1939 *Present:* **Moseley A.C.J. and Wijeyewardene J.**

KUDHOOS *v.* JOONOOS.

7—D. C. Colombo, 47,499.

Misjoinder of parties and causes of action—No ground for dismissed of action —Amendment of pleadings—Action by administrator before grant of letters—No justification for dismissal of action—Muslim deed of gift—Reservation of life-interest—Intention to create gift under Roman-Dutch law.

A Court is not bound to dismiss an action on the ground of a misjoinder of parties and causes of action.

In such a case the Court may on application made and in the exercise of its discretion strike out one or more plaintiffs and give an opportunity for amendment of the pleadings, so as to make the plaint conform to the requirements of section 17 of the Civil Procedure Code.

***Abraham Singho v. Jayaneris Singho* (3 C. L. W. 53) not folowed.**

Where an administrator, who had applied for letters of administration instituted an action before the grant of letters to him, the Court may postpone the hearing of the action pending the grant.

The Court would be justified in refusing to dismiss the action in such circumstances.

***Silva v. Weerasuriya* (10 N. L. R. 73) followed.**

The failure to take out letters of administration is an irregularity which comes within the scope of section 36 of the Courts Ordinance and the respondent, who has obtained a decree, is entitled to claim the benefit of the section.

Where a Muslim donated property subject to the reservation of a life-interest in his favour and creating a *fidei commissum* in favour of the children of the donee,

***Held*, that the donor intended to create and did in fact create a valid *fidei commissum* as known to the Roman-Dutch law.**

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

THIS was an action for declaration of title to property bearing assessment No. 64 at Hulftsdorp street.

By deed P 1 of December 8, 1894, Ummukuludu Umma gifted the property to Mahmood Natchia reserving a life-interest in her favour

and subject to a *fidei commissium.* By deed P 2 of September, 1902, Mahmood Natchia conveyed certain interests in the property to the defendant.

Ummukuludu died intestate about 1897 and letters of administration were granted to the first plaintiff. Mahmood Natchia died intestate in June, 1924, and letters of administration in respect of her intestate estate were granted to the second plaintiff on April 23, 1934. This action was instituted in January, 1932, asking for judgment declaring the first plaintiff entitled to the property as administrator of the estate of Ummukuludu or in the alternative declaring the second plaintiff entitled to the property in his own behalf or as belonging to the estate of Mahmood Natchia. The plaintiff alleged that the second plaintiff was the husband and sole heir of Mahmood Natchia and that he has applied for letters of administration to her estate in D. C. Colombo (Testy.) 5,967.

The defendant field answer pleading, *inter alia,* that there was a misjoinder of parties and causes of action and that plaintiffs could not maintain the action.

On March 16, 1934, the case came up for trial and the District Judge held on the preliminary issue that there was a misjoinder of plaintiffs and causes of action.

The plaintiff's Counsel thereupon moved to delete the name of the first plaintiff and to proceed with the action as at the instance of the second plaintiff. The case was then postponed as the second plaintiff had not yet obtained letters of administration to the estate of Mahmood Natchia.

In November, 1937, the case was heard and judgment given in favour of the second plantiff.

C. Thiagalingam (with him *T. K. Curtis*), for defendant, appellant.—There was a misjoinder of parties and of causes of action. Two persons claiming on two contradictory titles cannot, in law, join in the same action against the same defendant. On this point alone the whole action should have been dismissed, and no opportunity should have been given to the second plaintiff to continue his action after the first plaintiff's name was deleted. Section 11 of the Civil Procedure Code should be read with section 17. Section 18 is a correct corollary to section 17 and enables a party to be struck out only where several plaintiffs have joined in the same action, and not where different actions are embodied in the same plaint. The English rule is similar to ours—*Smuruthwaite et al. v. Hannay et al.*[1] That case was followed here in *Don Simon Appuhamy et al. v. Marthelis Rosa*[2] which, in turn, was followed in *Sivakaminathan v. Anthony et al.*[3] and *Abraham Singho v. Jayaneris Singho et al.*[4]. In *Fernando et al. v. Fernando*[5], however, the case was remitted, but it was left open to the defendant to raise the objection of misjoinder in the trial Court. The following authorities are also of assistance to the appellant :—*Mulla's Code of Civil Procedure* (9th ed.) 406 ; *Ali Serang et al. v. Beadon*[6] ; *Varajlal Bhaishanker et al. v. Ramdat*

[1] (1894) *A. C. 494.*
[2] (1906) *9 N. L. R. 68.*
[3] (1935) *3 C. L. W. 51.*
[4] (1930) *3 C. L. W. 53.*
[5] (1937) *39 N. L. R. 145.*
[6] (1885) *I L. R. 11 Cal. 524.*

Harikrishna et al.[1]; *Peninsular & Oriental Steam Navigation Company v. Tsune Kijima et al.*[2]; *Ram Narain Dut v. Annoda Prosad Joshi et al.*[3]; *Ettaman v. Narayanan et al.*[4].

At the date of his plaint, the second plaintiff had not been appointed administrator. He cannot, therefore, claim any rights as administrator in the present action.

The rights of parties must be determined as at the date of the action—section 42 of the Civil Procedure Code; *Silva v. Nona Hamine*[5]; *Ponnamma v. Weerasuriya*[6]; *Eminona v. Mohideen et al.*[7]; *Silva v. Fernando et al.*[8].

The deed P 1 does not create a valid gift under Muslim law—*Weerasekere v. Peiris*[9]; *Sultan v. Peiris*[10]; *Ponniah et al. v. Jameel et al.*[11]. P 1 contemplates a gift *in futuro* not *in presenti*.

S. J. V. Chelvanayagam for second plaintiff, respondent.—The objection regarding the status of the second plaintiff should have been taken at the early stages of the case. No objection was raised in the District Court that the second plaintiff had not obtained letters of administration at the date of the plaint. Nor is the objection taken in the petition of appeal now—*Steward v. North Metropolitan Railways*[12]. Further, it is open to any one who has an interest in the property of a deceased to institute an action in respect of such property. The fact that the respondent had not obtained letters would not vitiate the action—*Alagakawandi v. Muttumal*[13].

[WIJEYEWARDENE J. referred to *The Administrator-General of Bengal v. Lalit Mohan Roy*[14].]

R. D. Sethna v. Grace Hemingway[15] is directly in point.

In regard to the question of misjoinder, section 36 of the Courts Ordinance can cure the irregularity, if any—*Appuhamy v. Banda*[16]; *Rup Narain v. Gapal Devi*[17]; *Mahant Ramdhan Puri et al. v. Chandhury Lachmi Narain*[18]. The practice of the Ceylon Courts has been not to dismiss the entire action for misjoinder—*Jayamaha et al. v. Singappu et al.*[19]; *Menika v. Menika et al.*[20]; *Kanagasabapathy v. Kanagasabai*[21]; *London & Lancashire Fire Insurance Co. v. P. & O. Company et al.*[22]; *Salima Bibi et al. v. Sheik Muhammad et al.*[23]; *Behari Lal et al. v. Kodu Ram*[24]; *Alagamma et al. v. Mohammadu et al.*[25]. It may even be argued that there was no misjoinder. There is a distinction between conflicting claims and contradictory claims—*Lingammal et al. v. Chinna Venkatammal*[26]; *Paules Appuhamy v. The Attorney-General*[27]; *Fakirapa*

[1] (1901) *I. L. R. 26, Bom. 259.*
[2] (1895) *A. C. 661.*
[3] (1887) *I. L. R. 14 Cal. 681.*
[4] (1938) *12 C. L. W. 152.*
[5] (1906) *10 N. L. R. 44.*
[6] (1908) *11 N. L. R. 217.*
[7] (1930) *7 T. L. R. 162.*
[8] (1912) *15 N. L. R. 499.*
[9] (1932) *34 N. L. R. 281.*
[10] (1933) *35 N. L. R. 57.*
[11] (1936) *38 N. L. R. 96.*
[12] (1886) *16 Q. B. D. 556.*
[13] (1920) *22 N. L. R. 111.*
[14] (1908) *12 C. W. N. 738.*
[15] (1914) *I. L. R. 38 Bom. 618.*
[16] (1922) *24 N. L. R. 217.*
[17] *L. R. (1909) 36 I. A. 103 at p.*
[18] (1937) *A. I. R. 42.*
[19] (1910) *13 N. L. R. 348 at p. 350.*
[20] (1923) *25 N. L. R. 6.*
[21] (1923) *25 N. L. R. 173.*
[22] (1914) *18 N. L. R. 15 at p. 20.*
[23] (1895) *I. L. R. 18 All. 131.*
[24] (1893) *I. L. R. 15 All. 380.*
[25] (1917) *4 C. W. R. 73.*
[26] (1882) *I. L. R. 6 Mad. 239.*
[27] (1907) *3 Bal. Rep. 286.*

v. Rudrapa[1]; *Haramoni Dassi et al. v. Hari Churn Chowdhry*[2]; *Mrutyumjaya et al. v. Janakamma et al.*[3].

P 1 creates a valid gift. *Weerasekere v. Peiris* (*supra*) would be applicable. *Vide* also *Ismail v. Mohamed*[4] and *Muhammad Abdul Ghani et al. v. Fakhr Jahan Begam et al.*[5].

C. *Thiagalingam*, in reply.—At the date of the plaint, the plaintiff could not claim as administrator. This point is covered by issue No. 11. It can also, being a pure point of law, be taken for the first time in appeal—*Fernando v. Abeyagoonesekere*[6]; *Niles v. Velappa*[7]. To guide one in the construction of section 42 of the Civil Procedure Code, *The King v. The Justices of Middlesex*[8] and *Edward Garnett v. William Bradley*[9] are of assistance. Indian cases should be read in the light of section 212 of the Indian Succession Act. In India, contradictory views have been taken, *e.g.*, in *Sethna v. Hemingway* (*supra*) and *in re Ramdas Brij Govandas*[10].

Cur. adv. vult.

October 23, 1939. WIJEYEWARDENE J.—

This is an action for declaration of title to a property bearing assessment No. 64 at Hultsdorp street. By deed P 1 of December 8, 1894, one Ummukuludu Umma gifted the property to Mahmood Natchia, reserving a life interest in her favour and subject to a *fidei commissum*. By deed P 2 of September 30, 1902, Mahmood Natchia conveyed certain interests in the property to the defendant.

Ummukuludu Umma died intestate about 1897 and letters of administration were granted to the first plaintiff. Mahmood Natchia died intestate in June, 1924, and letters of administration in respect of her intestate estate were granted to the second plaintiff on April 23, 1934.

The present action was instituted in January, 1932, asking for judgment declaring the first plaintiff entitled to the property as administrator of the estate of Ummukuludu Umma or "in the alternative declaring the second plaintiff entitled to the property in his own behalf or as belonging to the estate of Mahmood Natchia". The plaint alleged that the second plaintiff was the husband and sole heir of Mahmood Natchia and that he has applied for letters of administration to her estate in D. C., Colombo (Testamentary) 5,967. The action was presumably instituted by the plaintiffs claiming an alternative title in either of them owing to the uncertainty which prevailed at least at the time of the institution of the action regarding the validity of Mohammedan deeds of gift subject to certain conditions and limitations.

The defendant filed answer pleading *inter alia* that there was a misjoinder of parties and causes of action and that the plaintiffs could not therefore "maintain this action".

On March 16, 1934, the case came up for trial before the then District Judge of Colombo, Mr. O. L. de Kretser, when the defendant's Counsel suggested the following issue for decision as a preliminary issue:—

Is there a misjoinder of plaintiffs and of causes of action?

[1] (*1891*) *I. L. R. 16 Bom. 119.*
[2] (*1895*) *I. L. R. 22 Cal. 833.*
[3] (*1903*) *I. L. R. 26 Mad. 647.*
[4] (*1933*) *13 C. L. Rec. 105.*
[5] (*1922*) *I. L. R. 44 All. 301.*
[6] (*1931*) *34 N. L. R. 160 at p. 163.*
[7] (*1937*) *39 N. L. R. 145.*
[8] (*1831*) *2 B. & Ad. 818 at p. 821.*
[9] (*1878*) *3 A. C. 944 at p. 950.*
[10] (*1885*) *I. L. R. 10 Bom. 107.*

The District Judge answered the issue in the affirmative and the plaintiff's Counsel moved to delete the name of the first plaintiff and to proceed with the action as at the instance of the second plaintiff. The Judge thereupon dismissed the first plaintiff's action and framed a number of issues suggested by the Counsel for the second plaintiff and the defendant. The case was however postponed as the second plaintiff had not obtained at that time the letters of administration to the estate of Mahmood Nacthia.

The case came up for hearing ultimately before another District Judge of Colombo who delivered his judgment in November, 1937, in favour of the second plaintiff. The present appeal is preferred by the defendant against that judgment.

In arguing the appeal before us the appellant's Counsel raised the following points:—

(1) The action should have been dismissed as there was a misjoinder of parties and of causes of action.
(2) As the second plaintiff had not obtained letters of administration at the time he filed the plaint, the action should have been dismissed in view of the District Judge's finding that the second plaintiff was not an heir of the estate of Mahmood Natchia.
(3) The deed of gift P 1 was invalid and that the property did not therefore belong to the estate of Mahmood Natchia.
(4) The defendant became the absolute owner of the property under P 2.

In support of his first contention the appellant's Counsel argued that the order of the District Judge dated March 16, 1934, was bad in so far as it allowed the second plaintiff to proceed with the action and there was no provision in the Code which enabled the Judge to strike out the name of one plaintiff and permit the action to proceed in the name of the second plaintiff, as in this case there was not only a misjoinder of parties but also a misjoinder of causes of action. He relied strongly on section 17 of the Civil Procedure Code and a decision of this Court (*Abraham Singho v. Jayaneris Singho*, Supreme Court Minutes, March 6, 1930) reported in (*1935*) *3 Ceylon Law Weekly 53.*

Now section 17 of the Civil Procedure Code enacts:—

"Nothing in this Ordinance shall be deemed to enable plaintiffs to join in respect of distinct causes of action".

I am unable to agree that this enactment compels a Court to dismiss an action for misjoinder of parties and of causes of action. I do not think we are compelled by any other provision of the Civil Procedure Code to read into this particular enactment anything more than it states. All that the section states is that the plaintiffs should not join in respect of distinct causes of action. I do not see any reason why a Court should not, on an application made to it, exercise its discretion and strike out one or more of the plaintiffs so as to make the plaint conform to the provisions of sections 17. In *Jayamaha et al. v. Singappu et al.*[1] Hutchinson C.J. said—"The first plaintiff's cause of

[1] (*1910*) *13 N. L. R. 348.*

action is for trespass on portions of his land A and he has nothing to do with B. The second plaintiff's is for trespass on his land B, and he has nothing to do with A. It is true that all the defendants who filed answer claim ultimately from the sannas; but the claims of the plaintiffs are for distinct causes of action, and ought not to have been joined. See Section 17 of the Civil Procedure Code. Their Counsel says that he is willing that the second plaintiff and his claim should be struck out. But there was no application by either party to strike him out; and section 18 does not empower the District Court to do so without an application; and I think that we have no power to do it now". The order made by Hutchinson C.J. with the concurrence of van Langenberg A.J. was to the effect that the case should be sent back to the District Court for the consideration of an application to strike out one of the plaintiffs and that the District Judge should deal with it on such terms as to costs, amendment of pleadings, if necessary, and otherwise as he thought fit and if he acceded to it he should proceed with the trial of the other issues.

In London & Lancashire Fire Insurance Co. v. P. & O. Company et al[1], de Sampayo J. who was of opinion that there was a misjoinder of parties and of causes of action said that he would send the case back for trial of the first cause of action excluding the second cause of action: In *Alagamma v. Mohamadu*[2] Shaw and de Sampayo JJ. held that neither section 17 nor any other provision of the Civil Procedure Code necessitated the dismissal of an action in all cases where there has been a misjoinder of parties and causes of action. De Sampayo J. further observed in the course of his judgment:—"Section 17 of the Code is one of a number of sections concerned with the framing of an action, and it is obvious from the whole set of provisions that the intention of the Code is not to make technical defects wholly to defeat an action but to facilitate the correcting of such defects in order that the Court may once and for all adjudicate on the merits of the case. Section 93 gives to the Court wide powers of amendment, and I think the District Judge should have exercised those powers in this case. It is not as if the plaintiff had not moved him to do so, for it appears that when the legal issue on the objection in question was discussed by both sides, Counsel for the plaintiffs intimated to the Court that he was prepared to strike off from the record the first, second, and third plaintiffs and their particular claims".

In this connection reference may also be made to *Menika v. Menika*[3]; *Kanagasabapathy v. Kanagasabai*[4]; *and Fernando v. Fernando*[5].

Section 17 of our Code corresponds to section 31 of the Indian Code of Civil Procedure, 1882, and under that section it was held in *Behari Lal and another v. Kodu Ram*[6] that where a suit was bad for misjoinder of plaintiffs and causes of action it was not proper to dismiss the suit without giving the plaintiff an opportunity of amendment.

I regret I am unable to assent to the view expressed in *3 Ceylon Law Weekly 53* and I hold that the first point raised by the appellant fails.

The second point urged on behalf of the appellant is that the claim of the second plaintiff is preferred as an heir and as administrator of the

[1] *(1914) 18. N. L. R. 15.*
[2] *(1917) 4 C. W. R. 73.*
[3] *(1923) 25 N. L. R. 6.*
[4] *(1923) 25 N. L. R, 173.*
[5] *(1937) 39 N. L. R. 145.*
[6] *(1893) 15 All. 381.*

estate of Mahmood Natchia and that as the District Judge has found against the second plaintiff's claim as an heir there remaind only his claim as administrator which should have been dismissed as he obtained the letters of administration about two years after the institution of the action. If the appellant intended to urge this argument in the lower Court, no explanation is forthcoming as to his failure to make his position clear at least on March 16, 1934, when the District Judge decided the preliminary issue regarding the misjoinder of plaintiffs and of causes of action. Had he done so, it would have been open to the second plaintiff to withdraw his action and file a fresh action immediately after he obtained the letters of administration on April 23, 1934, and before the expiry of ten years from the death of Mahmood Natchia in June, 1924. If the appellant 's contention is now upheld and the plaintiff is compelled to file a fresh action it will be open to the defendant to plead against him that he has obtained title by prescriptive possession. There appears to be some ground for the complaint of the Counsel for the respondent that this point has been taken for the first time at the hearing before us and if the point is now upheld his client will be seriously prejudiced. Though the learned District Judge has dealt with the various matters in dispute argued before him in a very full and well considered judgment, he has made no reference whatever to this point. It is no doubt just possible that the District Judge may have forgotten to consider this argument thought it was urged before him, but in that case I should have expected the appellant to raise this point in the petition of appeal in which he has raised specifically various other points of law. The petition of appeal in fact makes no reference whatever to this point. The learned Counsel for the respondent has referred us to *Steward v. North Metropolitan Tramways Co.*[1] and pleaded that the appellant should not be allowed to urge this objection at this stage of the proceedings.

There is no direct authority in our Law Reports on the question whether the plaintiff who was not an administrator at the time of filing the plaint but obtained the letters of administration pending the action could obtain a decree in his favour. But there are decisions which tend to show that a Court of law should refuse to dismiss an action in circumstances similar to those which have arisen in this case. In *Silva v. Weerasuriya*[2] an administrator instituted an action in respect of a property which was not mentioned in the inventory and the value of which had not been included in the sum on which stamp duty had been paid in the testamentary proceedings. Hutchinson C.J. said that if an application was made even in the Appeal Court, the case would not have been dismissed but remitted to the lower Court to enable the plaintiff to get the letters of administration duly stamped, and Wendt J. went further and expressed his view that the Judge of the lower Court should not have dismissed the action in any event but adjourned the trial in order to enable the plaintiff to get his letters duly stamped. *In Kanappa Chetty v. Kanappa Chetty*[3] the plaintiff appears to have claimed as an adopted heir of a deceased person whose estate was not administered and this Court sent the case back to the District Court

[1] *(1886) 16 Q. B. D. 556.* [2] *(1906) 10 N. L. R. 73.*
[3] *(1908) 2 S. C. Decisions. 40.*

with a direction that further proceedings should be stayed to enable the plaintiff to get the letters of administration within a reasonable time and that on the plaintiff being appointed as administrator he should *in that capacity* be substituted as plaintiff and allowed to proceed with the action. Section 42 of our Code of Civil Procedure corresponds to section 50 (4) of the Indian Code of Civil Procedure, 1882, and order 7, rule 4, of the Indian Code of Civil Procedure, 1908, while section 547 of our Code so far as it is material for the consideration of the present question is somewhat similar to section 190 of the Succession Act. In *Sethna v. Hemingway*[1] Scott C.J while holding that the plaintiff who sued as administratrix before obtaining the letters of administration should be allowed to retain the benefit of a decree entered in her favour after obtaining the letters of administration, said—"The plaint was defective in that it did not show that the plaintiff had obtained letters of administration and it should on that account have been rejected on presentation.

The plaintiff however obtained letters of administration on October 31, 1913, a fortnight before the hearing, and the hearing was allowed to proceed. A decree was passed for the plaintiff declaring that the Rs. 10,000 in question formed part of the estate of the deceased and that the plaintiff was entitled to the same. This was not contrary to section 190 of the Succession Act as remarked by the learned Judge. The only tenable technical objection was to the institution of the suit before the plaintiff had an existing interest in the subject-matter. That point, however, if it had been taken and had resulted in the rejection of the suit at the hearing, would have only led to a waste of time and costs without benefiting the defendants, for a fresh suit would immediately have been brought by the administratrix".

Moreover, I think that in all the circumstances of this case the respondent is entitled to claim with regard to this contention the benefit of the provisions of section 36 of the Courts Ordinance which enacts that "no judgment or order pronounced by any Court shall on appeal or revision be reversed, altered or amended on account of any error, defect or irregularity which shall not have prejudiced the substantial rights of either party".

I hold therefore that the decree obtained by the plaintiff cannot be attacked on the ground that he was not a duly appointed administrator at the time of institution of the action.

The third point involves a determination of the law which governs Muslim deed of gifts. The ruling authority on this question is *Weerasekere v. Peiris*[2] in which the Privy Council considered the validity of a deed of gift executed by one Muslim in favour of another. The deed purported to transfer the property as "a gift *inter vivos* absolute and irrevocable" subject to—

(*a*) a reservation to the donor of the right of taking and enjoying the rents and income of the property;
(*b*) a burden of *fidei commissum*;
(*c*) a right in the donor to revoke the gift.

[1] *(1914) 38 Bom. 618.*

[2] *(1932) 34 N. L. R. 281.*

In view of the elaborate argument addressed to us by the appellant's Counsel based on the alleged difficulty of seeing clearly the principles of law enunciated by the Privy Council, I think it best to reproduce *in extenso* the relevant passage from that judgment:—

"The conditions and restrictions mentioned in the deed are quite inconsistent with a valid gift *inter vivos* according to the Mohammedan law, for, by the deed, the father reserved to himself the right to cancel and revoke the so-called gift, as if the deed had not been executed, and to deal with the premises as he thought fit; he reserved to himself the rents and profits of the premises during his lifetime, and it was only after his death that the premises were to go to and be possessed by the son.

In their Lordships' opinion all the terms of the deed must be taken into consideration when construing the deed, and it seems clear to their Lordships that it was never intended that the father should part with the property in or the possession of the premises during his lifetime, or that the son should have any control over or possession of the premises during his father's lifetime. In other words it was not intended that there should be a valid gift as understood in the Mohammedan law.

The deed further provided (among other things) that after the father's death, the son should not sell, mortgage or alienate the premises or any part thereof . . . .

It was not disputed that the last-mentioned provisions constituted a *fidei commissum*, according to Roman-Dutch law, but, as already stated, it was contended, on behalf of the respondent, that inasmuch as the terms of the first part of the deed purported to constitute a gift *inter vivos* between Muslims, the Mohammedan 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 the son such a gift *inter vivos* as is recognised in Mohammedan 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 the Roman-Dutch law."

If I may say so, I do not see any difficulty in ascertaining the principles of law laid down in that judgment. Nor am I able to hold, in view of that decision, that deed P 1 which has to be constructed in this case should not be regarded as governed by the Roman-Dutch law. The deed P 1 is a deed of gift between Muslims subject to a reservation of a life-interest in favour of the donor and creating a *fidei commissum* in favour of the children of the donee. I am unable to see any indication in the deed of the donor's intention to make a gift *inter vivos* as known to the Muslim law and I have no doubt that the donee intended to create and did in fact create a valid *fidei commissum* as known to the Roman-Dutch law

The argument of the appellant's Counsel appeared to me to be an invitation to us to whittle away the effect of the Privy Council decision by endeavouring to ignore the plain meaning of that judgment and decide the present case according to the view of law expressed in the decision reported in *32 New Law Reports 176* which was the very judgment overruled by the Privy Council. There are three reported cases in which this Court had to consider the validity of Muslim deeds of gift subsequent to the Privy Council decision. In *Sultan v. Peiris*[1] and in *Ponniah v. Jamal*[2], this Court held that the validity of deeds of gift in those cases should be decided according to the Muslim law and not the Roman-Dutch law. It is possible to distinguish these cases from the Privy Council case as the learned Judges who decided those cases pointed out that the deeds themselves gave a clear indication of the donor's intention that the deeds should have "the character of a deed of gift under the Muslim law". It is however not possible to reconcile some of the views expressed in the two subsequent decisions of this Court mentioned above with the ruling of the Privy Council but in spite of these views I am bound to follow the decision of the Privy Council. In *Kalenderumma v. Marikar*[3] this Court followed the Privy Council decision and held that a Muslim deed of gift reserving a life-interest in favour of the donor was not governed by the Muslim law and the deed was valid according to the Roman-Dutch law.

I hold that the deed P 1 is a valid deed of gift and that effect should be given to the *fidei commissum* created by it.

With regard to the fourth point the appellant's Counsel argues that by deed P 2 Mahmood Natchia purported to convey the entire property and that even if Mahmood Natchia held the property subject to a *fidei commissum,* the defendant became the absolute owner of the property on her death without leaving any fiduciary heirs. An examination of P 2 shows that there is no foundation whatever for this argument as by that deed Mahmood Natchia conveyed for a sum of Rs. 250 only her "life rent or possessory interest" in the property.

I would therefore dismiss the appeal with costs.

MOSELEY A.C.J.—I agree.

Appeal dismissed.