1942 *Present :* **Howard C.J., Moseley S.P.J., Soertsz, Hearne and Wijeyewardene JJ.**

ALIYA MARIKAR ABUTHAHIR *v.* ALIYA MARIKAR MOHAMMED SALLY.

110—D. C. Kegalla, 1,351.

*Muslim deed of gift—Reservation of life-interest in donor—*Fidei commissum *attached to the gift—Valid* fidei commissum *created—Roman-Dutch law.*

A Muslim executed a deed of gift in favour of one of his sons, reserving to himself and his wife, if she survives him, the right to take, enjoy and receive the rents and profits of the property gifted, during their lifetime.

He also reserved to himself the right to revoke and cancel the gift at his will and pleasure.

The gift was also subject to a *fidei commissum* in favour of the donee's children.

The donee and the donor's wife accepted the gift.

Held, that the deed created a valid *fidei commissum,* and was a valid gift under the general law although between Muslims.

Weerasekere v. Peiris (34 N. L. R. 281) followed.

Sultan v. Peiris (35 N. L. R. 57) over-ruled.

THIS was a case referred to a Bench of five Judges under section 51 of the Courts Ordinance.

The facts are as follows :—

A Muslim, Tamby Lebbe Aliya Marikar, executed a deed of gift in favour of one of his sons, Mohamed Sally, the defendant-appellant. The deed contained the following provisos :—

(*a*) That the said Aliya Marikar shall be at liberty and the right is hereby reserved to him to take, receive and enjoy the rents and profits of the said premises during his lifetime and, after his death, his wife shall be at liberty and the right is hereby reserved to her to take, receive and enjoy the rents and profits of the same during her lifetime, and Aliya Marikar, the said donor, reserving the right to revoke or cancel these presents at his will and pleasure.

(*b*) That the said Mohamed Sally shall not sell, mortgage or alienate the premises but shall only hold and possess the same during his lifetime and, after his death, the same shall devolve on his children . . . .

(*c*) In the event of the said Mohamed Sally dying without issue the said premises shall devolve on his brothers and the children of his deceased brother.

The deed of gift was accepted by the donee and the donor's wife.

The donor died in 1934. In 1936 his widow conveyed her life-interest in the property to the plaintiff who is another son. The plaintiff sued the defendant to recover the rents and profits which were wrongfully appropriated by the latter. The defendant resisted the claim on the

ground that the deed was invalid as it was not implemented by delivery of possession of the subject-matter of the gift to the donee as required by the Muslim law. The learned District Judge held against the defendant.

C. V. Ranawake (with him *H. A. Koattegoda* and *Kariapper*), for the defendant, appellant.—The question for consideration is whether the deed of gift executed by Aliya Marikar on August 23, 1928, is governed by the Muslim law or the Roman-Dutch law. It is submitted that it is governed by the Muslim law. A deed of gift between Muslims has to be first tested by Muhammedan law even though the deed purports to contain a *fidei commissum*, the validity of which must admittedly be tested by Roman-Dutch law. This is the rule as laid down by the Supreme Court in *Weerasekere v. Peiris*[1]. This rule is not affected by the judgment of the Privy Council in that same case. In the deed of gift considered by the Privy Council in *Weerasekere v. Peiris*[2] it was held (1) that there was an intention to execute it under the Roman-Dutch law, and (2) that it was a gift *in futuro*. In both these respects the deed in the present case differs from the deed in *Weerasekere v. Peiris (supra)*, for the deed in this case is *prima facie* a Muslim gift and, further, it is a gift *in praesenti*. The District Judge was, therefore, wrong in giving judgment against the appellant on the basis of *Weerasekere v. Peiris*. *Sultan v. Peiris*[3], where *Weerasekere v. Peiris* is fully considered, is applicable to the facts of this case. These two decisions are not in conflict with each other. In *Sultan v. Peiris* the Muslim law was held to prevail, despite the fact that the word "fidei-commissum" appeared in the deed. See also *Ponniah et al. v. Jameel et al.*[4], *Casie Chetty v. Mohamed Saleem et al.*[5], and *Abdul Caffoor v. Packir Saibo*[6]. Cases in which the deeds construed were similar to the one in *Weerasekere v. Peiris* are *Kudhoos v. Junoos*[7], *Kalender Umma v. Marikar*[8] *and Ismail v. Mohamed*[9]. The gift in this case fails for want of seisin. There is a vesting of the *dominium* in the donee, but no possession passed. There is nothing to show that the parties intended to make the gift under the Roman-Dutch law.

H. V. Perera, K.C. (with him *Haniffa, Ameer,* and *Ariaratnam*), for the plaintiff, respondent.—This case comes directly within the *ratio decidendi* of the judgment of the Privy Council in *Weerasekere v. Peiris*. The present state of the law is very unsatisfactory. There is a real conflict between *Weerasekere v. Peiris* and *Sultan v. Peiris* and confusion has resulted from the fact that subsequent decisions have followed the one or the other.

Prior to *Weerasekere v. Peiris* the Muslim law in Ceylon recognized only pure donations, and in the construction of *fidei commissum* the principles of the ordinary general law and not of the Muslim law were always applied—*(1873) 2 Grenier (D. C.) 28; Rahiman Lebbe et. al. v. Hassan Ussan Umma et al.*[10]; *Saidu v. Samidu*[11]. For the first time in *Weerasekere v. Peiris* the Supreme Court took the view that a

[1] *(1931) 32 N. L. R. 176 at 181.*
[2] *(1932) 34 N. L. R. 281.*
[3] *(1933) 35 N. L. R. 57.*
[4] *(1936) 38 N. L. R. 96.*
[5] *(1940) 42 N. L. R. 41.*
[6] *(1941) 42 N. L. R. 428.*
[7] *(1939) 41 N. L. R. 251.*
[8] *(1936) 38 N. L. R. 271.*
[9] *(1933) 35 N. L. R. 331.*
[10] *(1916) 3 C. W. R. 88.*
[11] *(1922) 23 N. L. R. 506.*

transaction could be broken up into two separate parts, one of which being governed by the Muslim law and the other by the Roman-Dutch law. On appeal to the Privy Council the decision of the Supreme Court was reversed and the old view was restored.

There are three conditions necessary, in Ceylon, for the validity of a Muslim gift: (1) Intention, (2) Acceptance, (3) Delivery of possession. For Muslim law to be applicable, there should be the intention to give delivery of the property completely, reserving nothing to the grantor and giving nothing to a third party. There is a full statement of the law in *Weerasekere v. Peiris*[1]. *Sultan v. Peiris* (*supra*) is an interpretation of *Weerasekere v. Peiris*. It does not, however, state correctly the principle laid down by the Privy Council. There is not in *Sultan v. Peiris* a consistent statement of principle.

C. V. Ranawake in reply.—For principles on which to determine the intention of the parties to a contract with reference to the law by which it should be governed, see *Dicey's Conflict of Laws (5th ed.), pp. 666-8* and *Vol. 6 Halsbury's Laws of England (2nd ed.) p. 263, section 321.*

Cur. adv. vult.

February 25, 1942. SOERTSZ J.—

This case has been referred to us under section 51 of the Courts Ordinance in view of the obscurity in which Muslim donations are involved in the present state of our law.

Whatever doubts and difficulties there might have been in regard to these donations before the Privy Council delivered its opinion in the case of *Weerasekere v. Pieris* (*supra*) (December, 1932) that opinion enunciated the governing principle in terms so clear that there was every reason for supposing that the matter had been settled once and for all. But the unfortunate case of *Sultan v. Pieris*[2] came up shortly afterwards (March, 1933) before a Divisional Bench and served to revive the earlier confusion; indeed, to make the last state worse than the first.

If I may say so with respect, the judgments delivered in that case are, by no means, easy to follow. But that is not all. Macdonell C.J. and Garvin J. who wrote those judgments gave substantially different interpretations of the opinion of the Privy Council. The two other Judges, Drieberg and Akbar JJ. expressed their concurrence with the judgment of the Chief Justice, but he, in a later case *Ponniah v. Jameel*[3] recanted his interpretation and adopted that of Garvin J.

In these circumstances, it is hardly matter for surprise that such a diversity of views as we have to-day should have arisen. That was almost inevitable. Judges sitting, in the ordinary course, found themselves confronted with the unquestionable authority of the Privy Council and with what appeared to be an authoritative decision of the Divisional Bench interpreting that opinion in two different ways, and it fell to them to endeavour, as well as they could, to reconcile what are, in reality, irreconcilable views.

A brief summary of the cases subsequent to *Sultan v. Pieris* will suffice to show how uncertain and unsatisfactory the law relating to this question has been during the last decade or so. The cases in

[1] *(1932) 34 N. L. R. 281 at 284 et seq.*
[2] *35 N. L. R. 81.*
[3] *38 N. L. R. 96.*

question are those of *Ismail v. Mohamed* (Nov. 1933), *Ponniah v. Jameel* (Mar. 1936), *Kalender Umma v. Marikar* (Oct. 1936),[1] *Kudhoos v. Junoos* (Oct. 1939)[2], *Casie Chetty v. Mohamed Saleem* (Oct. 1940)[3], *Abdul Caffoor v. Packir Saibo* (*May 1941*)[4].

But first of all in regard to *Sultan v. Pieris* itself, the interpretation Macdonell C.J. put upon the opinion of the Privy Council was that it laid down that a Muslim might " manifest a sufficiently clear intention to contract himself out of the Mohamedan law as to gifts altogether and, therefore, to make it—the only alternative—under the Roman-Dutch law ", and in that view of the matter he said that " in examining a deed of gift from one Mohamedan 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 Mohamedan law ". He then proceeded to examine the deed in question in that way, and came to the conclusion that the inference that arose from all the terms of the deed was that the " donor and his conveyancer . . . . intended . . . . to emphasize the Mohamedan character of the deed of gift and to ensure the donees remaining in that faith ", by imposing a forfeiture in the event of their abandoning the Islamic faith or marrying a widow or a divorced woman. He added " I find it difficult to give due significance to the penalty or forfeiture clause unless the donor considered himself as acting under and within the ambit of his own Mohamedan laws ". Having reached that conclusion, he examined the deed to see whether it complied with the essential requisites of a gift as understood in the Muslim law, and he held it to be void because it was not in conformity with those requisites. In other words, the learned Chief Justice interpreted the opinion of the Privy Council as laying down that, in the first instance, it is necessary to consider all the terms of the deed in order to ascertain whether the donor has manifested an intention to contract himself out of the Mohamedan law or not. If he has not, the Mohamedan law must be applied ; if he has, the Roman-Dutch law governs the question of the validity of the deed. It will appear presently, that this is how Dalton J. understood the interpretation given in *Sultan v. Pieris* (*supra*) of the opinion of the Privy Council.

But, as a matter of fact, Garvin J. gave a different interpretation. He said " 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 is understood by the Muslim law and the intention of the donor must, if possible, be given effect to under the general law ". He went on to add " 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, notwithstanding 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 ".

[1] *(1936) 38 N. L. R. 271.*
[2] *(1939) 41 N. L. R. 251.*
[3] *(1940) 42 N. L. R. 41.*
[4] *(1941) 42 N. L. R. 429.*

This is in direct opposition to the view taken by Macdonell C.J. As I have already observed Drieberg and Akbar JJ. who were the other members of that Divisional Bench expressly agreed with the judgment of the Chief Justice, so that the view of the Chief Justice was the view of the majority of the Bench and, therefore, the authoritative interpretation of the opinion of the Privy Council. As I have already pointed out, the learned Chief Justice later adopted the interpretation given by Garvin J. and explained how the two concurring Judges came to express their agreement in the way in which they did, but the fact remains that their concurrence, as recorded, is with the judgment of the Chief Justice.

Dalton J. regarded the interpretation of Macdonell C.J. as containing the true *ratio decidendi* of *Sultan v. Pieris*, when he considered the case of *Ismail v. Mohamed* (*supra*) and distinguished it from that case. In the case just mentioned, a Muslim donor made a gift to the donee reserving for himself and for his wife life-interest and reserving to himself a power of revocation. The donee accepted the gift and the deed itself was handed to him. Shortly afterwards the donor renounced by deed both the power of revocation and the life-interest that had been reserved. Many years later, he sought to repudiate the gift on the ground that the reservation of the power of revocation and of life-interests was obnoxious to the Mohamedan law and that, therefore, the deed was void. Dalton J. with whom Poyser J. agreed, held that even if the Mohamedan law were applicable there was a valid gift because the effect of the deed of gift read with the deed of renunciation was to create a valid transfer of *dominium*, and that, on the evidence, the donee was shown to have had possession as well. But he ruled that, on a true interpretation of the deeds, it was the Roman-Dutch law that was applicable because the retention of the power of revocation and the reservation of a life-interest were " quite inconsistent with a valid gift under Muslim law, whereas they are entirely consistent with a valid gift under the Roman-Dutch law." Counsel who appeared for the party impeaching the deed had also submitted that a Muslim could not possibly make a gift reserving a life-interest, and in regard to that submission, Dalton J. said, " Mr. Hayley for the respondent, however, carried his argument so far as to say that a Muslim in Ceylon is debarred by law from making a donation reserving a life-interest in himself, but that seems to me quite inconsistent with the principle laid down by the Privy Council in *Weerasekere v. Pieris* ". He held that *Sultan v. Pieris* (*supra*) had no application to the case before him for the reason that the Mohamedan law was applied in that case because the Judges had found, on an examination of all the terms of that deed, that both the donor and the conveyancer had emphasized the Muslim character of the deed, whereas in the deed he was considering there was no such implication. The point I seek to stress is that Dalton J. did not accept the interpretation given by Garvin J. of the opinion of the Privy Council although Counsel " urged that the case for the application of Muslim law and not of Roman-Dutch law is the same in the circumstances here as it was in the circumstances of that case " (*i.e., Sultan v. Pieris*). This submission could have been made only on the interpretation given by Garvin J.

The next case is that of *Ponniah v. Jameel* (*supra*). It came before Macdonell C.J. and Poyser J. The former delivered the judgment in the case and it was in the course of this judgment that he adopted the interpretation given by Garvin J. and explained how the other Judges came to express their concurrence with his own judgment. The donor in that case and his conveyancer appear to have had a thoroughly confused idea as to the meaning of the judgments in *Sultan v. Pieris* and they sought to secure the validity of the gift notwithstanding the reservation of the donor's life-interest and the *fidei commissum* he had imported into it, by means of an express declaration that the deed of gift was handed over to the donees " as a token of the transfer of possession of the property hereby conveyed in accordance with the decision of the Supreme Court ". It is obvious that they were obsessed with the bugbear of *seisin* and that their minds were running on the dictum in *Sultan v. Pieris* as affording them their only hope of escape—"delivery of possession may be constructive but must be real ", and they supposed that this solemn avowal of the handing over of the deed to the donee with the additional declaration they made that the donor " has given up every right he may have under any law whatsoever to revoke the deed " satisfied the requisite condition of a *real* delivery. But all the anxious thought they had brought to bear, all the precautions they had taken, were in vain. They seemed never to be able to make the gift they desired. The deed was held to come within the interpretation given by Garvin J. and to be void because it amounted to a gift intended to take effect at once and was unaccompanied by delivery of possession, the donor having reserved a life-interest.

The case of *Kalender Umma v. Marikar*[1] followed and added to this burden of doubt and uncertainty. Fernando A.J., while professing to adopt the interpretation given by Garvin J. in *Sultan v. Pieris* and adopted by Macdonell C.J. in *Ponniah v. Jameel,* in reality, departed from it and gave an interpretation that brought the case with which he was dealing within the rule laid down by the Privy Council in *Weerasekere v. Pieris.* He appears to have taken the view that the gift in *Sultan v. Pieris* was made with the intention that it should take effect immediately because it not only purported to be an absolute and irrevocable gift, but also because there was in the deed a declaration that the deed of gift together with the connected deeds was handed to the donees, and that the deed before him could not be said to have been made with any such intention because although it declared that the donors " annex the aforesaid deeds with this ", there is nothing to show that even the deed of gift itself was intended to be delivered to the donees. I would respectfully submit that this is excessive refinement. There is a declaration in the deed that the donation was accepted " with gratitude and delight ". That declaration viewed in the light of the maxim invoked by Macdonell C.J. in *Sultan v. Pieris,* namely that " *omnia praesumuntur rite esse facta* " seems to me to lead fairly to the conclusion that the deeds were handed to the donees. If, then, the giving up of the deeds to the donee is the decisive factor in regard to the question whether a gift is an immediate one or one *in futuro,* no differentiation can properly

[1] *(1936) 38 N. L. R. 271.*

be made between the two deeds. In other respects, they were identical. In both deeds, there was a forthright donating, conveying and setting over, without retention of any power of revocation. In both deeds, there was the reservation of a life-interest. And yet Garvin J. held that such a deed is *invalid* because a life-interest was reserved, while Fernando A.J. purporting to adopt the interpretation given by Garvin J. held that such a deed is *valid* because the reservation of the life-interest makes it clear "that the donor did not intend to part with the possession of the premises at the time of the gift."

It will be seen on a careful examination of the judgment of Garvin J. in *Sultan v. Pieris* that he did not consider the handing of the deeds to the donee to be of material importance in a case in which actual possession of the subject-matter of the gift is not given. He said "the mere delivery of the deed . . . . is not constructive delivery when the donor had clearly manifested his intention that it was he and not the donee who was to take all the rents, profits, produce and income".

In point of time, the next case that arises for consideration is that of *Kudhoos v. Junoos*[1] but before I proceed to deal with that case reference to the case of *Casie Chetty v. Mohamed Saleem*[2] seems to be opportune in view of the opinion Keuneman J. expressed in regard to the judgment in *Kalender Umma v. Marikar* (*supra*). Confronted with the facts, that the judgment was not what it appeared to be and that it did not follow the test it purported to adopt, he sought to solve the difficulty by suggesting that Fernando A.J. had used the word "possession" *per incuriam* instead of the word "property" or of the word "dominium". But the trend of the whole judgment is opposed to that view of the matter. In the end Keuneman J. followed *Sultan v. Peiris* because he found that the deed he had to consider purported to make an immediate gift and had, therefore, to be tested by Mohamedan law and that it failed by that test inasmuch as possession of the property gifted was not given to the donee. He said that he did not find the judgments in *Sultan v. Pieris* inconsistent with the opinion of the Privy Council in *Weerasekere v. Pieris.*

But in the earlier case of *Kudhoos v. Junoos*, already referred to, Wijeyewardene J. took a very different view. Referring to the contention of Counsel who attacked the deed as obnoxious to the Mohamedan law because while purporting to make an immediate gift the donor reserved to himself a life-interest, Wijeyewardene J. said that it was "an invitation to them to whittle away the effect of the Privy Council decision by endeavouring to ignore the plain meaning of the judgment and decide the present case according to the view of law expressed in the decision reported in *32 N. L. R., p. 176* (that is to say, the judgments given here in *Weerasekera v. Pieris*) which was the very judgment overruled by the Privy Council". He went on to say that "It is not possible to reconcile some of the views expressed in the two subsequent decisions (*i.e.*, in *Sultan v. Pieris* and *Ponniah v. Jameel*) with the ruling of the Privy Council, but in spite of these views I am bound to follow the decision of the Privy Council".

[1] *(1939) 41 N. L. R. 251.* [2] *(1940) 42 N. L. R. 41.*

The last case of this series is that of *Abdul Caffoor v. Packir Saibo*[1] in which Moseley J., sitting with Keuneman J., followed the judgment of Keuneman J. and concurred in by Cannon J. in *Casie Chetty v. Mohamed Saleem*.

To sum up, *Sultan v. Pieris* gave two different interpretations of the opinion of the Privy Council. In *Ismail v. Mohamed*, Dalton J., Poyser J. agreeing, held that the deed in that case did not come within the interpretation given by the Chief Justice with which Drieberg and Akbar JJ. agreed, and he did not adopt the interpretation given by Garvin J. although Counsel rightly submitted that on that interpretation the two cases were indistinguishable. In *Ponniah v. Jameel*, Macdonell C.J., with whom Poyser J. agreed, adopted Garvin J's interpretation in *Sultan v. Pieris*. In *Kalender Umma v. Marikar* Fernando A.J., Moseley J. agreeing, purported to follow Garvin J's interpretation in *Sultan v. Pieris* but as already pointed out departed from it. In *Kudhoos v. Junoos* Wijeyewardene J. with whom Moseley A.C.J. agreed found *Sultan v. Pieris* to be *inconsistent* with the opinion of the Privy Council in *Weerasekere v. Pieris*, and felt bound to follow the latter. In *Casie Chetty v. Mohamed Saleem* Keuneman J., Cannon J. agreeing, found that *Sultan v. Pieris* was not inconsistent with the opinion of the Privy Council, and followed Garvin J's interpretation suggesting that Fernando A.J's conclusion in *Kalender Umma v. Marikar* was due to an erroneous use of the word "possession". In *Abdul Caffoor v. Packir Saibo*, Moseley J., with whom Keuneman J. agreed, followed *Casie Chetty v. Mohamed Saleem*.

It is in this uncertain state of the law, that the present case arises for consideration, and it arises on the facts that I shall now state.

One Tamby Lebbe Aliya Marikar executed a deed of gift in favour of one of his sons, who is the defendant-appellant before us. The donor reserved to himself and to his wife, if she survived him, the right to take, enjoy and receive the rents and profits of the property gifted during their lifetime. He reserved to himself the right to revoke and cancel the gift at his will and pleasure. He also annexed a *fidei commissum* to the gift. The donee and the donor's wife thankfully accepted the gift.

The donor died in 1934. In 1936 his widow conveyed her life-interest in the property to the plaintiff who is another son.

Relying upon this deed, the plaintiff brought this action alleging that, whereas he is entitled to the rents and profits of the property, the defendant is wrongfully receiving and appropriating to himself the rubber coupons issued in respect of it under the Rubber Control Ordinance.

The defendant, apparently more concerned with the present than about the future, repudiated the plaintiff's claim on the ground that the deed on which that claim is ultimately based, that is of course the deed in favour of the defendant himself, is void inasmuch as it was not implemented by delivery of possession of the subject-matter of the gift to the donee in the manner required by the Mohamedan law.

It seems to suit the defendant's immediate purpose to invoke the Mohamedan law. In other circumstances, there can be little doubt he would as vehemently have called in aid the Roman-Dutch law. Such is the good fortune that attends some Muslim donors and donees, and

[1] (1941) 42 N. L. R. 123.

persons claiming through them! They have the choice of two systems of law to suit the changing occasion and, what is more, they appear to have an even change either way.

The learned trial Judge held against the defendant. He found that the case was clearly within the rule laid down in the opinion given by the Judicial Committee of the Privy Council in *Weerasekere v. Pieris* and that the deed of gift is valid.

The appeal is from that order. Counsel for the appellant submits that in view of the interpretation put upon the opinion of the Privy Council by the Divisional Bench in the case of *Sultan v. Pieris,* the rule laid down in that opinion has no application to this case.

We must, therefore, examine the cases of *Weerasekere v. Pieris* and *Sultan v. Pieris* for ourselves. In the former case, a deed of gift in terms very similar to those of the gift in this case came up for consideration. There, too, the donor reserved to himself the right to cancel and revoke the gift and to deal with the property as he thought fit, as if the deed of gift had not been executed. He reserved to himself the right to take the rents and profits of the property gifted during his lifetime, and declared that "the same shall go to and be possessed" by the donee after his death. He also subjected the gift to a *fidei commissum.* The trial Judge held that the gift was valid and gave judgment accordingly.

On appeal, Macdonell C.J. and Garvin J. reversed that finding. They held that the gift was obnoxious to the Mohamedan law because no possession of the property gifted was intended to be given or was, in fact, given to the donee inasmuch as the donor had reserved to himself a life-interest. They took the view that as the first part of the deed purported to constitute a deed *inter vivos,* the Mohamedan law must be applied thereto, and as possession of the premises was not taken by the donee in the donor's lifetime, the gift was offensive to the Mohamedan law. The failure of the gift, they said, resulted in the failure of the *fidei commissum* based upon it.

As has been repeatedly pointed out, there are certain essential requisites for the validity of a Mohamedan law gift or *hiba* as it is called. There must co-exist (*a*) a signification on the part of the donor of his willingness to make to the donee an immediate and unconditional transfer, without consideration, of all the donor's ownership of or of all his rights in an existing and specified thing; (*b*) an acceptance by the donee of the gift so signified; (*c*) as complete a delivery of possession as it is possible for the donor to give to the donee. (See *Tyabji 1919 Ed., p. 365.*)

It is difficult to understand why the learned Judges here, in dealing with *Weerasekere v. Pieris* on appeal, singled out the requisite in regard to delivery of possession, and made that the crucial test of validity. A gift involving a *fidei commissum* is not absolute and is, so far as Mohamedan law is concerned, a contradiction in terms. But the judgments of this Court in *Weerasekere v. Pieris* suggest that effect can be given to such a condition under the Mohamedan law if there is "an otherwise valid gift" as known to that law. Perhaps, the phrase "an otherwise valid gift" affords a clue to the reasoning in those judgments which appears to be as follows:—A *fidei commissum* offends against the strict Mohamedan

law of gifts; but the Mohamedan inhabitants resident in this Island have " absorbed " the principle of *fidei commissum* " into their system " of gifts, and have evolved a new kind of gift sanctioned by custom; therefore, what remains to consider is the sole question whether there is an immediate gift accompanied by immediate possession.

But if I may say so with respect, this is to beg the question. It assumes that a new Muslim gift had become so sanctioned by custom as to have acquired the force of law.

There does not, however, seem to be any justification for that assumption. The evolution of customary law is not based on any elements of *deliberate* will and consent, but on what Ulpian calls the " tacitus consensus populi longa consuetudine inveteratus ". That cannot be said—having regard to the known facts—of the way in which Muslims here charged their gifts with *fidei commissa.* If it is at all possible to say that a new kind of gift involving *fidei commissa* had been absorbed by Muslims into their system of law, a similar claim can be made with as much force in regard to gifts reserving usufructs. Such gifts we know are no less numerous than those containing *fidei commissa.* The three deeds in these three cases themselves, I mean in *Weerasekere v. Pieris*, in *Sultan v. Pieris* and in the present case, are three such instances.

But it is this very reservation of a usufruct in the case of *Weerasekere v. Pieris* that Macdonell C.J. and Garvin J. employed to defeat that deed. They condemned a gift which could not possibly have been intended to be a Muslim gift simply because it was not a Muslim gift. Analysed to its first logical basis, their finding meant that a Muslim could not make any gift other than the one known to the Mohamedan law, but they reluctantly conceded the exception of the " otherwise valid gift " with a *fidei commissum* imposed as something sanctioned by custom. The true position, however, appears to be that it was not at all a case of Muslims absorbing any other kind of gift into their system of law and so evolving a new form of gift, but of their making gifts, some of which were or purported to be in conformity with their law, while others were or purported to be in conformity with the general law of the land. Effect is given to the latter not because, as was supposed by Macdonell C.J., a Muslim donor has manifested a sufficiently clear intention to contract himself out of the Muslim law, nor merely because he has made manifest that his intention is to address himself to making such a gift as is known to the general law, but because he has, in fact, made a gift that can be given effect to under that law. For example, suppose a Muslim donor has made a gift in which he stipulates that the donee shall hold the property gifted " under the bond of *fidei commissum* " but fails to designate beneficiaries ; in such a case, it may reasonably be said that the intention of the donor is to create a *fidei commissum,* but that does not mean that the Mohamedan law is ousted. The prohibition will, in that event, in the words of Bertram C.J., be treated as *brutum fulmen,* and the deed will be held valid or invalid according as there are present, or are not present, the essential requisites of a Muslim gift. It is for this reason that, in the opinion they gave, their Lordships are careful to say that " they are of opinion that the father *did not intend* to make to the son

such a gift *inter vivos* as is recognized in Mohamedan law as necessitating the donee taking possession of the subject-matter, but that the father *intended* to create *and that he did create* a valid *fidei commissum* ".

This view is supported by the judgment of that eminent District Judge of Colombo, Judge Berwick. The judgment I refer to is reported in *Grenier's Appeal Reports, Part 2 (1873) (D. C. cases) at p. 28.* The judgment was affirmed on appeal by this Court for the reasons given by the District Judge. He found that the deed in that case which was a deed of gift between Muslims containing a *fidei commissum* is valid. The contention advanced against that deed was that the condition against alienation involved in the *fidei commissum* was obnoxious to the Mohamedan law; that the condition must, therefore, be disregarded and the property held to have vested absolutely in the donee. Berwick D.J. disposed of that contention in a few words—He said " the clause in question would be valid by the ordinary law of Ceylon and must, therefore, be held valid in this case, however the Mohamedan law may vary in this regard in distant parts of the world ".

There was no allusion whatever to a new kind of Muslim gift which had " absorbed " the principle of *fidei commissum.* Nor was there reference to any such thing in any of the later cases before the suggestion was made in *Weerasekere v. Pieris.*

There is not one word in the Privy Council opinion to suggest such a view. There is in the opinion delivered by the Privy Council a passage that is parallel to the dictum quoted from the judgment of Berwick D.J. Their Lordships said " the common law of Ceylon is the Roman-Dutch Law . . . . under that law donations involving *fidei commissa* are well known and recognized transactions ". This is, clearly, the statement of Berwick D.J. that " the clause in question is valid by the ordinary law of Ceylon," in ampler form. Indeed, it is no exaggeration to say that Berwick D.J.'s judgment contains in germ the principle we find fully developed in the opinion delivered by thir Lordships of the Privy Council in *Weerasekere v. Pieris.* If the judgment of Berwick D.J. had been carried to its logical conclusion we should have steered clear of all difficulties. But, unfortunately, while the letter of it was observed the spirit was either not appreciated or was ignored. Thereafter, Muslim donations containing *fidei commissa* were invariably recognized as valid, but Muslim donations in which the donor reserved a life-interest or a usufruct were frowned upon and nearly always rejected on the ground that such a reservation offended against the requirement of the Mohamedan law that a gift should be accompanied by immediate seisin of its subject-matter. If I may say so, this was an illogical attitude. If a gift between Muslims that contained a *fidei commissum* is a valid gift, although it is inconsistent with the Mohamedan law, it must follow that a Muslim gift reserving a life-interest to the donor is also valid. The only difference between the two is that the former violates only *one essential requisite* of a Mohamedan law gift namely, the requisite of an absolute and unconditional transfer of ownership, while the latter violates *two essential requisites,* the one just mentioned and also the requisite of immediate seisin. But it cannot be pretended that that is sound reason for recognizing the one and rejecting the other. If, as Berwick D.J.

pointed out, the clause imposing the *fidei commissum* is valid because it is valid by the ordinary law of Ceylon, for the same reason must a clause reserving a usufruct be valid.

The inconsistency of view undoubtedly arises from the fallacious assumption that a gift *qua* gift between Muslims resident in Ceylon must stand or fall by the Mohamedan law. That was precisely the fallacy exposed by the Privy Council.

In the Privy Council, their Lordships quite clearly disapproved the method of interpretation the Judges here had adopted. They said " 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 Mohamedan 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 Mohamedan 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 that he did create a valid *fidei commissum,* such as is recognized by Roman-Dutch law." But when the case of *Sultan v. Pieris* came before the Divisional Bench, the Judges resorted once again to the method of construction that had been expressly condemned by their Lordships. They could not, of course in view of the opinion expressed by the Privy Council, consider as preliminary questions, as they had done in their judgments which were reversed by the Privy Council,—

(*a*) whether there was a gift *inter vivos*—regardless of the question whether that gift was intended to take effect *in praesenti* or *in futuro.*

(*b*) whether actual possession of the property gifted had been delivered to the donee.

They sought to surmount that difficulty by proceeding to examine the deed to ascertain, by way of a preliminary step, whether there was a gift *inter vivos* intended to take effect *in praesenti* or *in futuro* with a view to rejecting the deed if it was a gift *in praesenti* unaccompanied by actual delivery of possession. In other words, they interpreted the opinion of the Privy Council as limited to gifts *inter vivos* and *in futuro* for Garvin J. says " the effect of their Lordships' decision . . . . 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 is understood by Muslim law and the intention of the donor must if possible be given effect to under the general law ".

I cannot find that their Lordships said anything of the kind in the whole course of their opinion, nor can I find any such statement implied in anything they said. They make no reference whatever to gifts intended to take effect immediately as contrasted with gifts to take effect after the donor's death.

Garvin J. is obviously referring to that part of their Lordships' opinion in which they say " 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 . . . . and it was *only after his death* the premises were to go and be possessed by the son ". And again " it was never intended that the father should part with the property in . . . . the premises *during his lifetime* ".

But their Lordships made those observations in the course of examining all the terms of the deed to see whether there could be said to be a gift valid according to Mohamedan law. They pointed out several facts which are inconsistent with the Mohamedan law conception of a gift, for instance the fact that there is no such transfer of the donor's property in the subject-matter of the gift *as is required by Mohamedan law*, for the reservation of the power to cancel and revoke and the provisions that the premises would pass to the donee completely only after the death of the donor are inconsistent with the requirement of an immediate and absolute transfer of all the donor's rights in and to the property gifted. They next drew attention to the reservation of the life-interest which is likewise inconsistent with the requirement of immediate seisin. Thirdly, they referred to the prohibition against alienation which while offending against the requirement that a gift should be unconditional was framed in terms that were adequate to create a *fidei commissum* such as is known to and is recognized by the general law of the land.

Their Lordships were applying the test they proposed as the true test, namely, a construction of the deed *having regard to all its terms*. That was the *ratio decidendi in Weerasekere v. Pieris*. But in *Sultan v. Pieris*, the Judges preferred to assume that the *ratio decidendi* was that the gift in that case was not a gift *in praesenti* but *in futuro*, in order, as I have indicated, to escape from the authoritativeness of the opinion of the Privy Council.

A summary—not intended to be exhaustive—will show what appears to be the true position in the light of the opinion given in the Privy Council. Their Lordships said that in construing a deed of gift to which Muslims are parties, regard should be had to all the terms of the deed—" all the terms of the deed must be taken into consideration " as is done in the case of any other deed. If, upon such a construction, the deed conforms to the essentials of a Muslim gift, effect will of course be given to it. The fact that such a deed is a good deed according to the general law, as well, is coincidence. It does not make the deed any better or any worse. If, however, upon such a construction, it is found that although the parties to it are Muslims, the deed is not in compliance with Mohamedan law, and there is nothing more, the deed fails. But if there are terms in it inconsistent with Mohamedan law, but known to and recognized by the general law, the inference is that it was not intended that there should be a valid gift as understood in the Mohamedan law, but that the donor intended to produce the particular transaction known to and recognized by the general law, and if he has produced it, effect will be given to the deed under that law.

If this test is applied to the deed in *Sultan v. Pieris*, there can be only one answer in regard to its validity, and that is that the donor there like

the donor in *Weerasekere v. Pieris* " did not intend to make to the donee such a gift *inter vivos* as is recognized by the Mohamedan law as necessitating the donee taking possession of the subject-matter during the lifetime of the donor, but that he intended to make and did make such a gift as is known to Roman-Dutch law " as a gift with a usufruct reserved to the donor and a *fidei commissum conditionale* superimposed, and that the deed *is valid* under that law. Applying the same test to the deed in this case, it is as clear that the donor intended to create and did create a valid *fidei commissum*, and that he did intend to reserve and did reserve life-interests for himself and his wife, features inconsistent with the gift of the Mohamedan law, but frequently appearing in gifts under the Roman-Dutch law.

In concluding their opinion their Lordships referred to Ordinance No. 10 of 1931 which is " an Ordinance to define the law relating to Muslim intestate succession, donations, and charitable trusts or Wakfs " and they drew attention in particular to sections 3 and 4 of that Ordinance. Those sections are as follows : —

(3) For the purpose of avoiding and removing all doubts it is hereby declared that the law applicable to donations not involving *fidei commissa*, usufructs and trusts and made by Muslims domiciled in the Island or owning immovable property in the Island, shall be the Muslim law governing the sect to which the donor belongs. Provided that no deed of donation shall be deemed to be irrevocable unless it is so stated in the deed, and the delivery of the deed to the donee shall be accepted as evidence of delivery of possession of the movable or immovable property donated by the deed.

(4) " It is hereby further declared that principles of law prevailing in the maritime provinces shall apply to all donations, other than those to which the Muslim law is made applicable by section 3."

Their Lordships then went on to say that they do not base their decision upon the provisions of the Ordinance " because in their opinion that Ordinance cannot govern the present case as it did not come into effect until June 17, 1931, and cannot be said to be retrospective in effect ". The reference to these two sections of the Ordinance, and the declaration that their Lordships do not base their decision upon them because they have no retrospective force are significant for, upon the interpretation submitted in this judgment, the first sentence in section 3 is, in effect, an anticipation by the Legislature of the rule their Lordships laid down.

For these reasons we hold that—

(1) *Sultan v. Pieris* was wrongly decided and must be overruled.

(2) *Ponniah v. Jameel, Casiechetty v. Mohamed Saleem,* and *Abdul Caffoor v. Packir Saibo,* based as they are on *Sultan v. Pieris,* were wrongly decided and must be overruled.

(3) *Kalender Umma v. Marikar* was in the result correctly decided but not for the reasons given in the judgment in that case.

(4) *Kudhoos v. Junoos* and *Ismail v. Mohamed* are approved.

(5) The trial Judge in the present case was right when he held that the deed of gift in favour of the defendant is within the rule laid down by the Privy Council in *Weerasekere v. Pieris.*

This appeal, therefore, fails and it is dismissed with costs.

HOWARD C.J.—I agree.

MOSELEY S.P.J —I agree.

HEARNE J.—I agree.

WIJEYEWARDENE J.—I agree.

Appeal dismissed.