1950 *Present :* **Dias S.P.J. and Swan J.**

MUTTALIBU, Appellant, *and* HAMEED, Respondent

S. C. 335—D. C. Kandy, 2,308

Muslim law—Benami *transaction—Not recognized in Ceylon—Usage—Proof, and judicial notice, thereof—Evidence Ordinance (Cap. 11), S. 57—Donation—Ingredients thereof.*

Trusts Ordinance (Cap. 72)—Sections 2 and 84—Purchase of property by father in name of son—Equitable doctrine of advancement—Resulting trust—Burden of proof.

A, An Indian Muslim domiciled in Ceylon for fifty years, provided the consideration to four vendors, B. C. D. and E, who thereupon transferred by deed property to F, who was the son of A. A and F having fallen out, A sued F (*a*) for a declaration that F held the property in trust for A, or (*b*) for a declaration that (i) the four properties, or (ii) the consideration for the four transfers, were gifts to F by A, who was entitled to revoke the gifts.

It was sought to be argued, in view of the decisions of the Privy Council in *Gopeekrist Gosain v. Gungapersaud Gosain (1854) 6 Moore's Indian Appeals 53* and *Moulvie Sayyud Uzhur Ali v. Mussumat Beebee Ultaf Fatima (1869) 13 Moore's Indian Appeals 232*, that the usage in India known as *Benami* transactions applied to this case and that, therefore, F held the lands or the consideration as a trustee for his father A.

Held, (i) that there was no proof that the usage in India known as *Benami* transactions had been introduced into Ceylon. The Muhammedan Law which prevails in Ceylon is so much, and no more of it, as has received the sanction of custom or usage in Ceylon. *Abdul Rahiman v. Ussan Umma (1916) 19 N. L. R. 178* followed.

(ii) that the existence of a usage is a question of fact, and must be proved by the evidence of persons who become cognizant of its existence by reason of their occupation, trade, or position. A usage is not proved by merely bringing the person interested in establishing its existence to give oral evidence of its existence unsupported by other evidence. A usage must be notorious, and certain, and must not offend against the intention of any legislative enactment. A usage passes through three well marked stages, namely, (*a*) the primary stage when the particular usage must be proved with certainty and precision, (*b*) the secondary stage when the Court has become to some degree familiar with the usage, and when slight evidence only is required to establish it, and (*c*) the final stage when the Court takes judicial notice of the usage and evidence is not required. *Quaere*, whether, in view of the terms of section 57 of the Evidence Ordinance, a Ceylon Court can take judicial notice of a usage. *Dodwell & Co. v. John (1915) 18 N. L. R. 137* and *Kumarappa Chetty v. Ceylon Wharfage Co. (1905) 2 Bal. 120* referred to.

(iii) that it is a well settled principle of Equity, which is recognized by section 2 of the Trusts Ordinance, that where a father or person *in loco parentis* purchases property in the name of his child or wife there is a strong initial presumption that such transfer was intended for the advancement of such child or wife, and the provisions of section 84 of the Trusts Ordinance do not apply to such transaction. The *onus* in such cases is, therefore, on the party seeking to establish the trust to prove that fact. F, therefore, did not hold the lands or the consideration in trust for his father A. *Fernando v. Fernando (1918) 20 N. L. R. 244* and *Ammal v. Kangany (1910) 13 N. L. R. 65* approved and applied.

(iv) that the transactions could not be regarded as donations either of the lands or of the consideration given by A. *Affefudeen v. Periatamby (1909) 12 N. L. R. 313* dissented from.

APPEAL from a judgment of the District Court, Kandy.

S. J. V. Chelvanayagam, K.C., with *H. W. Tambiah*, for the plaintiff appellant.—When a person buys property in the name of his son the transaction may be regarded either as a trust or as a gift. Viewed as a trust section 84 of the Trusts Ordinance is applicable to the facts of the present case.

[DIAS S.P.J. referred to the presumption of advancement for the benefit of the son.]

There is no case where the doctrine of advancement from father to son was recognized in Ceylon.

[DIAS S.P.J.—That doctrine was adopted before the Trusts Ordinance was enacted.]

Ammal v. Kangany [1] does not consider the doctrine of advancement. *Fernando v. Fernando* [2] is no authority for saying that the doctrine of advancement is engrafted in our law, *Fernando v. Fernando* [3] was a case of advancement from mother to son. What was held in that case was that the son held the property in trust for the mother. The doctrine of advancement was considered but not applied. Hence any *dicta* in the case with regard to the doctrine are *obiter*. In any event the doctrine of advancement is only a presumption that arises in respect of certain classes of persons.—*Kerwick v. Kerwick* [4]; *Gopeekrist Gosin v. Gungapersaud Gosain* [5]; *Moulvie sayyud Uzhur Ali v. Mussumat Beebee Ultaf Fatima* [6]. Particular habits of life and usages are recognized by the Courts when determining the question whether the doctrine of advancement should be applied in any particular case—*Kerwick v. Kerwick* (*supra*).

If the transactions in this case are held not to create trusts then it is submitted that they must be regarded as gifts under the Muslim Law. Under Muslim Law gifts from father to son are revocable. The gift of the money is tantamount to a gift of the land. The Court must look to the substance of the transaction and not to the form—*Affefudeen v. Periyatamby* [7]. See also Voet (de Sampayo's translation): 39-5-2, 39-5-10; and *Pandit Ram Narain v. Maulvi Muhammad Hadi* [8]. On the question of revocation see *Cader v. Pitche* [9]. Section 3 of the Muslim Intestate Succession and Wakfs Ordinance (Cap. 50) has no effect on donations not effectuated by deeds. The proviso to

[1] (*1910*) *13 N. L. R. 65.*
[2] (*1928*) *29 N. L. R. 316.*
[3] (*1918*) *20 N. L. R. 244.*
[4] (*1920*) *47 Indian Appeals 275.*
[5] (*1854*) *6 Moore's Indian Appeals 53 at p. 74.*
[6] (*1869*) *13 Moore's Indian Appeals 232*
[7] (*1909*) *12 N. L. R. 313.*
[8] (*1898*) *26 Indian Appeals 38.*
[9] (*1916*) *19 N. L. R. 246.*

section 3 does not apply in the present case as the deeds here are not from donor to donee. Section 3 was construed by Canekeratne J. in *Saraumma v. Mainona* [1]. That was a case of direct gift.

H. V. Perera, K.C., with *N.K. Choksy, K.C.*, and *Cyril E. S. Perera*, for the defendant respondent.—In order to ascertain whether the doctrine of revocation in Muslim law applies it is necessary to consider whether the transaction is a valid gift under Muslim law. Under Muslim law the subject matter of the gift must be owned by the donor and subject to his control at the time the gift was made—*Tyabji : Muhameddan Law (1913 ed.)* pp. 276,277; *Amir Ali : Principles of Muhammeddan Law, Vol. I, p. 35 ; Weerasekera v. Pieris* [2]. In the present case the plaintiff neither had title to nor possession of the property transferred. Before the transfer was made the vendor was holding the property as owner and not as agent of the plaintiff. The transaction is therefore not a donation. Section 3 of Cap. 50 has no application to the present case.

On the question of trust it is submitted that section 2 of the Trusts Ordinance (Cap. 72) distinguishes all the Indian cases cited. There is no corresponding section in the Indian Trusts Act. The doctrine of advancement is a rule of English law, not a presumption of fact. On the applicability of English principles of Equity in Ceylon see *Abeyesundera v. Ceylon Exports Ltd* [3]. The existence of a usage is a question of fact and must be proved by clear and convincing evidence—10 *Hailsham* p. 60. One witness cannot prove a usage. In the present case it was an interested witness, the plaintiff himself. The findings of the trial judge should not be disturbed.

S. J. V. Chelvanayagam, K.C., in reply.—The presumption of advancement was applied in the Indian cases cited as a principle of the English law. See the judgment of the Rangoon Court in *Kerwick v. Kerwick* [4]. *Ammal v. Kangany* [5] did not deal with the question of donation which was not even raised. *Affefudeen v. Periatamby* [6] was a case of donation. See also *Tyabji: Muhameddan Law* (3rd ed.) pp. 378-380.

Cur. adv. vult.

August 23, 1950. DIAS S.P.J.—

By deed of transfer P2, dated December 20, 1933, one W. Weerakoon conveyed to the defendant respondent for a sum of Rs. 5,500 the premises bearing assessment number 282, Trincomalee Street, Kandy. It is admitted that the consideration for this transfer was found by the defendant's father who is the plaintiff appellant. By deed P8, dated May 19, 1938, one Cader Mohideen conveyed to the defendant the premises numbered 56 and 56A in Castle Street, Kandy, for a sum of Rs. 6,000. These premises had been mortgaged to the plaintiff who had put the bond in suit and obtained mortgage decree. The notary's attestation in P8 shows that out of the consideration a sum of Rs. 5,500 was set off at the request of the plaintiff in full settlement of the balance claim and costs due to him, and the balance sum was paid to the vendor (mortgagor). By deed P9, dated December 24, 1941, one Ramasamy Rettiar

[1] *(1948) 50 N. L. R. 319.*
[2] *(1932) 34 N. L. R. 281 at p. 284.*
[3] *(1936) 38 N. L. R. 117 at p. 124.*
[4] *A. I. R. (1918) Lower Burma 15.*
[5] *(1910) 13 N. L. R. 65.*
[6] *(1909) 12 N. L. R. 313.*

for a consideration of Rs. 37,500 conveyed to the defendant Panchipitiya Estate. The attestation shows that out of the consideration Rs. 2,000 was acknowledged to have been received previously. The balance was paid in cash in the presence of the notary. The plaintiff's case is that it was he who found that money for his son the defendant. Finally, by deed P10, dated March 29, 1944, one Davudu Saibo conveyed to the defendant Ginigathhena Estate for the sum of Rs. 35,000. The attestation shows that the consideration was paid by two cheques of the plaintiff in favour of the defendant who endorsed them to the transferor.

S. 84 of the Trusts Ordinance (Chapter 72) provides :

> " Where property is transferred to one person for a consideration paid or provided by another person, and it appears that such other person did not intend to pay or provide such consideration for the benefit of the transferee, the transferee must hold the property for the benefit of the person paying or providing the consideration ".

In the case of three of the above-mentioned deeds, namely, P2, P8 and P10, it is clear that the plaintiff (father of the defendant) provided the consideration for those transfers. In the case of the deed P9 the plaintiff asserts that it was he who provided the consideration. I shall for the purposes of this judgment assume that that is the fact.

Section 2 of the Trusts Ordinance also provides :

> " All matters with reference to any trust, or with reference to any obligation in the nature of a trust arising or *resulting by the implication or construction of law*, for which no specific provision is made in this Ordinance, shall be determined by the principles of Equity for the time being in force in the High Court of Justice in England ".

It is a well recognized principle of Equity that a purchase by A in B's name raises no presumption of a trust *where B is the wife or child of A.* In such a case a strong presumption arises that the parent intended it to be a gift (I am using that word in the popular sense) for the advancement of the child. In other words, the provisions of s. 84 of the Trusts Ordinance do not apply where the consideration for the transfer has been found by the father or a person standing in *loco parentis* to the transferee.

Although our Trusts Ordinance was only enacted in the year 1917, nevertheless, ever since the time the British connexion began in this Island, and thereafter, our Courts have applied principles of Equity to the problems which arise in our Courts whenever necessary. Keuneman in his *Notes on the Law of Trusts* (*pages 3-9*) has traced the historical development of the rules of Equity in general, and of the Law of Trusts in particular in this Island, culminating in the enactment of the Trusts Ordinance. That the doctrine of " advancement " is part of the law of Ceylon is placed beyond all question by the provisions of section 2, which makes applicable the English rules of Equity to all *casus omissi.*

The case of *Fernando v. Fernando*[1] (which was probably decided shortly before the Trusts Ordinance became law) is an authority in point. Counsel for the plaintiff appellant strenously argued that what the

[1] *(1918) 20 N. L. R. 244.*

learned Judges said in that case in regard to the doctrine of advancement are *obiter dicta*, and therefore, not binding on us. It is therefore necessary to consider that contention.

The facts in *Fernando v. Fernando*[1] are as follows: A lady named Nonnohamy had two sons—Edwin and Samuel. Nonnohamy lent money on a mortgage, and caused the bond to be written in favour of her son Edwin. In making her last will Nonnohamy dealt with the money due on that bond as if it was her own property. Edwin was present when Nonnohamy gave instructions to the notary to draft the will, but he made no protest. After Nonnohamy's death Edwin, as one of the executors, filed an inventory in which he without protest disclosed the money due on the bond as being part of the estate of his deceased mother. He also elected to take benefits under his mother's will. Edwin then died, and a contest arose between Samuel (Nonnohamy's surviving executor) and the administratrix of Edwin's estate as to the ownership of the money due on the bond. It was held (1) that the law is "well established" that the presumption which arises (now under s. 84 of the Trusts Ordinance) when property is bought in the name of one person with the money of another of a resulting trust in favour of the person who provides the money, *does not apply* in a case where property is bought by a father or another person *in loco parentis* in the name of a child. (2) Whether this doctrine applies to a mother is open to some doubt, and there are divergent decisions on the subject. The balance of authority goes to show that such a presumption does not necessarily arise, but only when she has placed herself *in loco parentis* within the special meaning given to those words in these cases. Very little evidence in the case of a mother beyond relationship is wanted to establish that she stands *in loco parentis*—there being very little additional motive required to induce a mother to make a gift to a child. (3) The presumption of a gift in favour of a child can, however, be displaced by evidence of the intention of the parties. The cases show that the evidence of intention must be *contemporaneous* with the purchase, and relate to the intention *at the time*. Subsequent acts and declarations are admissible, *but are of little probative value*. (4) On the facts it was held that there were no contemporaneous statements of Nonnohamy. The only statement was what she said in her will when she dealt with the money as her own. There was however strong evidence showing that no gift to Edwin was intended from his own acts. It was further held that Edwin, having elected to take under his mother's will, neither he nor his privies could thereafter say that the money was not the property of Nonnohamy.

I am unable to hold that any of the points decided in *Fernando v. Fernando*[1] are *obiter dicta*. All the questions of law there dealt with were necessary for the *ratio decidendi*. The Divisional Bench case of *Ammal v. Kangany*[2], although not directly in point on the question I am dealing with, shows that this doctrine of advancement was not unknown to our law prior to the enactment of the Trusts Ordinance. In that case a father purchased a land in the name of his minor son. The father then contended that the transfer to the child was in law a transfer to himself.

[1] *(1918) 20 N. L. R. 244.* [2] *(1910) 13 N. L. R. 65.*

It was held that such a contention could not be supported in view of the Statute of Frauds, but the Court also referred to the presumptions which may arise in such a case, and to the evidence necessary to establish a trust. I, therefore, hold that the doctrine of advancement is and always has been part of the law of Ceylon and forms an exception to the rule of resulting trusts formulated by s. 84 of the Trusts Ordinance. In a case where a father or person *in loco parentis* buys property in the name of a child, there is an initial presumption that s. 84 of the Trusts Ordinance does not apply. On the contrary, there is a strong initial presumption that the transaction was for the benefit of the child. The *onus* therefore lies on the parent or person in *loco parentis* to rebut that presumption, by proof of his intention not to make the child the absolute owner.

In this case, however, the plaintiff appellant seeks to avoid the consequences of this presumption of advancement by contending that that doctrine does not apply to *Indian Muslims in Ceylon*. This is the first time such a contention has been set up in Ceylon, and it is therefore necessary to consider the matter carefully.

The Indian Trusts Act, No. 2 of 1882, although it is almost identical with our own Ordinance, does not contain a provision similar to our s. 2 which makes the English principles of Equity to apply to *casus omissi*. This difference between the two systems of law should be borne in mind when considering the Indian cases.

In the case of *Gopeekrist Gosain v. Gungapersaud Gosain*[1] the Privy Council held that the presumption of the *Hindu Law* in a joint undivided family is that the whole property of the family is the joint estate, and the *onus* lies upon a party claiming any part of such property as his separate estate to establish that fact. Therefore, when a purchase of land was made by a Hindu in the name of one of his sons, the presumption of Hindu Law is in favour of its being a *benami* purchase, and the burden of proof lies on the party in whose name it was purchased to prove that he was solely entitled to the legal and beneficial interest in such purchased estate. The Privy Council said "It is very much *the habit* in India to make purchases in the names of others, and, from whatever cause or causes the *practice* may have arisen, it has existed for a series of years, and these transactions are known as '*benami* transactions' ". In the case of *Moulvie Sayyud Uzhur Ali v. Mussumat Beebee Ultaf Fatima*[2] the principle in the former case in regard to *benami* purchases between Hindus was held to be equally applicable to similar transactions between *Muhameddans*. The Privy Council said : " It is however perfectly clear that in so far as the *practice* of holding lands and buying lands in the name of another exists, that *practice* exists in India as much among Muhameddans as among Hindus". In *Kerwick v. Kerwick* [3] which was a case between *Europeans* from Lower Burma, the Privy Council did not apply the principle laid down in the two earlier Privy Council judgments but decided that the English rule of Equity applied to Europeans. The Privy Council said: "It is a mistake to suppose that according to the cases already cited the determination of the question which rule

[1] *(1854) 6 Moore's Indian Appeals at p. 74 et seq.*
[2] *(1869) 13 Moore's Indian Appeals 232.*
[3] *(1920) 47 Indian Appeals 275.*

of law is in any given case to apply in India entirely depended on race, place of birth, domicile, or residence; these were not to be treated as being *per se* as decisive. What were treated as infinitely more important were the wide-spread and persistent *usages* and *practices* of the native inhabitants. But subject to this qualification, it is their Lordships' view that the principles and rules of law which would be applicable to this case if it were tried in one of the Courts of Chancery in England were applicable to it when tried in Rangoon "[1]. So far as Muhameddans *in India* are concerned, the law is thus summed up in Article 405 in *Tyabji's Muhameddan Law* : " The purchase by a Muslim of property in the name of his son or wife or other person will, unless there are circumstances indicating that a gift was intended, ordinarily be considered to be *benami* or *farzi*, and the property to belong to the person who paid the purchase money; but very little evidence might be sufficient to turn the scale ".

That being the Indian usage what warrant is there for holding that it has been imported into Ceylon, or that it applies to a person like the plaintiff, who, although he was an Indian Muslim, has now become domiciled in Ceylon since 1900, and who was dealing with landed property situated in Ceylon ?

I must confess that I had never heard of " a *benami* transaction " until that expression was used in this case. We have been told that the word " *Benami* " means " in the name of " or " in a fictitious name ". I looked up the local digests of our case law in order to ascertain whether " *Benami* Transactions " are known to our law. In *Rajaratnam's Digest* I came across the following reference : " BENAMI TRANSACTIONS—see Fraudulent Alienation, Paulian Action, Trust ". There was also a reference to a case reported in *2 Leader Law Reports, page 164.* My researches, and those of the learned counsel on both sides, have failed to find any reference to a Ceylon case in regard to the kind of usage we are now dealing with. It is clear that our Courts know nothing about this usage.

The fact that a " habit ", " practice " or " usage " of a certain kind has been persistent in India amongst Hindus and Muslims does not necessarily mean that such habits, practices or usages have been imported into Ceylon. A " usage " is a particular course of dealing, or line of conduct generally adopted by persons engaged in a particular mode of business ; or more fully it is a particular course of dealing or line of conduct which has acquired *such notoriety*, that where persons enter into contractual relationships in matters respecting the particular branch of business-life where the usage is alleged to exist, those persons must be taken to have intended to follow that course of dealing or line of conduct, unless they have expressly or impliedly stipulated to the contrary —*10 Hailsham s. 47, p. 35.* A usage besides being notorious, certain and reasonable must not offend against the intention of any legislative enactment—(*ibid.* s. 52, p. 39)—and see *Dodwell & Co. v. John* [2]. No usage, however extensive, will be allowed to prevail if it be directly opposed to positive law ; for to give effect to a usage which involves a defiance

[1] See *In re Kershaw (1860–62) Ram. 157.*
[2] *(1915) 18 N. L. R. at p. 137.*

of the law would be, obviously, contrary to fundamental principle—(*ibid*, s 57. p. 42). The existence of a usage is a question of fact, and must be proved by the oral evidence of persons who become cognisant of its existence by reason of their occupation, trade, or position. *The evidence to prove a usage must be clear and convincing*—(*ibid*. ss. 77, 78, p. 60). A usage is not proved by merely bringing *the person interested* in establishing its existence to give oral evidence of its existence *unsupported by any other evidence*—(*ibid*. s. 78, p. 61). Hailsham also points out that in regard to proof, usages pass through three well marked stages—(*a*) There is the primary stage when the particular usage must be proved with certainty and precision ; (*b*) there is the secondary stage when the Court has become to some degree familiar with the usage, and when slight evidence only is required to establish it ; and then (*c*) there is the final stage when the Court takes judicial notice of the usage and evidence is not required—(*ibid*. s. 83 p. 63)—see also *Kumarappa Chetty v. Ceylon Wharfage Co.* [1] It is to be noted that s. 57 of our Evidence Ordinance does not require a Court to take judicial notice of a usage. S. 49 of the Evidence Ordinance permits experts to be called to prove a usage, while s. 92 proviso 5 allows extrinsic evidence to be led to prove a usage in order to explain a document. In *Abdul Rahiman v. Ussan Umma* [2] the Court said " a series of decisions show that Muhameddan Law applies among Mohameddans in Ceylon so far only as it is consistent with the ancient *usages* of the Muhameddans *of Ceylon*, and *is not at variance with express enactment*. . . There are also a series of decisions to the effect that once such a usage has been found to exist (in Ceylon), Muhameddan Law may be looked to elucidate it and supplement it in detail . . . . Clearly the Muhameddan Law is based on usage, and where the (local Muhameddan) Code is silent, and no ancient custom (usage ?) has been proved the general law of the Island is the law applicable "—*per* Ennis J. Schneider J. said: " The reported cases show that since 1862 A.D. our Courts have consistently followed the principle that the Muhameddan Law which prevails in Ceylon is so much *and no more of it* as has received the sanction of custom in Ceylon. It is true that treatises on the Muhameddan Law generally are frequently referred to in our Courts ; but this is done only to elucidate some obscure text in our written Muhameddan Law, or in corroboration of evidence of *local custom*. I cannot find a single decision that has gone to the length of holding that, apart from the prevalence of a local custom, Muhameddan Law has any application in Ceylon. On the contrary, there is authority to the effect that where there is a conflict between the Muhameddan Law as found in the treatises and local custom, the latter should be followed ".

Far from there being any local usage in regard to *benami* transactions in Ceylon which the Courts can recognize, I am of opinion there is no proof at all that such a usage has ever been introduced into this Island at all. It was the duty, therefore, of the plaintiff, appellant strictly to establish that usage in Ceylon with certainty and precision by evidence other than his own. Not only has he failed to do so, but the usage he has endeavoured to prove and which the trial Judge disbelieved is not a habit, practice or usage such as is referred to in the Privy Council cases

[1] (1905) *2 Bal. 180.* [2] *(1916) 19 N. L. R. at pp. 178-184–185*

which the plantiff relies on. This is what the plantiff said : " *The custom in India* is for a father to transfer all the properties in the name of the eldest son. and if the father were to die he (the son) is expected to share these properties with his brothers and sisters . . . . I bought these three properties in the name of the defendant with the intention of getting the benefit of these properties for all my children and not for the benefit of my female children . . . I transferred to the defendant on P5 and P6 . . . . in trust subject to the agreement that he should transfer these lands back to me whenever I wanted to sell them . . . . All the properties which I transferred to the defendant . . . .were to be held by him upon the same conditions, that is to say, to give these lands back to me whenever I wanted to sell them, or if I died suddenly, he was to divide these lands amongst himself and my four sons by the second wife . . . . I kept these conditions in my mind. I did not take any advice from a notary or a proctor when I executed P5 and P6 . . . . The notary told me that if P8, P9 and P10 were written in the way they were written, my object would be achieved—that is to have them impressed with the trust ". In this connection it is to be noted that the defendant was born in 1925. Therefore, on the day P2 was executed in 1933 he was only 8 years old. At the date of P8 in 1938 he was 13. At the date of P9 he was 16 and at the date of P10 in 1944 he was 19. It is also a relevant fact that the plantiff married a second wife in 1933. By his first wife he had four daughters whom he had got married and dowered. His only son by the first wife is the defendant. Therefore, before his second marriage the plaintiff made provision for his son. He not only caused the deed P2 to be executed in the defendant's name, but on the same day he donated by deeds P5 and P6 certain other landed property to his son the defendant. The plaintiff's intention was clearly to benefit his only son by the first marriage and to make provisions for his advancement. The fact that he subsequently changed his mind does not affect the validity of the transaction and turn it into a trust.

The judgment of the learned District Judge shows that he disbelieved the plaintiff's evidence on this and other matters. The evidence also clearly indicates that the plantiff is a man whose word is of little or no value on any disputed question of fact in which he is interested. He had the hardihood to state on oath " After the Japanese dropped bombs in 1942 everybody started making money and plundering other people. *I also did the same thing* ". Not only is there not a *scintilla* of proof that the practice or usage prevalent in India in regard to *benami* transactions has become established in Ceylon, but beyond the attempt made by the plaintiff to prove such a usage there is, admittedly, no other evidence. As I have already pointed out a usage cannot be proved by merely bringing the person interested to establish its existence unsupported by other evidence. The findings of fact of the learned District Judge cannot be disturbed. I have no hesitation in holding that whatever may be the usage in India, no usage such as that referred to in the Privy Council cases has ever been imported into this Island or have taken root here. Furthermore, such a usage cannot be established in Ceylon because it would be in contravention of the provisions of the Trusts Ordinance.

[1] J. N. B.

The position then is this. The considerations for those transfers in the defendant's name having been paid for by his father the plantiff, there is a presumption that the conveyances were intended to be for the benefit of the son who holds them, not as trustee for his father, but as owner in his own right. The plaintiff not only has failed to prove any usage to the contrary, but he has also failed to rebut that presumption by showing that at the time those deeds were executed his intention was that the son should hold the lands for his (the father's) benefit. It is true that he now says he did not so intend, but as was pointed out in *Fernando v. Fernando* [1] such *ex post facto* evidence is of little or no probative value. All the circumstances point to a different conclusion. No doubt the father and the son have been trading together, and in the books, accounts, and rent receipts, &c., there appears to be a confusion as to what belongs to the plaintiff and what to the defendant. Having regard to the habits of local Muslims, I can see nothing peculiar in a father and son trading and acting together in the manner this plantiff and defendant have done. The question is whether or not the plaintiff has proved to the satisfaction of the Court that at the date the four deeds P2, P8, P9 and P10 were executed the intention of the plaintiff was that full dominium was not to pass to the defendant? On that question of fact the trial Judge has held against the plantiff and it is impossible for a Court of Appeal to disturb the findings of the trial Judge who saw the witnesses and heard the evidence. The finding that full dominium passed to the defendant under those four deeds is right and must, therefore, be affirmed.

The next submission made on behalf of the plaintiff is that if the defendant is to be deemed to be the legal owner of the properties in question, whether the transfers were gifts or donations by the father to the son, and if so, whether they could be and have been duly revoked by the plaintiff donor? The relevant issues read as follows :—

4. If Issue No. 2 is answered in favour of the defendant—

(*a*) Were the considerations for the said deeds in effect gifted by the plaintiff to the defendant?

(*b*) Were the considerations for the said deeds in effect gifts by the plaintiff to the defendant?

5. If the said properties or considerations therefore are gifts, have they been duly accepted by the defendant or on his behalf?

6. Has possession of the properties transferred by the said four deeds always remained with the plantiff for the plantiff's own benefit and use?

7. If Issue No. 5 is answered in the negative and/or Issue No. 6 in the affirmative, are the said deeds or the consideration invalid as gifts to the defendant?

8. Has the defendant been guilty of gross ingratitude towards the plaintiff?

[1] *(1918) 20 N. L. R. 244.*

9. If Issue No. 8 is answered in the affirmative, is the plaintiff entitled to revoke the gifts of the properties and/or the gifts of the consideration for the said four deeds ?

10. Is the plaintiff entitled in law to revoke his gifts to the defendant of the properties transferred by the said four deeds and/or the gifts of the consideration for the said four deeds ?

11. Has the plaintiff by deeds Nos. 1409 of 2.12. 47 and 1451 of 10.2.48—

(*a*) Revoked the four deeds referred to in Issue 1 ?

(*b*) Revoked the gifts of the properties transferred by the said four deeds ? and

(*c*) Revoked the gifts of the consideration paid or provided on the said four deeds ?

14. Did the said deeds or the consideration therefor require acceptance in law ?

Counsel for the appellant complains that the learned District Judge in his judgment, although he has answered the above issues, has not given reasons for those findings.

The first point which strikes the eye is whether these transactions can be called " gifts " by the plaintiff to the defendant ? If so, then various other questions arise, e.g., are they " gifts " governed by the Muhammeddan Law or by the Roman Dutch Law ? Where A pays to a vendor, B, the consideration, and B executes a deed of transfer in favour of C, can it be said that the consideration paid by A to B is a gift of that money to C, or that the land conveyed by B to C is a gift of that land by A to C ?

The word " Gift " has a popular meaning as well as a precise legal meaning. I agree that in ordinary parlance when a father finds the money for a transfer, and the vendor transfers the property at the father's request to the son, such a transaction may be described as being " a gift " by the father to the son; but when we have to consider whether such a transaction can be revoked, then precise language and precise definition are essential.

Under the Muhammeddan Law the conditions necessary to constitute a valid donation are (1) a manifestation of the wish to give on the part of the donor; (2) an acceptance by 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. Periathamby (No. 2)*,[1] *Mohamadu v. Marikar*[2]. Under the Muhammeddan Law a gift by a father to his minor child of property in the parent's possession is complete on his declaration that a gift has been made—*Abdul Rahim v. Hamidu Lebbe*[3]. Under the Muhammeddan Law the donor must have title to the subject matter of the gift, and he must not only own the thing donated, but he must also possess it—Tyabji: Muhammeddan Law (1913 ed.) pp. 276, 277.

Applying these tests to the facts of this case, the plaintiff neither had title to nor possession of the property transferred to the defendant. There must also be delivery by the donor to the donee. In the case

[1] *(1911) 14 N. L. R. 295.* [2] *(1919) 21 N. L. R. 84.*
[3] *(1926) 28 N. L. R. 136.*

before us, the vendors were not possessing the land for and on behalf of the plaintiff, but in their own right, as owners. When the transfer deeds were executed, the vendors handed the same over, constructively may be, to the minor defendant, and not as the agent of the plaintiff. Therefore, it is impossible to hold that any of these transfers are gifts under the Muhameddan Law. For the same reasons I find it impossible to accede to the argument that there was a gift of the consideration money for these transfers by the plaintiff to the defendant.

Counsel for the appellant relies on the case of *Affefudeen v. Periatamby* No. 1 [1] where a Bench of two Judges held that where a person pays his own money for a land and gets his daughter's name inserted in the deed as purchaser, this is in effect a donation by the father to the daughter. That case, however, must now be read with and subject to the decision of the Divisional Bench in *Ammal v. Kangany* [2]—Where A (a father) pays the consideration to the transferor B, who transfers property to the son C, the case of *Ammal v. Kangany* [2] shows that the transaction cannot be regarded as being a transfer in favour of A. In my opinion, despite the decision in *Affefudeen v. Periatamby No. 1* [3], such a transfer cannot be held to be a *gift* of the property by A. to C.

If these transactions cannot be regarded as gifts or donations, the other questions do not arise, and it is unnecessary to consider the applicability of s. 3 of the Muslim Intestate Succession and Wakfs Ordinance (Chapter 50) to these transactions.

The judgment appealed against is right and must be affirmed with costs.

SWAN J.—I agree.

Appeal dismissed.