language used by the donor disclosed an intention to impose a *fidei commissum* on the donee.

The first instance of a deed of gift whereby the donor in addition to imposing a burden in the nature of *fidei commissum* on the donee reserved to himself a usufruct for life and where it was quite clear that there had been no delivery of possession to the donee the validity of which was in question is the case of *Weerasekere v. Peiris* (*supra*). Indeed, there is but one other case of a deed of gift with such a reservation which came before this Court in any connection, the case of *Ahamadu Lebbe v. Sulaiyamma et al.*[1] but there all the parties claimed under the deed and the only question submitted to the Court related to their respective rights under the deed.

In the circumstances and consistently with the repeated rulings of this Court that there was an infringement of the fundamental principle of the Muslim law of gift as it obtains here, that delivery of possession was essential to the validity of all gifts, it was held that the gift was bad. In the absence of delivery of possession there was no valid transfer of property to the donee on whom the *fidei commissum* was imposed.

In *Weerasekere v. Peiris* (*supra*) I suggested that the present position of the law was the result of the development of the Muslim law in force in Ceylon by the absorption into that system of *fidei commissum* and the principle of the Roman-Dutch law relating to *fidei commissum*. So that in determining the validity of restrictions and restraints in an otherwise valid Muslim gift we were applying principles which now form part of the laws and customs of the Muslims of Ceylon.

A more recent parallel development has gone on in the Kandyan law. As recently as the year 1907 when the case of a gift by a Kandyan where the donor sought to impose a *fidei commissum* came before our Courts in *Dantuwa v. Setuwa*[2], Middleton J. did not think it was intended that any analogy of the Roman-Dutch law of *fidei commissum* should be applied to a Kandyan deed of gift. But the Kandyans continued to annex such clauses to their gifts and in the year 1921, Sir Thomas de Sampayo who saw nothing in the Kandyan law of gift to prevent such restrictions being imposed upheld the validity of the clause and gave effect to it remarking "it is not a question of applying any particular rule of the Roman-Dutch law to the construction of this deed of gift. It is rather a question of the right of an owner of property to dispose of it according to his pleasure. I am not aware of any principle of the Kandyan law which prevents a Kandyan from giving a limited interest to one person, and providing that at the termination of that interest the property should vest in another person. Such a disposition would, of course, be called in the Roman-Dutch law a *fidei commissum*. It may not be a proper expression to describe a similar disposition by a Kandyan. It is, however, a convenient expression, and if the thing itself may be done among the Kandyans, the Court will not hesitate to give effect to it, simply because the disposition may also amount to a *fidei commissum*."—(*Assistant Government Agent, Kandy v. Kalu Banda*[3].)

A few years later Jayewardene A.J. in *Menika v. Banda*[4] upheld such a gift by a Kandyan observing "the deed of gift, although it creates a *fidei commissum* is valid under the Kandyan law which governs the rights of the parties in this case". The right of a Kandyan to burden his disposition with *fidei commissum* has never since been questioned. It

[1] (1916) 2 *C. W. R.* 208.
[2] (1907) 11 *N. L. R.* 39.
[3] (1921) 23 *N. L. R.* 26.
[4] (1923) 25 *N. L. R.* 207.

has never to my knowledge been suggested that when a Kandyan or a Muslim makes a gift with a *fidei commissum* attached to the grant that the Roman-Dutch law of gift applies to the exclusion of the Kandyan or Muslim law as the case may be so that for instance the question whether the deed is revocable or not, must be determined by the Roman-Dutch law. But upon whatever theory they may have proceeded the effect of the judgments of this Court in regard to gifts between Muslims may be summarized as follows:—

1. The law applicable to gifts between Muslims is the Muslim law as it obtains in Ceylon which to the extent to which it exists is their common law.
2. It is essential to the validity of such gifts that there should be (*a*) a manifestation of the wish to give on the part of the donor, (*b*) the acceptance of the donee either express or implied, (*c*) the taking possession of the subject-matter of the gift by the donee.
3. Clauses imposing restrictions and restraints which would be effective to create a *fidei commissum* if tested by the principles of Roman-Dutch law are not obnoxious to the Muslim law as it obtains in Ceylon and are therefore valid.
4. Where the donor reserves to himself a usufruct for life and therefore manifests his intention not to give possession, the gift is bad as it offends against the requirement of the Muslim law that the donee must take possession of the subject of the gift before the transfer can take place, until when the gift is not valid and complete.

The case of *Weerasekere v. Peiris* (*supra*) was presented to us as a deed of gift whereby the donor reserved to himself a life-interest which disclosed a clear intention not to give possession and negatived any suggestion that there had been such delivery of possession but contained language which would have burdened the donee with a *fidei commissum* if there had been a valid transfer of the property by way of gift. Such a gift is bad when examined in the light of the proposition of law stated above. The language of the donor was clearly sufficient to create a *fidei commissum* if the gift was in other respects a valid gift under the Muslim law. There was no authority to be found in our law for the proposition that a transaction which is bad as a gift under the Muslim law could be given effect to as a valid gift under the Roman-Dutch law. But there is authority for the proposition that there is nothing in the laws and customs of the Muslims of Ceylon relating to gift which prevents a Muslim from impressing an otherwise valid gift with a burden in the nature of *fidei commissum* and that if he does the validity of the clause or clauses in the deed by which such a burden is sought to be impressed must be tested and determined in accordance with principles derived from the Roman-Dutch law.

One point which is strongly emphasized throughout the judgment of the Privy Council reversing our judgments is " that it was never intended that the father should part with the property in or the possession of the premises during his lifetime ". Now if I may respectfully say so, there certainly is to be found in the deed strong indications that the father never intended to give anything until after his death. Having reserved to himself the fullest rights of property in and enjoyment of the premises

during his lifetime he says: "*after my death the same shall go to* and be possessed by the said Arisi Marikar Hadjiar Mohamado Salih Hadjiar as his property". If the matter was governed by the Roman-Dutch law this would be an instance of a donation to take effect after the donor's death which is under the rules of that system of law a good gift *inter vivos* if accepted "in which case there is no doubt that the stipulation is at once perfected and irrevocable, although it will have effect only after the promissor's death and the thing promised will only then be transferred from among the donor's property". *Voet XXXIX. 5, 4 (de Sampayo's Translation)*. An instance of such a gift but not between Muslims is the case of *Fernando v. Soysa*[1]. There is no reason to doubt that in the case of such a gift by persons subject to the Roman-Dutch law a *fidei commissum* might have been validly imposed on the donee. Their Lordships concluded that the father did not intend to make such a gift *inter vivos* as is recognized under the Muslim law as necessitating the donee taking possession of the subject-matter during the lifetime of the donor but that the father intended to create and did create a valid *fidei commissum* such as is recognized under the Roman-Dutch law.

But a gift to take effect after the donor's death is void under the Muhammadan law though it may take effect as a testamentary bequest. As a gift such an "endowment after death" is inoperative and void by reason of absence of any relinquishment by the donor or of seisin by the donee—*Jeswunt Sing-Jee Ubby Sing-Jee and Chuter-Sing-Jee Deep Sing-Jee v. Jet Sin-Jee Ubby Sing-Jee*[2]. The attitude of the Muslim law in Ceylon towards such deeds is similar; see D. C. Colombo 29,129 (*supra*) where it was said of a grant by way of gift of certain lands to S N "from and after the death of the donor" that it "could not take effect according to the original intent of the donor because no delivery can be made to him at the time when the gift is to take effect."

The view that when a Muslim makes a deed of gift to take effect after his death he is doing an act which is not contemplated by the Muslim law of gift as it obtains in Ceylon was not submitted to us, possibly for the reason that it was thought the matter was concluded by the decision in D. C. Colombo 29,129 (*supra*) referred to above. In that view such a deed of gift is not a gift within the contemplation of the Muslim law.

The effect of their Lordships' decision, as I conceive it, is that where it appears upon the construction of the deed as a whole that the intention of the donor is not to make an immediate gift but a gift to take effect after his death there is not such a gift as understood by the Muslim law and the intention of the donor must, if possible, be given effect to under the general law.

As to the contention that their Lordships' judgment proceeds upon the principle that a Muslim may by a sufficient manifestation of such an intention obtain for a deed which is in form a transfer by way of gift made by him the effect which it would be given if the Roman-Dutch law applied, nothwithstanding that it would be bad and inoperative as such under the system of law to which he is subject, I can only say that as I understand the judgment no such principle is laid down.

It only remains therefore to apply the ruling of their Lordships as I conceive it to the facts of the case before us.

[1] *(1919) 21 N. L. R. 114.*

[2] 2 Moore [illegible]

Apart from a superficial similarity the two cases are clearly distinguishable. There is upon the construction of this gift a clear intention to make an immediate gift of the premises. There is first the recital " whereas I am desirous of transferring and conveying the aforesaid allotments of land and premises to my nephews M. B. Abdul Cader and M. B. Oduman, ... *as and by way of gift*"—which is followed by the words of grant, "I . . . . . do hereby grant, convey, transfer, assign, set over and *assure as and by way of gift* inter vivos *absolute and irrevocable*"—and lastly the intention to make an immediate gift is manifested in a very special and exceptional manner in the last clause but one in which the donor says " by way of vesting the legal title to the premises donated from the date hereof in the donees I hereby hand them this deed and the connected deeds ".

There is first the expression of an intention to transfer and convey " by way of gift ", then a grant " as and by way of gift *inter vivos* ", and lastly the statement that the deed and the connected deeds were delivered " by way of vesting title to the premises from the date hereof ".

The deed is in form a gift *inter vivos* to take effect immediately. It is not a deed which discloses an intention to make a gift to take effect after the death of the donor and is therefore clearly distinguishable from the case of *Weerasekere v. Peiris* (*supra*) and outside the ruling of the Privy Council.

It was urged, however, that the reservation to the donor of the full and unfettered right of residing in any of the said premises hereby gifted and of taking and enjoying the rents, profits, produce and income of all the said several allotments of land and premises *hereby gifted* without the interference of the said donees or either of them being inconsistent with an intention to give such delivery of possession as is required by the Muslim law is indicative of an intention not to make such a gift as is recognized by the Muslim law. This aspect has already been considered earlier. I need only add that instances are not rare in which the primary intention of a person is defeated by other words in a deed and that under any system of law cases are not infrequent in which an act intended to have a definite legal effect fails by reason of attempts to make reservations or impose restrictions and conditions. The circumstance that a person who has so clearly manifested an intention to make an immediate gift of property fails to carry out his intention by the reservation to himself of rights which defeat his purpose is not of itself a sufficient reason for ascribing to him an intention not to make a gift under the system of law which applies to him or for ascribing to him an intention to invoke the principles of a different system of law. Where the parties to a deed of gift are Muslims the presumption in the absence of strong indications to the contrary is that they intend to act in accordance with their own laws and customs.

It was then urged that the rights reserved to the donor did not include every right of possession so that it is possible for some possession to have been given. Even so, the possession which is necessary to complete a gift under the Muslim law involves the surrender to the donee of all the donor's rights of possession and enjoyment in the subject of the gift. Delivery of possession may be constructive but it must be real in the sense that it is intended that the donee should have the full possession and control of the subject of the gifts so that he may enjoy the benefits

derivable from it. Such transfer of possession is essential to the transfer of ownership of the property from the donor to the donee without which there can be no gift.

"The necessity for the transfer of possession is expressly insisted upon as part of the substantive law, in order that that may be effectuated, which is sought to be effectuated by a gift, viz., the transfer of the ownership of the property from the donor to the donee". (*Tyabji, s. 383, p. 433.*) It is not merely a matter of form.

The mere delivery of the deed, assuming that to have taken place, is not constructive delivery when the donor has clearly manifested his intention that it was he and not the donee who was to take all the "rents, profits, produce and income".

Nor do I think the evidence in the case shows that as a fact there was such a transfer of possession. It is not suggested that the donee Abdul Cader ever took possession of the premises or any part of them. As to the donee Oduman he lived with his aged uncle, the donor. The evidence as to his connection with the premises and such acts as he is said to have done are not inconsistent with the retention by the donor of the rights which he reserved for himself. That evidence has been fully analyzed by His Lordship the Chief Justice and I have nothing to add to what he has said.

This gift between Muslims fails for want of delivery of possession. In the absence of a valid transfer of the premises to the donees no *fidei commissum* can exist, and if the law is what I deem it to be there is no purpose in discussing whether and if so what effect can be given to the clauses by which the donor sought to impose conditions and restrictions on the donees.

The further argument was addressed to us that the decision of the Privy Council is authority for the proposition that in every case of a deed between Muslims which purports to be and is intended to be an immediate transfer of property by way of gift with a *fidei commissum* imposed on the donee, the Roman-Dutch law applies to the exclusion of the Muslim law notwithstanding that under the Muslim law which applies to the parties the gift may be bad for want of seisin.

I can only repeat that their Lordships appear to me to have reached their decision in a different way and for different reasons.

The Muslim law is excluded not because the donor wished to exclude it but because he did not intend "to part with the property in or the possession of the premises" and did not therefore intend to and did not purport to make such a gift as is understood by the Muslim law. What he did intend to do and what he did do was to create a *fidei commissum* by a donation to take effect after his death.

Such a donation not being a gift as understood by the Muslim law of gift as it obtains in Ceylon there was nothing to prevent the donation being given the effect intended under the Roman-Dutch law.

This in my judgment is not such a case in that the donor intended to make and purported to make an immediate transfer by way of gift but failed to make an effective transfer to the donee, because he endeavoured at the same time to reserve to himself rights of possession in the subject of the gift and did not make such a delivery of possession as is necessary to transfer the property.

DRIEBERG J.— I agree with my Lord the Chief Justice.

AKBAR J.—I agree with my Lord the Chief Justice.