1932 *Present :* **Dalton J. and Jayewardene A.J.**

SAHUL HAMID *v.* MOHIDEEN NACHIYA.

83—D. C. Jaffna, 26,351.

Muslim law—Deed of gift to children—Absolute and irrevocable—Acceptance by major son on behalf of minors—Reservation of right to live on premises and enjoy the rents and produce—Ordinance No. 10 of 1931, s. 3—Retrospective effect.

A Muslim gifted certain premises to her four sons as a gift absolute and irrevocable. The gift was accepted by the eldest son, a major, on behalf of his minor brothers.

The deed further provided that the donor shall have "the right of living in the premises and enjoying the rents and produce thereof during her lifetime".

Held, that the donation was a valid one under the Muslim law.

Per DALTON J.—That the Muslim Intestate Succession and Wakfs Ordinance, No. 10 of 1931, in regard to the declaration in section 3 is declaratory of the law applicable to donations not involving *fidei commissa.*

Per JAYEWARDENE A.J.—That the donation was irrevocable.

Ordinance No. 10 of 1931 is not merely declaratory of the existing law, and therefore not retrospective.

THE plaintiff, a minor appearing by his next friend, instituted this action for a declaration that the deed of gift executed by the defendant (his mother) in favour of himself and of three of his brothers was a valid one and that it was irrevocable. The parties are Muslims. The deed was executed by the defendant on December 20, 1929, in favour of four children, three of whom were minors, and was signed by the father and the eldest son, who accepted it on behalf of the minors. The defendant purported to revoke the deed on February 13, 1930. The material facts of the deed are as follows:—"I . . . . with the consent and concurrence of my husband, in consideration of the natural love and affection which I have and bear unto my sons, do hereby grant, convey, assign, transfer, set over, and assure unto the said donees as a gift *inter vivos,* absolute and irrevocable that piece of land called . . . . subject to the terms and conditions . . . . To have and to hold the said premises hereby granted unto the said donees in equal shares, provided, however, that I, the said donor, shall have the right of living in the said premises and enjoying the rents and produce thereof during my lifetime" . . . .

The learned District Judge held that the gift was a valid one under the Muslim law and gave judgment for the plaintiff.

N. E. Weerasooria (with him *Thyagaraja*), for defendant, appellant.—The deed of gift should be construed according to Muslim law. There must first be a valid gift under the Muslim law. Then only can any question of *fidei commissum* arise. The requisites of a valid gift under the Muslim law have been reviewed in *Weeresekere v. Peiris*[1]. There should be a manifestation of the wish to give, an acceptance, and complete

[1] *(1931) 32 N. L. R. 176.*

and effectual possession. In the deed under consideration no question of complete and effectual possession on the part of the donees can arise. To the donor are reserved the right of residence and the right to enjoy the rents and produce during her lifetime. This is, in effect, the reservation of an usufruct; and even if the rights reserved are less, they are sufficient to prevent the taking of complete and effectual possession (*Tyabji on Mohammedan Law (2nd ed.), ss. 383, 400, &c., pp. 427, 451, &c.*). The fact that the donor is a parent and the donees her minor children is therefore immaterial.

H. V. Perera (with him *M. I. M. Haniffa*) for plaintiff, respondent.—The words here are different to the words used in *Weeresekere v. Peiris* (*supra*). There the words used gave the donor a "a life interest" and the power of revocation. Here the gift is expressly "absolute and irrevocable". In such a case, no revocation is possible (*Rafeeka et al. v. Mohammed Sathuck* [1]). The decisions of the Privy Council in *Umjad Ally Khan v. Mohumdee Begum* [2] and *Muhamed Abdul Ghani v. Fakr Jahan Begum* [3] are clearly applicable. Further, in view of Ordinance No. 10 of 1931 the construction of the deed should be governed by the Roman-Dutch law. The Ordinance came into operation subsequent to the decision in *Weeresekere v. Peiris* (*supra*). The words and intention of the Ordinance are clearly declaratory and the Ordinance is retrospective in operation. Counsel also cited *Abdul Rahim v. Hamidu Lebbe* [4] and *Maxwell on Statutes.*

Weerasooria, in reply.—The decision in *Weeresekere v. Peiris* (*supra*) did not turn on the reservation of the right of revocation. Ordinance No. 10 of 1931 is not retrospective. It amends the law and effects considerable changes. Even if it was intended to be declaratory, the words used are not clear enough to make it declaratory. If there is any ambiguity, the rule is not to make an Ordinance retrospective (*Young v. Adams* [5]).

May 27, 1932. DALTON J.—

The parties in this appeal are Muslims, mother and son. On December 20, 1929, the mother (appellant) executed notarially a deed of donation of certain immovable property in favour of her four children, three of whom were minors. The deed was signed by her, her husband, and the eldest son, the latter himself a major signing for himself and the three other children. On February 13, 1930, she purported to revoke the deed, and in June, 1930, plaintiff, the second son, who is stated to be twenty years of age, appearing by his next friend, his father, commenced this action claiming that the deed was a valid deed of donation that was irrevocable. It has been suggested in the lower Court that after the deed of donation was executed, the donor mortgaged the property, and that it is really the case of the mortgagee that is being defended, but there is no evidence of any such act on her part.

The only issue in the case was whether the deed in favour of the plaintiff was null and void. In dealing with that issue, however, it has to be decided whether Muslim law or Roman-Dutch law is applicable. No

[1] *1 Ceylon Law Weekly 103.*
[2] *11 Moore I. A. 517.*
[3] *44 All. 301.*
[4] *28 N. L. R. 136.*
[5] *(1898) A. C. 469.*

evidence was led in the lower Court apart from the production of the deed itself, and after hearing argument on these points the trial Judge has held, applying Muslim law, that the deed is a valid one and that the plaintiff is entitled to succeed. It was not necessary, therefore, for him to consider the second point raised on behalf of plaintiff that a valid *fidei commissum* is created by the deed and that therefore it is governed by Roman-Dutch law. The donor has appealed from that finding.

Following the order in which the trial Judge dealt with the two points, I will first of all deal with his finding that, under Muslim law, the deed is a valid deed of gift and irrevocable. The material parts of the deed are as follows:—

> Know all men . . . . that I, ... wife of . . . . of . . . . (hereinafter called and referred to as the donor) with the consent and concurrence of my husband, the said . . . . as is testified by his becoming a party hereto and signing these presents, in consideration of the natural love and affection which I have and bear unto my sons, ... hereinafter called and referred to as the donees . . . . do hereby grant, convey, assign, transfer, set over, and assure unto the said donees as a gift *inter vivos* absolute and irrevocable that piece of land called . . . . together with all easements, rights, and advantages whatsoever appertaining . . . . and all the estate, right, title, interest, claim, and demand whatsoever of me into, upon, or out of the said premises . . . . subject to the terms and conditions hereinafter mentioned:
>
> To have and to hold the said premises hereby granted or intended so to be unto the said donees in equal shares; provided, however, that I, the said donor, shall have the right of living in the said premises, and enjoying the rents and produce thereof during my lifetime; provided, further, the donees shall not seek partition of the said premises either amicably or in a Court of law, and they, the said donees, shall not alienate or encumber or lease the said premises, except among themselves. In the event of any of the donees dying without issue, the said premises shall devolve on the surviving donees; and in case the said donees should die possessed of the said premises leaving issue the said premises shall devolve on their respective children.
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> And I, the said . . . . the first-named donee, do hereby for myself and on behalf of my minor brothers, ... thankfully accept this gift subject to the conditions hereinafter mentioned.

The usual notarial attestation follows. The word "hereinafter" in the last line of the deed may be taken to be an error for "hereinbefore", as no other conditions are thereafter mentioned.

The essentials for a valid deed of donation in Muslim law have been the subject of numerous decisions in these Courts. The latest case upon which the appellant relies is *Weeresekere v. Peiris*[1]. From the authorities there cited, it is clear that the three conditions requisite for a valid donation are manifestation of the wish to give on the part of the donor, the acceptance of the donee either impliedly or expressly, and the taking possession of the subject-matter of the gift by the donee either actually

[1] *32 N. L. R. 176.*

or constructively. Applying these requirements to the deed that they had to construe in that case, the learned Judges came to the conclusion that all three of the conditions had not been fulfilled, and that therefore the deed was not a valid one. The facts of the case before us are, however, in my opinion very different from the facts in that case, for there the donor in express terms reserved to himself not only a life interest or usufruct, but also the right of dealing with the property as owner as if the deed of donation had not been executed, and he finally states the property shall go to the donee and be possessed by him after the death of the donor.

The appellant here expressed clearly her wish to give, and sets out her reasons for making the gift. The donation is expressly accepted by one of the donees for himself and the others. Have they complied with the third condition by taking possession either actually or constructively of the subject-matter of the gift? It is urged for the appellant that they have not done so inasmuch as she has reserved for herself a life interest in the property, that is, a real right in the property which implied possession and enjoyment of the premises for herself, and which is inconsistent with their effective possession. The necessity for possession in order to complete a gift, says Tyabji in his *Principles of Muhammedan Law* (section 383) is based on the same ground as that on which a contract without consideration cannot be enforced. Where the donor has not done everything to divest himself of the property in order to complete the gift, some third party must make him do what he has left undone, and this infringes the principal notion connected with a gift, its voluntary nature.

The donees living with their parents in the premises, as was the case here, on the execution of the deed there would be no change in the occupancy of the premises to denote that the donees had come into possession as a result of the donation. Tyabji, in section 396, states that where the donor and the donee are present on the same premises which form the subject of the gift, an appropriate intention may put the donor out of possession and the donee into it without any actual physical departure or formal entry. It has been held according to Muslim law a gift by a father to his minor child of property in the parent's possession is complete on his declaration that a gift has been made (*Abdul Rahim v. Hamidu Lebbe*[1]). The parent will probably in all such cases still remain in possession since the donee is a minor, but whether that possession is on behalf of the minor, or, as a result of other conditions in the deed whereby the donee retained rights in the property, for himself is a question that must be decided according to the facts of each case. In the absence of any such reservation the weight of authority is stated to be in favour of the view that in the case of a gift by a father to his minor child of property in his possession the gift is complete on his declaration that a gift has been made, and thereafter his possession is the possession of the donee.

The fact that the deed we are required to construe is stated to be absolute and irrevocable has been referred to, and *Rafeeha et al. v.*

[1] *28 N. L. R. 136.*

Mohammed Sathuck[1] was cited. There it was held that where a deed of donation given by a Muslim recites that the donation is absolute and irrevocable, such donation cannot be revoked by the donor. It is not necessary, however, for us to consider that question here. If the requirements to constitute a valid deed of gift are not present, the question of its irrevocability does not arise.

The terms of the deed which we are required to construe could not be more explicit than they are for the purpose of conveying all rights in the property to the donees. Can it be said that, by the conditions she has attached to this conveyance, she is retaining possession and enjoyment of the property in such a way as to be inconsistent with real possession by the donees? She retains the right to live in the premises and to enjoy the rents and produce thereof during her lifetime. It cannot be said that she has retained the right of "usufruct" as has been done in some of the cases cited to us, for there are various things that a usufructuary can do that she has not retained for herself. I am not sure that the term "usufruct" is happily used in reference to deeds of donation to which we are asked to apply Mohammedan law, since it implies that the bare ownership is vested in another person. She has not even retained all the rights which would come under the lesser right of *usus*. It is urged she has retained a life interest, but she has retained nothing which seems to me can possibly be described as a real right or such an interest as in English law would be an estate for life.

Ameer Ali (*Mohammedan Law, Vol. I., p. 136*) states where the intention is clear to transfer the entire right of property in the *corpus* of the gift, a mere reservation of interest in its rents and issues, or any profit accruing therefrom or a subordinate share in its enjoyment does not affect the validity. He adds also that this view is not restricted in the case of a minor donee. In such a case the reservation would merely be a condition of the gift rather than an indication of the donor in making the gift that there has been no change of status in the possession of the subject-matter of the gift. (*Vide Maydeen v. Abubaker*[2].) An example of such reservation of the income of property, the subject of a deed of donation, for life appears in the case of *Ibrahim Natchia v. Abdul Cader*[3]. It was held there that it imported no right of possession in the person in whose favour the reservation was made. Another case to which our attention was called is *Maricar v. Umma*[4]. There Lyall Grant J. dealing with the particular deed before him which, inasmuch as it reserved a life interest in the donors with the right to mortgage or transfer it, the donees only to possess after the donors' death, was held not to be a valid donation, points out that the question to be decided is whether it is the case of a deed of donation with conditions derogatory from the grant, or a free grant to which are attached conditions and limitations.

In the case of *Weeresekere v. Peiris* (*ubi supra*), upon which the appellant strongly relies, two judgments of the Privy Council were considered, *Umjad Ally Khan v. Mohumdee Begum*[5] and *Muhammed Abdul Ghani v.*

[1] *1 Ceylon Law Weekly 103.*
[2] *21 N. L. R. 284.*
[3] *28 N. L. R. 318.*
[4] *31 N. L. R. 237.*
[5] *11 Moore I. A. 517.*

Fakr Jahan Begum [1], but the facts in the local case under consideration were distinguished from the facts in those two cases. In the first-named case it was held that a donation reserving not the dominion over the *corpus* of the property, nor any share of the dominion over the *corpus*, but merely stipulating for and retaining a right to the recurring produce during the donor's lifetime, is not an incomplete gift by Mohammedan law. It was held there the gift related to the substance of the article donated and not to the use of it, and there was no such participation in the thing donated as would invalidate the gift. In the second case, the deed as construed by the Lords of the Privy Council made a gift of movable and immovable property, the donor reserving to herself for her life the usufruct of the property, the subject of that appeal. She made it clear, however, she did not reserve to herself any right to transfer by mortgage, sale, or gift any part of the property. They read the deed as intending to be and to operate as an immediate and irrevocable disposition of all the donor's movable and immovable property, subject to the reservation for her own use during her lifetime, of the usufruct of the property in question. The donee took physical possession of part of the property donated and exercised acts of ownership, but the donor remained in physical possession of the particular property, the subject of the action, for over twenty years after the execution of the deed. After consideration of the requirement for a valid gift under Muslim law it was held the donee must be regarded as having been constructively in possession of all the property donated, and the gift was a valid gift in Muslim law.

Commenting on these two judgments in *Weeresekere v. Peiris* (*supra*) Garvin J. agrees that if the reservations dealt with are merely rights to receive from the donee the produce or profits 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 as fully as if there were no such reservation. The reservation before us seems to me to be clearly no more than that, and retaining no real right in the land. The added condition of right of residence, having regard to the relationship of the parties, seems to me under the circumstances to be of exactly the same nature, and in no way to prevent the completion of the gift by delivery of possession. I agree with the trial Judge's conclusion that the deed of donation in favour of the plaintiff was a good and valid deed in Muslim law, and the issue was rightly answered in favour of the plaintiff.

The second question raised, that a valid *fidei commissum* was created by the deed, and hence governed by Roman-Dutch law, the deed being thereby taken out of the operation of Muslim law, if answered in the affirmative would also entitle the plaintiff to succeed. The trial Judge has not dealt with this point, in view of his finding on the first question, but on appeal it was fully and ably argued before us.

In *Weeresekere v. Peiris* (*ubi supra*) this Court held that where a gift contained a *fidei commissum*, the validity of the gift must be determined by Muslim law, although the construction of the *fidei commissum* is governed by Roman-Dutch law. That decision is dated January 20, 1931. By Ordinance No. 10 of 1931, which came into force on June 17, 1931, it is declared that donations not involving *fidei commissa* are governed by

[1] *44 All. 301.*

Muslim law, it following that donations involving *fidei commissa* are governed by the common law. The question to be decided here is whether that Ordinance is declaratory of the law, since otherwise it is admitted it can have no retrospective effect.

The Ordinance from the first line of its title to the end of the fifth section, the portion with which we are here primarily concerned, is full of difficulties as has been made clear to us during the course of the argument we have heard, and it has been described as a fruitful source of future litigation. I do not propose, however, in view of the fact that the judgment appealed from must be supported on the first point raised, to examine the matter in detail or to do more than give expression to my opinion ; it being conceded that if the deed creates a *fidei commissum* that plaintiff was entitled to succeed on the second point also. The argument adduced on his behalf leads me to the conclusion that the Ordinance, in regard to the declaration in section 3, is declaratory of the law applicable to donations not involving *fidei commissa.* A long chain of decisions of this Court leads one to the conclusion that a Muslim deed involving a *fidei commissum* was without question regarded as being governed by the common law ; and it would seem the question was not in any doubt until very lately. What had given rise to that doubt is not clear, or whether doubts were current on this particular point before the decision in *Weeresekere v. Peiris* (*supra*) is also not clear, if one examine the original draft bill, upon which Ordinance No. 10 of 1931 was eventually based with the explanatory memorandum attached. That bill, to which counsel has drawn our attention, and which has been very much changed in the process of becoming law, is published in the official *Gazette* of March 1, 1929, Part II., p. 178. Nothing I have heard from Mr. Weerasooria for the appellant has satisfied me that the opinion I have formed is wrong, although he made it clear the question was not such an easy one to decide as it first appeared to be.

For the reasons I have given I am satisfied the judgment of the lower Court was correct, and the appeal must be dismissed with costs.

JAYEWARDENE A.J.—

By deed No. 740 dated December 20, 1929, the defendant, who is a Mohammedan woman, gifted the land called Thalvupalam and Kavaiyankadu, " with the house, well, and cultivated and spontaneous plants situated thereon," to her four sons, three of whom, including the plaintiff, were minors, as a gift absolute and irrevocable. The gift was duly accepted by the eldest brother for himself and his minor brothers. It was provided by the deed that the donor should have the right of living on the land, and enjoying the rents and produce during her lifetime. The deed created a *fidei commissum* binding on the donees in favour of their children. By deed No. 15,450 dated February 13, 1930, the defendant purported to revoke the deed of gift. The plaintiff by his next friend has brought this action for a declaration that the deed of revocation is void. The learned District Judge has entered judgment for the plaintiff, and the defendant appeals.

The Mohammedan law distinguishes two kinds of gifts (properly so-called) by the terms *sudakah* and *hiba.* Both are voluntary transfers of

property without consideration; in the former the motive is to acquire religious merit, in the latter affection towards the donee (*Wilson's Anglo-Mohammedan Law, 6th ed., p. 323*). "Gifts are rendered valid by tender, acceptance, and seisin" (*Hedaya, p. 482*). The donee of a thing acquires no right over it unless he actually takes possession. This important condition is founded on an express saying of the Prophet, "that a gift is not valid unless possessed" (*Baillie Digest of Mohammedan Law, p. 508*).

The taking of possession may be either actual or constructive, according to the Privy Council ruling in *Muhammed v. Fakr Jahan*[1]. No actual delivery of possession is necessary where a parent makes a gift to a minor son. The gift is completed by the deed, and if the parent retains possession his possession is equivalent to possession by the minor and no formal delivery and seisin is required (*Fatima Bibi v. Ahmeed Baksh*[2]). Where there is on the part of the father or other guardian a real and *bona fide* intention to make a gift, the law will be satisfied without change of possession and will presume the subsequent holding of the property to be on behalf of the minors, according to the Privy Council, in *Amirunissa v. Abedoonissa*[3]. In the case of a gift by a parent to a minor child, no acceptance is necessary, the gift is completed by the contract; no transmutation of possession is necessary, for the possession of the parent is tantamount to that of the child (*Ameer Ali, p. 173*). This principle has been accepted and followed by this Court (*Affefudeen v. Periatamby*[4], *Abdul Raheem v. Hamid*[5], *Rafeeka v. Mohammed Sathuck*[6]).

The fact that a *fidei commissum* is imposed does not remove a gift, in regard to its validity, from the sphere of Mohammedan law. A gift may be a *hiba* simple or with stipulations but in each and every variation of gift, the transaction is a *hiba* and must contain the essential elements that constitute a *hiba* according to Mohammedan law (*Sarifudin v. Mohidin*[7]). A gift includes a transaction in which the donor's bounty passes to his intended beneficiary through the medium of a trust. The Mohammedan law applies to such a gift by trust, which, if without consideration, is void without delivery of such possession as the object of the gift is susceptible of (*Sadik Hussain Khan*[8] and *Wilson* p. 322). It has been held by Macdonell C.J. and Garvin J. that a *fideicommissary* gift between Mohammedans in Ceylon must be complete under Mohammedan law before the *fidei commissum* can become operative. The Mohammedan law being applied to test its validity as a gift and the Roman-Dutch law to test its validity as to the *fidei commissum* (*Weeresekere v. Peiris*[9]).

In the present case the donor is the mother, and three of the donees are her minor sons. The gift was made with the consent of the father and was accepted by the first donee on behalf of the others. The donor and donees seem to reside in the house on the property gifted. No physical departure or formal entry is necessary in the case of a gift of property in which the donor and donee are both residing at the time of the gift (*Mulla's Mohammedan Law, 9th ed., p. 115*). Where a Mohammedan

[1] *44 All. 301. 315.*
[2] *31 Cal. 319. 330.*
[3] *23 W. R. (Ind.). 208.*
[4] *14 N. L. R. 295.*
[5] *28 N. L. R. 130.*
[6] *9 Times L. R. 56 & 98.*
[7] *54 Cal. 754. 761.*
[8] *L. R. 43 I. A. 212.*
[9] *32 N. L. R. 176.*

lady executed a deed of gift in favour of a nephew, whom she had brought up as a son, of a house in which they were both residing and the donor did not physically depart from the house, but continued to live in the house with her nephew and the property was transferred to the name of the nephew and the rents were recovered in his name, it was held that the gift was complete, though there was no formal delivery of possession (*Humera Bibi v. Nufman Nissa*[1]).

Then it was contended that the reservation of the right of living on the premises and of enjoying the rents and produce during the donor's lifetime created a life interest or usufruct and that the deed came within the ambit of the principle enunciated in *Weeresekere v. Peiris* (*supra*). In that case Garvin J. drew a distinction between a life interest or usufruct and a right to the income. He said, "The reservation of a life interest or usufruct which is the equivalent right as known to the Roman-Dutch law, is a real right and includes not merely a right to the perception of the fruits or to the income of a land but possession and enjoyment in the fullest sense," and he based his decision in the case on the ground that the donor not merely intended to reserve a usufruct, and evidenced his intention by leasing the premises, but, in addition, he reserved the right to dispose of the premises as an owner might, as if the deed of gift had not been executed. He also held that the donor did not complete the gift by delivery of seisin either actually or contructively. Macdonell C.J. thought that there never was possession under the gift by the donee.

In many of the cases where Mohammedan gifts have been held to be invalid, the gifts were to operate *in futuro* and the property was to vest after the death of the donor. The two earliest cases reported in *Vanderstraaten's Reports, App. B31 and p. 157,* are in point. In *Meydum v. Abubacker*[2] the donee was not to possess until after the death of the donor, so that no question of seisin arose, and this Court held that there was no intention to make an absolute gift. In *Maricar v. Umma*[3] the donor reserved a life interest and also the right to mortgage or transfer the land when necessary and the donees were to possess after the death of the donors.

In *Affefudeen v. Periatamby* (*supra*) and *Mohamadu v. Maricar*[4] the donor had refrained advisedly from giving possession to the donee and the gift was incomplete.

In (*1877*) *Ramanathan's Reports 87* it was held that according to Mohammedan law, a deed of gift to a son, conditioned to take effect after the death of the donor, was good, and the rule as to delivery is subject to an exception in favour of the children of the donor on the authority of *Macnaghten 51.* The case of *Ibrahim Natchia v. Abdul Cader*[5] comes nearest to the present one. It was a gift by the father to his minor son, but the right to possess the income was reserved to the mother during her lifetime. Lyall Grant J. said "It was, however, argued that in this deed, the interposition of a life interest to the mother showed that no possession was given. I do not think, however, that any right of possession was given to Ava Umma (the mother). All that the deed

[1] *28 All. 147.*
[2] *21 N. L. R. 284.*
[3] *31 N. L. R. 237.*
[4] *21 N. L. R. 84.*
[5] *28 N. L. R. 316.*

said was that she should possess the income of the property during her lifetime. Accordingly, I think that even dealing with the deed as a deed under Mohammedan law it is valid".

The question whether the produce is distinguishable from the *corpus* was considered by the Privy Council in *Nawab Umfad Ally Khan v. Mussumat Mohumudee Begum*[1]. The Nawab of Oudh had made a gift to his son of Government promissory notes, with the condition that the donee should make over to the donor during his lifetime the interest accruing on the notes from time to time. It was held by the Judicial Commissioner of Oudh, on appeal from the Civil Judge of Lucknow, that the transfer to the son on the express condition that the father should receive the usufruct during his life violated the Mohammedan law of gifts and rendered the transfer inoperative. In the Privy Council it was argued that the donor retained the possessory rights and usufruct of these securities until his death, and any beneficial interest reserved in the thing given to continue during the lifetime of the donor was against the policy of the Mohammedan law and rendered the gift invalid. Their Lordships, however, reversed the decision of the Judicial Commissioner, saying on this point:—

> "It remains to be considered whether a real transfer of property by a donor in his lifetime under the Mohammedan 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 lifetime, is an incomplete gift by the Mohammedan law. The text of the *Hedaya* seems to include the very proposition and to negative it. The thing to be returned is not identical but something different. See *Hedaya, tit. "Gifts," Vol. 3, Bk. 30, p. 294*, where the objection being raised that a participation of property in the thing given invalidates a gift, the answer is, 'The donor is subjected to a participation in a thing which is not the subject of his grant, namely, the use (of the whole indivisible article) for his gift related to the substance of the article, not to the use of it.' Again, if the agreement for the reservation of the interest to the father for his life be treated as a repugnant condition, repugnant to the whole enjoyment by the donee, here the Mohammedan law defeats not the grant but the condition."

In *Mohamad Abdul Ghani v. Fakr Jahan Begum*[2] the donor made a gift of all her movable and immovable estate reserving for herself the usufruct of the property that was in question, but without reserving any right to transfer by mortgage or sale or gift any part of the property. The Privy Council held that the reservation of the life-interest did not by itself make the gift of the property in question void under Mohammedan law on the authority of *Unfad Ally Khan v. Mohumudee Begum* (*supra*). They thought that if the donee had received any of the rents and profits of the land in question, he would be held to have received them as trustee for the donor, although the title to the *corpus* of the property was in him. Their Lordships also regarded the donee as having been constructively in possession, although not in physical possession of the *corpus* of the property from the date of the gift in 1884 until the death of the donor in 1906.

[1] (1867) *11 Moo. I. A. 517, 547.*

[2] *44 All. 301, 314.*

A gift of property, with a reservation that the donee should not have the power of transfer over one-third the property during the life of a third party, the income being set apart for his maintenance, was held to be valid and the condition against alienation invalid, but the condition as to payment of a third of the income was valid and attached to the property in the hands of a transferee who had notice. The reservation of an interest by the donor for himself does not interfere with the right of property vested in the transferee by the act of transfer (*Lali Jan v. Mohammad*[1]). This was followed by the Bombay High Court in *Tavakulbai v. Imatiyaj Begum*[2], the condition about the payment of a portion of the income being treated as an obligation in the nature of a trust, attaching to the property and binding on the transferee with notice. With regard to the reservation of the right of residence, no authority was quoted and I can find none. In *Sarifuddin v. Mohiuddin*[3] the donor reserved a right of residence for herself in a portion of one of the properties. The deed was held invalid on the ground that a stipulation to pay Rs. 900 every year was not made dependent upon the profits of the *corpus* being sufficient to meet it, but no objection that the right of residence was reserved by the deed was taken or dealt with by the Court as an invalidating circumstance. In *Seyambo Natchia v. Osman*[4] one of the lands gifted consisted of an undivided ¼ share, whereas the donor possessed an undivided ½ share. The donor and donee, mother and daughter, continued to live together on one of the properties gifted. It was contended that the donor must vacate the premises gifted to enable the donee to take possession but Ennis A. C. J. found it difficult to see how in such circumstances the donor could be expected to vacate the property and he held that the gift was good without such vacation.

In the present case there is a complete gift showing a clear intention on the donor's part to divest herself *in praesenti* of all her title to the property, and to confer it upon the donee, as a gift absolute and irrevocable, only reserving the right of residence and enjoyment of the rents and produce during her lifetime. A real transfer of property by a donor, 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 her lifetime, is a valid and complete gift, according to their Lordships of the Privy Council. In this case, as there, the gift related to the substance of the thing, not to the use of it and the donor participates not in the subject of his grant but merely in its use. The mere reservation of the right of residence (*habitatio*) would not, in my view, derogate from the gift of the *corpus* and make that gift invalid. The dominion has been in the donees from the date of the gift, which was perfected by due acceptance and delivery. Anything over which the dominion or the right of property may be exercised, or can be reduced to possession, or which existed as a specific entity, or as an enforceable right may form the subject of a gift. The donor must evidence the reality of the gift by divesting himself, so far as he can, of the whole of what he gives (*Anwari Begum v. Nizamuddin*[5]).

[1] *34 All. 478.*
[2] *41 Bom. 372.*
[3] *54 Cal. 754, 767.*
[4] *26 N. L. R. 446.*
[5] *21 All. 165.*

As regards the revocation of the gift. By the Mohammedan law the donor may revoke his gift unless the right of revocation is barred by certain circumstances. Relationship within the prohibited degrees prevents the revocation of a gift and consequently there is no revocation of gift to parents or children (*1 Baillie, p. 525; Tyabji, Mohammedan Law, 2nd ed., p. 473*). This deed of gift is declared to be irrevocable and it has been held in *Rafeeka v. Sathuck* (*supra*) that when a donation is stated to be irrevocable, this is conclusive of its irrevocable character on the analogy of the Kandyan law, but according to the Mohammedan law it would seem that the donor may revoke the gift even when he has purported to waive his right of revocation at the time or after the declaration of the gift; provided that where he has accepted something in return for the waiver, he cannot revoke the gift (*Tyabji, p. 484 and Wilson, p. 341*). I would hold that the deed of gift No. 740 under consideration is irrevocable. The fulfilment of obligations is enjoined by the Prophet himself and Scott C.J. in *Tavakalbhai v. Imatiyaj Begum* (*supra*) cites a verse from the Quran which according to *Tyabji* (*Mohammedan Law, p. 473*) binds all Muslims equally, " It is of no avail that ye turn your faces in Prayer) towards the East and the West but righteousness is in . . . . those who perform their engagements in which they have engaged . . . . these are the true and these are the pious . . . . " (*Quran, 2 : 72*).

I cannot pass unnoticed a further contention raised before us that Ordinance No. 10 of 1931 was retrospective and that under section 4 the principles of law prevailing in the Maritime provinces, that is the Roman-Dutch law, applied to donations involving *fidei commissa* even to test their validity. The draft of this Ordinance was published in the *Government Gazette* of March 1, 1929 (Part II.), and the Ordinance itself became law on June 1, 1931. The case of *Weeresekere v. Peiris* (*supra*) which held that the validity of all gifts must be tested according to the Mohammedan law was decided on January 20, 1931, after the draft Ordinance was published. It was argued that the Ordinance was merely declaratory of the existing law and therefore retrospective, but two of the provisions seem to be contrary to the Mohammedan law as it was understood at the time. It is declared that no deed of donation is irrevocable unless it is so stated in the deed. Revocability was one of the characteristics of a Mohammedan gift both in Ceylon and elsewhere, and in this respect there is a marked change. The mere delivery of the deed to the donee is, by the Ordinance, to be taken as evidence of delivery of possession. This too seems to me to be a step in advance of the accepted Mohammedan law at the time. The Ordinance was not merely declaratory in my opinion. It is a fundamental rule of law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication (*Young v. Adams*[1] *West v. Gwynne*[2]).

I am of opinion that the judgment is right and that the appeal should be dismissed with costs.

Appeal dismissed.

[1] *(1998) A. C. 469.*

[2] *(1911) 2 Ch. 15.*