1936

Present : **Macdonell C.J. and Poyser J.**

PONNIAH *et al. v.* JAMEEL *et al.*

379—D. C. Colombo, 27.

Muslim law—Deed of gift inter vivos in praesenti—*Reservation of usufruct by donor—Gift subject to* fidei commissum—*Acceptance by donees—Delivery of deed as a symbol of possession—Gift governed by Muslim law—Invalid for want of delivery of possession.*

Where a deed of gift by a Muslim was expressed in the following terms; " I do hereby voluntarily give, grant, convey, transfer, assigns, set over, and assure by way of gift unto the said donees the land and premises . . . . to have and to hold the said land and premises hereby granted and conveyed subject to the following terms, conditions, and restrictions, namely, that I, the said donor shall have the right during my lifetime to take and enjoy the rents, profits, issues and incomes of the said premises by way of usufruct, and the said donees shall not be at liberty to give, sell, mortgage or otherwise alienate or encumber the said premises or any part of share thereof . . . ., that they shall only be entitled to hold, possess, and enjoy and take and receive the rents, profits issues and incomes derived or arising out of the said premises

[1] *26 N. L. R. 467.*

during their lifetime and that, after their death, the said premises shall devolve under the bond of *fidei commissum* in perpetuity on their children or other remote descendants . . . . These presents also witness that the donees do hereby thankfully accept the foregoing gift, subject to the terms, restrictions, &c.

" And whereas under the Muslim law a gift is not complete until the possession of the lands and premises has been given over to the donee.

" And whereas under this deed, I said donor have reserved unto myself a usufruct for my lifetime.

" And whereas it is necessary that I should make it clear that this deed is irrevocable by me I, hereby on signing this deed, do hereby hand over this deed to the donees as a token of the transfer of possession of property hereby conveyed in accordance with the decision of the Supreme Court.

" And I further declare that I have given up every right I may have under any law whatsoever to revoke this deed."—

Held, that the donor intended to make a valid gift *inter vivos to* take effect at once as recognized by Muslim law and that the deed failed of being a valid Muslim gift since under it possession did not pass.

Weerasekera v. Peiris (34 N. L. R. 281) distinguished ; *Sultan v. Peiris (35 N. L. R. 57)* explained and followed.

THIS was an action under section 247 of the Civil Procedure Code brought by the plaintiffs to have it declared that a certain land and premises were not liable to be seized and sold in execution against the defendant, as executor of the estate of one Nona Nei, wife of N. E. M. Pakir, a Muslim. Plaintiff claimed the premises by virtue of a deed of gift No. 1,176 dated September 4, 1924, under which the said Pakir donated them to their father Abdul Rahim. The relevant parts of the deed of gift are set out in the headnote.

On June 17, 1927, by deed No. 2,592 the donor purported to revoke the deed of gift No. 1,176 on the ground that the words therein, declaring it irrevocable had been inserted by the notary without instructions and also on the ground of ingratitude and disobedience by the donee.

On the same day Pakir and his wife Nona Nei made a mutual will by which, subject to certain bequests, they bequeathed the residue to the survivor.

Abdul Rahim, the donee, died on July 31, 1929, predeceasing the donor Pakir who died on September 23, 1927, leaving the plaintiffs as his heirs.

Nona Nei died in 1931, owing money to first defendant who in D. C. Colombo, 53,810 obtained judgment for Rs. 6,000 against second defendant as executor of her estate. The first defendant sought to execute his judgment on the property as belonging to Nona Nei under the mutual will as against the plaintiffs, who claimed under the deed of gift No. 1,176.

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

H. V. Perera (with him *S. Nadesan* and *G. E. Chitty*), for appellant.—The case is covered by the decision in *Sultan v. Peiris* [1]. As the third requisite for the validity of a gift in the Muslim law, viz. seizin, is absent the gift is bad.

The intention of the donor was clearly to make a gift *inter vivos* according to the Muslim law. The donor purported to give immediate legal title.

[1] *35 N. L. R. 57.*

4——J N. B 32999 (1/54)

It is expressly stated in the deed that, as under the Muslim law a gift is not complete until possession is given (*Mohammadu v. Marikar*[1]), the deed is handed over as a token of the transfer of possession.

Such symbolic delivery is not sufficient, where a usufruct has been reserved. In all the cases where delivery of the deed was held to be delivery of possession, there was no reservation of a life-interest. Therefore, the possession of the donor is referable to the title of the donee.

The terms " usufruct " and under the bond of "*fidei commissum*," do not necessarily negative the original intention of the donor. The Roman-Dutch law principles have no application, therefore.

The Privy Council case of *Weerasekera v. Peiris*[2] applies to a gift *in futuro* only. The important words of the document there are " *after* my death, the same shall be possessed ". The correct interpretation of the Privy Council decision is found in the judgment of Garvin J. in *Sultan v. Peiris* (*supra, at pp. 86 and 88*). The case in appeal is one where the donor intends to make a gift *in praesenti.*

It is not correct to say that a Muslim can contract himself out of the Muslim law, though there are *dicta* to support that view. One must distinguish between the rights and obligations of the parties to a contract from the contract itself. Stipulations may be made affecting the former, but the validity of the contract itself must be determined by the law to which they are subject.

Counsel also cited *Razeeka v. Sathuck*[3], *Meydeen v. Abubaker*[4], and *Marikar v. Umma*[5].

Rajapakse (with him *S. Alles* and *J. R. Jayewardene*), for respondent.—The question is one of intention. Was it intended that it should be a valid gift under Muslim law or under Roman-Dutch law? If upon a perusal of the whole document an intention to make a gift under the Roman-Dutch law is manifested, then the Roman-Dutch law principles should be applied. A Muslim can show an intention to make a gift outside the Muslim law, *e.g.*, under the Roman-Dutch law. These are the principles laid down by the Privy Council in *Weerasekera v. Peiris* (*supra, at pp. 285 and 286*). The Divisional Court interpreted *Weerasekera v. Peiris* in this way. See *per* Macdonell C.J. in *Sultan v. Peiris* (*supra, at p. 76*), also *Musheen v. Habeeb*[6].

Garvin J. interpreted it differently, but Drieberg and Akbar JJ. expressly agreed with the interpretation of Macdonell C.J.

One must give to a deed that construction which will give it force rather than that which will make it waste paper. *Verba sunt ita intelligenda ut res magis valeat quam pereat.* See *Ahamadu Lebbe v. Sularigumma et al.*[7]

That the donor intended to make a gift under the Roman-Dutch law is clear, because he uses legal expressions, *e.g.*, '*usufruct*' and bond of '*fidei commissum*', both of which are unknown to the Muslim law, and are well understood in the Roman-Dutch law.

[1] *21 N. L. R. 85.*
[2] *34 N. L. R. 281.*
[3] *33 N. L. R. 176.*
[4] *21 N. L. R. 284*
[5] *31 N. L. R. 237.*
[6] *14 C. L. Rec. 130 at p. 132.*
[7] *2 C. W. R. 208.*

In *Sultan v. Peiris* the donor intended to gift under Muslim law but perhaps " unwittingly expressed himself as to create a *fidei commissum* ". See *per* Macdonell C.J. in *35 N. L. R. at p. 75.*

Apparently symbolic delivery is made by giving the title deeds, *ex abundanti cautela,* because the donor feared, that if the Muslim law perchance was applied, it may not be otherwise valid.

Even " symbolic delivery " is not known to the Muslim law, but to the Roman-Dutch law.

The principle in *Weerasekera v. Peiris* (*supra*) should be applied here. One cannot whittle it down by applying it to the circumstances of that case only.

Counsel also cited *Sahul Hamid v. Mohideen*[1], *Abdul Ghani v. Jahan Begam*[2], and *Fatima Beebee v. Ahamad Baksh*[3].

Cur. adv. vult.

March 30, 1936. MACDONELL C.J.—

This case raises a question as to the construction of a deed of gift made by a Muslim to a Muslim. The facts are as follows. On September 4, 1924, one N. E. M. Pakir, a Muslim, executed before a notary deed No. 1,176 which is expressed as irrevocable and purports to give, under certain conditions, certain lands to certain grandsons and granddaughters of the donor. One of these grandsons was Tuan Ariffin Abdul Rahim (hereinafter called the donee) and the deed purported to give him a half share of land No. 1 set out in its first schedule. (His brother, donee of the other half, does not come into the story.) The material portions of this deed No. 1,176 (P1), will be set out later. On June 17, 1927, by deed No. 2,592 (1D2), the donor Pakir purported to revoke the deed of gift No. 1,176 (P1) on the ground that the words therein declaring it irrevocable had been inserted by the notary without instructions and had not been explained to him by the notary, also on the ground of ingratitude and disobedience by the donees, but no attempt was made at the trial to prove any of these assertions. On the same day, June 17, 1927, Pakir and his wife Nona Nei made a mutual last will No. 2,594 by which, subject to certain bequests, they bequeathed the residue of their property to the survivor of them. The wife Nona Nei, it may be mentioned, had signed the deed No. 1,176 (P1) " as testifying to her agreement to the conditions mentioned " therein. Abdul Rahim the donee on deed No. 1,176 died on July 31, 1929, predeceasing the donor Pakir who died nearly two months later on September 23, 1929 ; the minor children of the deceased donee are the first to fifth plaintiffs in this action, the sixth plaintiff being their guardian *ad litem.* If the will of June, 1927, No. 2,594, was valid, the widow Nona Nei would become entitled under it. She died intestate in 1931, owing money to the first defendant who in D. C. Colombo, No. 53,810 obtained judgment for Rs. 6,000 against second defendant as executor of her estate. This then raises a question between the first defendant, creditor of her estate, and the plaintiffs, representing the donee on deed No. 1,176 (P1.) The first defendant sought to execute his judgment against the executor of Nona Nei, on property that included the land gifted in deed No. 1,176 to the donee. The plaintiffs, representing

[1] *34 N. L. R. 57.*

[2] *44 Allahabad 301.*

[3] *31 Calcutta 319 at 330.*

the donee, claimed the land gifted to their father, the donee, on deed No. 1,176 and, their claim being dismissed, brought this, a section 247 action.

In the Court below the above facts were admitted, and it was found unnecessary to take evidence. The District Judge held that the deed No. 1,176 was a valid gift under Muslim law and that it duly gave to the donee Abdul Rahim a half interest in the land No. 1 in the first schedule ; consequently it was not the property of Nona Nei whose estate second defendant was administering and consequently first defendant could not execute on it. It is from this decision that the present appeal is brought.

It is now necessary to set out the material portions of deed No. 1,176, which are as follows :—

The deed begins with a recital that the donor has made provision for his wife Nona Nei and for a certain grandson and granddaughter but that he has not yet made provision for his three other grandsons, whom he names, and one of whom is the donee, or for his two granddaughters, and that he is desirous of making provision for them. He then recites that it is necessary to cancel certain three deeds fully described, and he says, " The power to cancel which I have in law on the ground that according to Muslim law the possession of the properties covered by the said deeds has not been given over by me to the donees under the said deeds, and on the further ground that the said donations have been accepted by my wife Nona Nei who is the step-grandmother of the said donees and who is therefore not a guardian qualified in law to accept the said donations on behalf of the said donees ", and he accordingly purports to revoke the three deeds in question. The deed then proceeds to say that in consideration of love and affection unto the three grandsons mentioned " I do hereby freely and voluntarily give, grant, convey, transfer, assign, set over and assure by way of gift unto the said two of the male donees, namely Mohamat Usoof Abdul Rahim and Tuan Ariffin Abdul Rahim " (the donee in this case and the father of plaintiffs 1 to 5) " the land and premises mentioned as land No. 1 in the First Schedule hereto . . . . subject to the terms, conditions, and restrictions contained . . . . " To have and to hold the said land and premises mentioned as land No. 1 in the First Schedule hereby granted and conveyed in equal shares unto the said two of the male donees, namely Mohamat Usoof Abdul Rahim and Tuan Ariffin Abdul Rahim " (the donee in this case and father of the plaintiffs 1 to 5) " . . . . subject to the following terms, conditions and restrictions, namely, that I the said donor shall have the right during my lifetime to take and enjoy the rents, profits, issues, and incomes of the said premises by way of usufruct, and that the said male donees shall not be at liberty to give, sell, or mortgage, or otherwise alienate, or encumber the said premises or any part or share thereof or any of the rents, profits, issues, or incomes thereof, and that neither the said premises nor the rents, profits, issues, or incomes thereof or any part thereof or a share of any one of them shall be liable to be seized or sequestered or taken in execution of any process of Court against the said male donees but that they shall only be entitled to hold, possess, and enjoy and take and receive the rents, profits, issues, and incomes derived or arising out of the said premises during their lifetime, and that after their death the said premises shall

devolve under the bond of *fidei commissum* in perpetuity on their children or other remote descendants or any deceased child or children *per stirpes*, that is to say, the child or children of any deceased child taking the share to which his or her or their parent would have been entitled if alive". There then follows a gift in precisely similar terms to his two grand-daughters, reserving to the donor for his lifetime the same usufruct and subjecting the gift to the same bond of *fidei commissum*. Then follows the usual covenants that he has power to grant, that the premises granted are free from encumbrances, and for further assurance.

He then proceeds—

" And these presents also witness that the said male donees and female donees do hereby thankfully accept the foregoing gifts subject to the terms, conditions, and restrictions and in token of the said acceptance do hereby put their signatures to this deed.

" And this deed further bears the signature of Nona Dalila Abdul Rahim aforesaid as testifying to her agreement to the conditions mentioned in this deed.

" And whereas under the Muslim law a gift is not complete until the possession of the lands and premises conveyed have been given over to the donees.

" And whereas under this deed I the said donor have reserved unto myself a usufruct for my lifetime.

" And whereas it is necessary that I should make it clear that this deed is to be irrevocable by me hereafter.

" I hereby on my signing this deed do hand over this deed to the said male donees and female donees as a token of the transfer of possession of the said properties hereby conveyed in accordance with the decision of the Supreme Court.

" And I further declare that I have given up every right that I may have under any law whatsoever to revoke this deed.

" And I further undertake that I will not revoke this deed, and we the donees do hereby thankfully accept the foregoing gifts. "

The questions before us on this appeal are these. Was this deed No. 1,176 a Muslim deed of gift, and if it was, was it an effective and valid Muslim deed of gift ? If both these questions be answered in the affirmative, then the respondents must succeed in this appeal ; there was a valid gift to their father Rahim the donee, and they are his successors in title, either as his heirs or as *fidei commissarii* under the deed of gift to him. The learned trial Judge has found no difficulty in answering both these questions in the affirmative ; the donor thought himself bound by Muslim law and the document must be construed according to Muslim law, and " the gift was valid and effective to pass title to Rahim and after him to the plaintiffs ". The appellant adopts that part of the judgment which declares No. 1,176 to be a Muslim deed of gift but denies that it was a valid Muslim gift since under it possession did not pass to the donee. The respondents agree with this last contention of the appellant and make common cause with him that possession did not pass to the donee under the deed and that consequently it cannot as a Muslim deed of gift be valid or effective, but they maintain that it is not a Muslim deed of gift at all but that it is a valid gift *inter vivos* under Roman-Dutch

law; they would uphold the judgment below that it was a valid gift, but say that it was valid under another system of law and that it was not a Muslim deed of gift at all. The appellant says it is a Muslim deed of gift, but as such invalid; the respondents, that it is valid, but not as a Muslim deed of gift. Now "the conditions required by Muslim law to constitute a valid donation are stated by Ameer Ali to be (1) a manifestation of the wish to give on the part of the donor; (2) the acceptance of the donee, either impliedly or expressly; and (3) the taking possession of the subject-matter of the gift by the donee, either actually or constructively" (*Affefudeen v. Periatamby*[1]). These three conditions have always been accepted with us as those requisite to make a valid Muslim gift and it is necessary then to keep them in mind while examining the terms of deed No. 1,176.

The opening recitals give the names of the donor, of his wife and of the donees, his grandsons and granddaughters, they all bear Muslim names. The donor after reciting that he has not so far made provision for certain of his grandsons, including the donee, and for certain of his granddaughters, proceeds to recite the necessity of cancelling certain deeds (specified) and to state that he has the power in law to cancel them since "according to Muslim law the possession of the properties covered by the said deeds has not been given over by me to the donees under the said deeds, and on the further ground that the said donations have been accepted by my wife Nona Nei who is the step-grandmother to the said donees and who is therefore not a guardian qualified in law to accept the said donations on behalf of the said donees."

By this recital he relies on a power given him (he says) by Muslim law to cancel deeds of gift where no possession has passed and where the person purporting to accept for the donees was not a guardian qualified by that law to do so. If no possession passed under the deeds to be cancelled, or if the person purporting to accept was not by Muslim law qualified to do so, then the deeds would perhaps be ineffective, and not need to be cancelled, but that the donor purported in this part of the deed 1,176 to be acting under and in conformity with Muslim law, there can be no question, and he recognizes categorically the third requisite—*vide supra*—of a valid Muslim gift, the donee taking possession. He then proceeds to revoke the deeds specified.

He then recites the consideration moving him—love and affection—and proceeds to "give, grant, convey, transfer, assign, set over, and assure by way of gift" unto the donee a certain land, "subject to the terms conditions and restrictions contained"—that is contained in the deed—for all the donor's interest, and estate with all rights, &c., pertaining thereto. Then follows the *habendum* to the donee, and after that the gift is stated to be subject to the following terms, conditions, and restrictions, namely, "that I, the said donor shall have the right during my lifetime to take and enjoy the rents, profits, issues, and incomes of the said premises by way of usufruct"—note, that the donor not only reserves to himself rights which will amount to a usufruct, but names the term of art in Roman-Dutch law, usufruct, which connotes them—"and that the said male donees shall not be at liberty to give, sell, or mortgage or

[1] *14 N. L. R. at p. 297.*

otherwise alienate or encumber the said premises or any part or share thereof or any of the rents, profits, issues, or incomes thereof, and that neither the said premises nor the rents, profits, issues, or incomes thereof, or any part thereof or a share of any one of them shall be liable to be seized or sequestered or taken in execution of any process of court, against the said male donees but that they shall only be entitled to hold possess and enjoy and take, and receive the rents, profits, issues, and incomes derived or arising out of the said premises during their lifetime, and that after their death the said premises shall devolve under the bond of *fidei commissum* in perpetuity on their children or other remote descendants or any deceased child or children *per stirpes,* that is to say, the child or children of any dceased child taking the share to which his or her or their parent would have been entitled if alive." Again, note that he not only defines the settlement or entail that is to fetter in the hands of the donee and his descendants the property given but labels it with the appropriate term of art—*fidei commissum*—of Roman-Dutch law.

It is on these two restrictions, the usufruct for life reserved and the *fidei commissum* imposed, but particularly on the former, that respondents rely to uphold the judgment below as will be more fully shown later.

The deed No. 1,176 then proceeds to make a gift to the donor's granddaughters in precisely similar terms—consideration, gift, interest, and estate, *habendum* and restrictions, usufruct and *fidei commissum* again naming them. Then follow the covenants that the donor has power to make the gift, and that the property gifted is free from incumbrances, and also a covenant for further assurance. Then follows the acceptance by the donees themselves—from this you presume that they were of full age when deed No. 1,176 was executed, and both in the trial Court and here it was common cause that they were of full age then—and the recital that the donor's wife Nona Nei has herself signed the deed as testifying her agreement thereto, and then certain clauses which must be quoted again in full, " and whereas under the Muslim law a gift is not complete until the possession of the lands and premises conveyed have been given over to the donees. And whereas under this deed, I the said donor have reserved unto myself a usufruct for my lifetime. And whereas it is necessary that I should make it clear that this deed is to be irrevocable by me hereafter. I hereby on my signing this deed do hand over this deed to the same male donees and female donees as a token of the transfer of possession of the said properties hereby conveyed in accordance with the decision of the Supreme Court. And I further declares that I have given up every right that I may have under any law whatsoever to revoke this deed. And I further undertake that I will not revoke this deed, and we the donees do hereby thankfully accept the foregoing gifts."

The clauses just quoted must be read with the other terms of the deed of gift, and particularly with those where the donor cancels certain specified deeds because the possession required by Muslim law had not passed under them, and those where he reserves the usufruct to himself for lifetime in the property given and places it under the bond of *fidei commissum,* and taken as a whole, the deed No. 1,176 seems to say "I, a Muslim give under Muslim law to other Muslims certain property. True, I have placed that property under the bond of *fidei commissum* but

Muslims in making gifts as understood by Muslim law have been in the habit of placing it under that bond for generations past, and true also I have reserved to myself a usufruct for my life in the property given, but I am well aware of, and intend compliance with, that requirement of a valid gift under Muslim law that possession must pass to the donee under it, therefore, I declare the deed to be irrevocable and myself to have abandoned every right I have to revoke it thereby transferring at once to the donees the *dominium* in the property gifted, and, by handing over to the donees as I do hand over to them this deed of gift, I transfer possession also, in accordance with the ruling, as I understand it, in *Mohamadu v. Marikar* [1], where it is said, 'The delivery of the deed is a constructive as well as effective delivery of possession of the lands' and in fulfilment of the requirement of Muslim law that to make a gift under it valid, possession must be given to the donees ". He gives the *dominium* and, purports to give *cy-près,* the possession also, intending throughout to make a gift under Muslim law as he understands it. " All the terms of the deed must be taken into consideration when construing the deed " (*Weerasekera v. Peiris* [2]) and taking all the terms of this deed into consideration I can only conclude that the donor's intention in executing deed No. 1,176 was to make " a valid gift as understood in the Muslim law " (*ibid*).

This construction of deed No. 1,176 is subject to this, that there is no authority binding upon me which requires me to decide differently, and this brings me to the two cases pressed upon us in the argument of this appeal (*Sultan v. Peiris* [3]) and the Privy Council decision in *Weerasekera v. Peiris* (*supra*).

It is best first to discuss *Sultan v. Peiris* because that decision has not been passed in review by the Privy Council and in the absence of such is binding upon us, being a four Judge decision, unless it be shown to be inconsistent with the ruling of the Privy Council in *Weerasekera v. Peiris* and that that ruling applies in the present case, or unless it can be shown that the facts now before us are distinguishable from one or other of these decisions. For the appellant it was argued that the present appeal is distinguishable on the facts from the Privy Council ruling in *Weerasekera v. Peiris* but that it is indistinguishable on the facts from the decision in *Sultan v. Peiris* which therefore must bind us in determining the present appeal. For the respondent it was contended that the facts of the present case are sufficiently the same as those in *Weerasekera v. Peiris* to make the *ratio decidendi* in that case applicable, and binding, in this appeal.

First then for *Sultan v. Peiris.* The facts there were that the donor a Muslim had made to two donees, also Muslims, a gift *inter vivos* stated to be irrevocable of certain urban lands with the houses on them subject to the restriction that the donor reserved to himself " during his lifetime the full and unfettered right of residing in any of the said premises hereby gifted and of taking and enjoying the rents, profits, &c., of all the . . . . premises hereby gifted without the interference of the said donees or either of them "—this was reservation to the donor of a usufruct for his life, though the word usufruct was not used, " real rights in the subject

[1] *21 N. L. R. at 85.* [2] *34 N. L. R. 281 at 285.*

[3] *35 N. L. R. 57.*

of the gift", as Garvin J. says at *35 N. L. R. 78*—and subject to the restriction that if either donee apostatized from the Islamic faith or married a widow or a divorced woman, his moiety should go over to the other donee, which was a penalty clause but also a *fidei commissum* in favour of the donee who did not incur the penalty. The deed of gift then said as follows "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 attestation says, "And the donor has required me the Notary to hand to the said donees the original of this instrument and the connected title deeds of the premises devised thereby", and, as later on, one of the donees produced and deposited with a bank the deeds in question, one can presume that they were handed over, as the deed says. In this clause, as Garvin J. says at *35 N. L. R. 87*, "the intention to make an immediate gift is manifested in a very special and exceptional manner". The decision of the Court in *Sultan v. Peiris (supra)* was that "this gift between Muslims fails for want of delivery of possession . . . . 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", *per* Garvin J., *35 N. L. R. at 88,* or as I put it, *ibid.* at 75, "One concludes from an examination of all the provisions in the deed . . . . that the donor intended to make a valid gift *inter vivos* as recognized by Muslim law but that the deed failed to be a valid one since under it possession did not pass."

Now the deed to be interpreted in the present appeal resembles in nearly all its provisions that in *Sultan v. Peiris.* In each the donor professes to make an immediate and irrevocable gift *inter vivos* and in each he hands over to the donees the deed itself, in *Sultan v. Peiris* by way of vesting legal title in the donees from the date of the deed, in the present deed No. 1,176, as token of the transfer of possession of the properties by it conveyed. In each the donor reserved to himself in unmistakable words the usufruct of the property for his life, in *Sultan v. Peiris* emphasizing his life-interest by forbidding the donees to interfere though not using the actual word, usufruct; in the present deed he does actually use that word. In each the donor created a *fidei commissum,* in *Sultan v. Peiris* in the form of a penalty and not using the actual word *fidei commissum,* the property to go over if a donee does any of certain things, here as a bond fettering the property in perpetuity in the hands of the donees and their descendants, actually using the word *fidei commissum.* In each there is an explicit declaration that the donor intends the deed to have the character of a deed of gift under Muslim law, in *Sultan v. Peiris* by saying that the donee apostatizing from the Muslim faith loses his share to devolve on the other donee, here by a number of recitals which show that the donor knew transfer of possession to be a necessary condition of a valid Muslim deed of gift and by a positive act, handing over the deed, which he thought was a handing over of possession or a token of such handing over.

With all deference to the forcible argument put to us that the donor on deed No. 1,176 by his reservation to himself of a life interest and by naming it, usufruct, and by his putting the property given under the bond of *fidei commissum*, naming that very word, intended to make a deed of gift outside Muslim law altogether, I cannot distinguish the present case from *Sultan v. Peiris* and am forced to conclude on the authority of that case which in the absence of a superior authority is binding on me, that under the deed in this case the donor intended to make a valid gift *inter vivos* as recognized by Muslim law but that the deed fails of being a valid Muslim gift since under it possession did not pass.

In holding that possession did not pass, I am differing with all respect from the learned District Judge who holds in effect that possession did pass. A further statement of the law as to gifts between Muslims will be given later from the judgment of Garvin J. in *Sultan v. Peiris*, for the present it seems sufficient to say that a Muslim donor reserving to himself a usufruct for life thereby manifests an intention not to give possession. This was the case here, consequently the deed fails.

A digression is necessary here. The learned trial Judge spoke of the judgment of " the majority of the Court " in *Sultan v. Peiris*. Garvin J. left the Island on leave before my own judgment was ready to be delivered, consequently his judgment was deposited in the Registry and delivered later along with my own but after he had left the Island on leave, and there was a doubt whether a judgment delivered by a Judge while on leave would be valid and a possibility that to become valid it might have to be redelivered by him on his return months after, and it was probably for this reason that the other two Judges concurred specifically in my judgment in *Sultan v. Peiris*. This concurrence enabled a judgment to be delivered which was that of a majority of the Court and of which the successful party could at once take advantage, notwithstanding the absence from the Island of a Judge who sat on the appeal.

It is necessary now to return to the question whether *Sultan v. Peiris* is the authority that must determine this appeal or whether there is another decision of higher authority governing the facts of the present case. This brings one to a discussion of *Weerasekera v. Peiris* (*supra*). The deed of gift there was in the following terms : " Know All Men by these Presents that I (the donor), for and in consideration of the natural love and affection which I have and bear unto my son (the donee), ... do hereby give, grant, assign, transfer, set over and assure unto the said donee, his heirs, executors administrators and assigns as a gift *inter vivos* absolute and irrevocable the land and premises described in the schedule hereto (of the value of Rupees Two thousand five hundred) together with all my right, title, interest, claim, and demand whatsoever in, to, upon or out of the same . . . .

" To have and to hold the said premises with all and singular the appurtenances thereunto belonging or used or enjoyed therewith or known as part and parcel thereof unto him the said donee, his heirs, executors, administrators, and assigns for ever subject to the conditions and restrictions hereinafter mentioned, that is to say, that I the said donor have reserved to myself the right and power to cancel and revoke these presents and make any other deed or deeds therewith or deal with the

said premises as I shall think fit and proper during my lifetime as if this deed had not been executed and that I have further reserved to myself the right of taking, receiving, and enjoying the rents, profits, issues, and income of the said premises during my lifetime and after my death the same shall go to and be possessed by the said donee as his property, provided, however, that the said donee shall not sell, mortgage, gift, exchange or otherwise dispose or alienate the said premises or any part thereof and further that he shall not be at liberty to encumber the rents, profits, income, or issues of the said premises or suffer, allow, or subject the said premises or the rents, profits, issues, and income thereof to be seized, attached or sold by any writ of execution for any debt, dues, default or undertaking of the said donee, that he shall not lease the said premises for any term exceeding three years at a time nor execute any subsequent leases before the expiration of the lease then in existence for the said premises. Provided, however, that the said donee can make gifts to his daughters in their marriages but not to any other. Provided, however, that after the death of the said donee the said property shall devolve on his children as their absolute property and I do hereby for myself, my heirs, executors, and administrators covenant, promise, and agree to and with the said donee, his heirs, executors, administrators, and assigns that the said premises hereby gifted are free from any incumbrance and that I and my aforewritten shall and will at all times hereafter warrant and defend the same unto him and his aforewritten against any person or presons whomsoever.

"And I the said donee do hereby thankfully accept the above gift made to me in the foregoing deed subject to the conditions therein set forth".

This deed then by the words of grant purported to be an irrevocable one but in the *habendum* subjected the grant to certain conditions, namely, that the donor could at any time revoke the deed and make another deed or deeds dealing with the property gifted, and that the donor should have the right to take the rents and profits during his lifetime, a usufruct, though the word is not used, and that after his death the property should go to the donee and his children under *fidei commissum* though again that term is not used. This Court held (*32 N. L. R. 176*) that the gift was governed by Muslim law but that it was not valid since no possession passed, also that the validity of the gift must be determined by Muslim law but the construction of the *fidei commissum* by Roman-Dutch law. The Privy Council reversed this decision, ruling that "upon the true construction of the deed, having regard to all its terms, the father did not intend to make to the son such a gift *inter vivos* as is recognized in 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 by the Roman-Dutch law". This decision was examined in both the judgments in *Sultan v. Peiris*[1], and endeavour made there to discover its exact scope, and it was also exhaustively and acutely analysed by both learned Counsel on this appeal, to whom I wish to express my best thanks for the assistance they have given; it would be lack of candour and courtesy if I did not recognize this in ample terms.

[1] *35 N. L. R. 57 at 86.*

What then is the scope of this judgment of the Privy Council in *Weerasekera v. Peiris* [1] ? I would respectfully adopt the answer to this question given by Garvin J. in *Sultan v. Peiris,* " 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 ". If I may paraphrase —I hope accurately—these words of Garvin J., I would say that Muslim law only recognizes as gifts those gifts purporting to be made *in praesenti* from one Muslim during his life to another Muslim, and that it does not, recognize as—indeed knows nothing of—gifts which are to take effect if at all after the death of the donor. The Muslim law as to gifts is (with all respect) an undeveloped law as compared with the Roman-Dutch law which is a developed law. The latter knows several kinds of gift, that *inter vivos in praesenti,* that *inter vivos* to take effect at a future time, that *inter vivos* not to take effect till the death of the donor, and the *donatio mortis causa ;* the Muslim law knows only the gift *inter vivos in praesenti,* property passing to the donee and possession also. Consequently if, as in *Weerasekera v. Peiris,* you purport to make a gift *inter vivos* to take effect after you are dead, you are purporting to do something outside the scope of your Muslim law, to do a legal act unknown to that law, consequently that legal act to be valid at all must be valid under some other system of law. It is much as if a man at Colombo or Cape Town in the year 1800 had sought to make a declaration of trust—" I, A, declare myself trustee of this sum of money for you X " ; such a legal act could not have been valid, could have had no significance, under the Roman-Dutch law as it then prevailed at those places, and the man seeking to do it could not ' have intended that there should be a valid legal act by him as understood in the Roman-Dutch law '—see *34 N. L. R. 285* (last four lines).

If these considerations are correct, then they do away with the suggestion that a Muslim "can contract himself out of the Muslim law as to gifts altogether ", a notion to which currency was given by some speculations—*obiter*—in my judgment in *Sultan v. Peiris* [2]. In extenuation it must be remembered that the judgments in that case were written in the confident expectation that appeal to the Privy Council would follow and that we would receive therefrom a broad and luminous judgment on this subject for our future guidance. In this connection I would respectfully adopt the argument put to us by learned Counsel for the appellant in his reply on the present appeal. He distinguished between the rights and obligations of the contracting parties on a contract—gift is a contract with us—and the contract itself. Parties can mutually stipulate that certain incidents of the contract are to be good by the law of a particular place but the validity of the contract must be governed by the law to which they are themselves subject. Thus parties to a lease of land in Ceylon might stipulate that the provisions in it as to cultivation or weeding should be interpreted according to the law of India (let us say) or of Malaya but they could not agree that the contract should be valid

[1] *34 N. L. R. 281.*

[2] *35 N. L. R. 57 a 176.*

though not notarially executed or covenant mutually not to raise the question of want of notarial execution, for this would be arrogating to themselves legislative powers. I would agree.

But it is necessary to examine the Privy Council decision in *Weerasekera v. Peiris* further to be certain of its exact effect and whether the present case is distinguishable. But before doing so I would wish to quote what I apprehend to be an accurate and sufficiently full statement of what is the Muslim law as to gifts in Ceylon, namely, the propositions laid down by Garvin J. in *Sultan v. Peiris*[1].

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 ".

Authority for these propositions can be found in our books *passim,* and many of the cases constituting that authority are cited in the judgments in *Sultan v. Peiris.*

Now the learned Counsel for the respondents pressed on us that the donor in No. 1,176 could not have intended to make a gift under his own Muslim law but by the reservation to himself categorically of a usufruct for his life and by placing the property categorically under the bond of *fidei commissum* had manifested an intention to make a kind of gift unknown to the Muslim law and therefore the only alternative, a gift under Roman-Dutch law. In considering this we must beware of the fallacy that because a deed of gift between Muslims, and therefore *primâ facie* to be governed by Muslim law, is for one reason or other ineffective, therefore the donor cannot have intended to make a Muslim deed of gift. A caution against this is to be found in my own judgment in *Sultan v. Peiris*[2], and better and more fully in that of Garvin J. at p. 87 :—" 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

[1] *35 N. L. R. 57, at 85.*
[2] *35 N. L. R. 57, at 74 (1st para.).*

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". This possible error put aside, we can proceed. Did the donor in deed No. 1,176 not "intend that there should be a valid gift as understood in Muslim law"?

Now the test to determine this, according to the decision in *Weerasekera v. Peiris*[1], seems to be that there "it was never intended that the father should part with the property in or the possession of the premises during his lifetime or that the son should have any control over or possession of the premises during his father's lifetime". This must be analysed and it is best to start at the end. "It was never intended that the son should have any control over or possession of the premises during his father's lifetime." In the present deed the donee certainly cannot by reason of the usufruct received, have possession of the premises during the donor's lifetime but he is to have that amount of control that possession of the deed of gift expressed as an irrevocable one would secure to him. Retaining the deed he would be able to register it, and this would give him some security against future attempts by the donor to alienate the *dominium* contrary to deed 1,176. "It was never intended that the father should part with the property in or possession of the premises during his lifetime." Here, certainly, there was no parting by the donor with the possession of the property during his lifetime for the usufruct therein was to remain in him for his life, but there was intention to part with the property itself, the *dominium*, for the gift of that *dominium* was expressed to be made irrevocably, and the donor gave substantial proof of that intention by handing the deed of gift over to the donee. Moreover, there was an expressed intention of parting with the possession of the property during the donor's lifetime, for the donor says that on signing the deed, he hands the deed over to the donees "as a token of the transfer of possession of the said properties". On the facts then the present case is clearly distinguishable from *Weerasekere v. Peiris* (*supra*). Attempting to put the distinction in one sentence, I would say that here there was a transfer of the *dominium* and an act purporting to transfer possession, the whole to take effect now in the donor's lifetime, consequently at the least an attempt to make a gift as Muslim law understands that term, while in *Weerasekera v. Peiris* (*supra*) there was no transfer during the donor's lifetime either of *dominium* or possession but a gift to take effect as to *dominium* and possession if at all after the donor's death, that is, not a gift as Muslim law understands the term but outside the scope of Muslim gifts altogether. Then this case is not governed by the decision in *Weerasekera v. Peiris* but, the alternative, by that in *Sultan v. Peiris*. The gift here was, and was intended to be a gift under Muslim law, but, as in *Sultan v. Peiris*, it fails because possession never passed but was retained by the donor.

For the foregoing reasons I am of opinion that this appeal must be allowed with costs here and below and the action of the plaintiff dismissed.

POYSER J.—I agree.

Appeal allowed.

[1] *34 N. L. R. 281, at 285.*